JUDICIAL COMPENSATION AND BENEFITS COMMISSION

BOOK OF EXHIBITS AND DOCUMENTS

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

December 20, 2024

Pierre Bienvenu, Ad. E.
Jean-Michel Boudreau
Étienne Morin-Lévesque
IMK LLP / s.e.n.c.r.l.

	QUADRENNIAL COMMISSION AND PARLIAMENTARY PROCEEDINGS
34.	Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No 32, 1st Sess, 36th Parl, September 30, 1998
35.	Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No 37, 1st Sess, 36th Parl, October 22, 1998
36.	Submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated December 15, 2003
37.	Evidence of Mr. E. Cherniak, QC to the House of Commons Standing Committee on Justice and Human Rights (Meeting No. 24, October 24, 2006), 39th Parliament, 1st Session
38.	Submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated December 14, 2007
39.	Reply Submissions of the Government of Canada, dated January 29, 2008
40.	Supplementary Reply Submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated February 12, 2008
41.	Submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated December 20, 2011
42.	Submission of the Government of Canada to the Levitt Commission, December 23, 2011 (excerpt)
43.	Submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated February 29, 2016
44.	Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated March 29, 2016
45.	Submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated March 29, 2021
46.	Submissions of the Government of Canada, March 29, 2021
47.	Expert Report of Peter Gorham, Compensation Review of Federally Appointed Judges, March 26, 2021 (Tab 4 of the Government's Book of Documents, March 29, 2021)
48.	Appointment Demographics provided by the Commissioner for Federal Judicial Affairs, with Summary, judicial appointments April 1, 2015 to October 23, 2020 (Tab 19 of the Joint Book of Documents, Volume II to the Turcotte Commission dated March 29, 2021)

49.	Submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated April 6, 2023
50.	House of Commons, Standing Committee on Justice and Human Rights, Evidence, No. 99, 1st Sess., 44th Parl., March 21, 2024
	TRIENNIAL COMMISSIONS REPORTS
51.	Report and Recommendations of Commission on Judge's Salaries and Benefits, October 6, 1983 (Lang Report)
52.	Report and Recommendations of the 1986 Commission on Judges' Salaries and Benefits, February 27, 1987 (Guthrie Report)
53.	Report and Recommendations of the 1989 Commission on Judges' Salaries and Benefits, March 5, 1990 (Courtois Report)
54.	Report and Recommendations of the 1992 Commission on Judges' Salaries and Benefits, March 31, 1993 (Crawford Report)
55.	Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits, September 30, 1996 (Scott Report)
	LAWS AND REGULATIONS
56.	*Court of King's Bench Act*, R.S.A. 2000, c. C-31
57.	*Court of King's Bench Act*, CCSM c C280
58.	*Courts of Justice Act*, CQLR c T-16
59.	*Judicature Act*, RSNB 1973, c J-2
60.	*Judicature Act*, RSNL 1990, c J-4
61.	*Judicature Act*, RSNS 1989, c 240
62.	*Supreme Court Act*, RSBC 1996, c 443
63.	*The King's Bench Act*, SS 2023, c 28 6
	NEWSPAPERS ARTICLES AND PRESS RELEASES
64.	Canadian Judicial Council, The Canadian Judicial Council publishes new Ethical Principles for Judges, June 9, 2021
65.	Louis-Samuel Perron, Entrevue avec la juge en chef de la Cour supérieure : « Tout tient avec du duct tape », La Presse, December 6, 2022

66.	Cristin Schmitz, “Top judges decry Ottawa’s appointment delays; application vetting defunct in B.C.”, Law360 Canada, May 9, 2023
67.	Daniel Leblanc, La Cour supérieure dépend de « miracles » au quotidien pour gérer la pénurie de juges, Radio-Canada, May 10 2023
68.	Darren Major, “New justice minister appoints more than a dozen judges in effort to address vacancies”, CBC, Aug 28, 2023
69.	Louise Dickson, “Provincial court judges get 28.4 % raise over four years”, Victoria Times Colonist, December 29, 2023.
70.	Remarks by the Right Honourable Richard Wagner, P.C. Chief Justice of Canada, June 3, 2024
71.	CPAC, Chief Justice Wagner Provides Update on Work of Supreme Court (June 3, 2024)
72.	Peter Zimonjic.“Ottawa making progress on judicial appointments but threats to rule of law remain, says chief justice”, CBC News, June 3, 2024
	ECONOMIC OUTLOOK – HISTORICAL
73.	Department of Finance Canada, ‘The Fiscal Monitor’, January to March 2006
74.	Statistics Canada, Catalogue # 13016 X, Economic accounts key indicators, Canada
75.	Department of Finance Canada, ‘Fiscal Reference Tables’, October 2011
	REPORTS
76.	Advisory Committee on Senior Level Retention and Compensation, Third Report: Dec 2000
77.	L.C. Burns, Canadian Centre for Justice and Community Safety Statistics, Profile of family law cases in Canada, 2019/2020
78.	Law Society of Saskatchewan, 2023 Annual Report
79.	Supreme Court of British Columbia, Annual Report (2023)
80.	British Columbia Judicial Compensation Commission 2022 Report, April 28, 2023
81. (a)	British Columbia Judicial Compensation Commission 2022 Report, Legislative Assembly Outcome
82.	Canadian Superior Courts Judges Association, 2023 CSCJA Member Research Report, November 2023

83.	The Advocates' Society, *A Call for Action on Delay in the Civil Justice System* (2023)
84.	ZSA, Private Practice Lawyer Salary Guide (June 2024)
85.	Robert Half Legal, Legal Salary Guide 2025
86.	Department of Finance, 2024 Fall Economic Statement
	VARIA
87.	The Honourable Chief Justice Lamer, "Remarks by the Rt. Honourable Antonio Lamer, P.C., Chief Justice of Canada, to the Council of the Canadian Bar Association Annual Meeting" (20 August 1994)
88.	Canadian Judicial Council. Statement of Principles on Self-represented Litigants and Accused Persons, September 2006
89.	Canadian Judicial Council, Ethical Principles for Judges (2021)
90.	The Advocates Society, Letter to The Honourable David Lametti, P.C., M.P., Minister of Justice and Attorney General of Canada re: Judicial Vacancies and Access to Justice in Canada, December 12, 2022
91.	Federation of Ontario Law Associations, Letter to the Prime Minister, the Minister of Finance and the Minister of Justice, February 13, 2023
92.	Canadian Bar Association, Letter to the Prime Minister, May 24, 2023
93.	Appendix A to the Letter of Agreement between Statistics Canada and the Department of Justice (June 19, 2024), Detailed Work Description
94.	Office of the Commissioner for Federal Judicial Affairs Canada, Demographic statistics on diversity in the judiciary (October 29, 2019 – October 28, 2024)

STATEMENT OF CHIEF JUSTICE MORAWETZ

I, the undersigned, Geoffrey B. Morawetz, Chief Justice of the Ontario Superior Court of Justice (the "**Court**"), with an office located in Toronto, Ontario, make the following declaration:

1. I was appointed to the Court in 2005.

2. I was appointed Chief Justice of the Court in 2019.

3. The purpose of this statement is to provide evidence to assist the Judicial Compensation and Benefits Commission (the "**Commission**") in its extant inquiry into the adequacy of the salaries and other amounts payable under the *Judges Act.*

4. More specifically, this statement will address the importance of maintaining a bench composed of judges with diverse experience, with strong representation of appointees from private practice, and the challenges in recruiting qualified candidates from private practice.

A. Importance of a Bench Composed of Judges with Diverse Experience, Including a Significant Contingent of Appointees from Private Practice

5. A judiciary composed of judges with diverse professional experiences is essential to preserve the efficacy of the Court. Within this diversity, it is important that a significant contingent of appointees come from private practice, as they bring a unique expertise that is increasingly essential to addressing the growing complexity of modern litigation.

6. Historically, the majority of judicial appointments have come from private practice. However, the proportion of lawyers appointed from private practice has steadily declined during the last 20 years.

7. As Chief Justice, while acknowledging that the Court is one of general jurisdiction, I can attest to the benefits of judges with the specialized knowledge and practical experience gained in private practice, within a bench composed of judges with diverse professional experiences.

8. Over recent years, I have observed a significant rise in the complexity of cases that come before Canada's superior courts.

9. Judges with a private practice background often bring extensive experience in specialized areas of law that represent an important proportion of superior courts' caseload, such as commercial litigation and family law.

10. This expertise is beneficial to meet the demands of increasingly complex legal proceedings, which call for a growing level of judicial specialization. For instance:

    a. In commercial law cases, judges must address intricate issues related to oppression, securities, corporate reorganizations and insolvency. A strong background in these areas is an important asset to respond to the needs of the litigants, especially for managing complex restructuring and insolvency proceedings, which involve high stakes and multiple stakeholders.

    b. Family law cases increasingly require judges to handle complex valuations of family held corporations and navigate cases involving intimate partner violence.

    c. The adjudication of First Nations claims often involves extensive historical records and demands cultural sensitivity and a deep understanding of Indigenous traditions.

    d. The number of class actions has risen, and they frequently raise issues that cross over into corporate insolvency. Such cases require judges adept at managing multi-party litigation and steering complex procedural dynamics.

    e. Estates litigation raises challenging issues such as valuations of closely held corporations, elder abuse claims, and intricate trust disputes. While in 2005, only one judge in Toronto presided over estate cases two or three days a week, today, four judges are assigned to Estates cases full time.

11. Given the nature of the cases that come before Canada's superior courts, it is key for the superior court bench to include a strong contingent of private sector practitioners with expertise and experience to handle these cases efficiently.

12. The 30-month trial deadline imposed by the Supreme Court in *R v Jordan,* and its attendant consequence on the allocation of judicial resources has a domino effect on civil cases. The resulting demands on superior courts underscore the benefits provided by a superior court bench that can count on an important proportion of judges with the specialized expertise and experience found among lawyers from private practice.

13. Canadians are fortunate to have a federally appointed judiciary composed of judges of a high calibre who strive to maintain the highest standards of judicial decision-making, ensuring that justice is delivered fairly and efficiently while upholding the rule of law. A judiciary with diverse professional backgrounds, that includes a significant contingent of appointees from private practice, is essential for Canada's superior courts to remain a first-class institution capable of meeting the evolving needs of society.

B. Difficulty in Recruiting Candidates from Private Practice

14. An increasing number of qualified private practitioners no longer view a judicial appointment, considering its attendant responsibilities and benefits, as attractive in light of the resulting significant reduction in income.

15. To be clear, I am not questioning the quality of recent appointments to the bench, nor am I suggesting that exceptional candidates cannot come from various legal backgrounds.

16. However, I am concerned about the diminishing pool of outstanding candidates from private practice, and even more so those from metropolitan areas or larger firms.

17. As Chief Justice of the Court, I frequently try to convince outstanding lawyers to consider applying for judicial appointment to fill judicial vacancies. Due to the confidential nature of this process, I am not in a position to provide specific examples of this recruiting activity.

18. What I can attest to is that, despite best efforts, I have often found myself unable to persuade qualified potential candidates to apply for judicial appointments. A routinely cited reason for this lack of interest is the combination of the heavy workload of superior court judges and the perceived lack of commensurate pay for that work.

19. This is an important issue as our Court has grappled with a significant number of judicial vacancies in the past four years, in a context where an increasing number of judges are inclined to retire before reaching the mandatory retirement age.

20. From exchanges within the Canadian Judicial Council, I know that this challenge exists in other areas of the country, particularly in urban centres.

21. In particular, many potential qualified candidates are aware of, and cite, the significant workload, travel demands, loss of autonomy, lack of administrative support, and increased public scrutiny imposed on federally appointed judges as reasons not to consider applying for judicial appointment. When these factors are considered alongside the significant resulting reduction in income, many candidates have expressed a lack of interest in seeking appointment.

22. In my experience, these issues are less pronounced amongst public sector lawyers and academics, who generally receive a pay increase upon appointment.

23. While it has always been the case that lawyers from private practice accept a reduction in income when appointed to the bench, this reduction has become more significant, as is clear from my discussions and similar discussions my colleagues at the Canadian Judicial Council have had with potential candidates.

Signed electronically this 20th day of December 2024

Geoffrey B. Morawetz, C.J.

D. E. Hyatt Litigation Economics Inc.

116 Sherwood Avenue
Toronto, ON M4P 2A7

December 19, 2024

Mr. Jean-Michel Boudreau and Mr. Étienne Morin-Lévesque
IMK s.e.n.c.r.l./LLP
Place Alexis Nihon, Tour 2
3500, boulevard De. Maisonneuve Ouest
Montréal (Québec)
H3Z 3C1

Dear Counsel,

Re: Judicial Compensation and Benefits Commission

I enclose my report in this matter.

Yours truly,

Douglas E. Hyatt
Professor Emeritus

James E. Pesando
In Memoriam
(1946 to 2021)

Douglas E. Hyatt
(416) 576 - 4712
doug.hyatt@rotman.utoronto.ca

Elizabeth M. Gjata (Park)
(647) 207 - 3967
eliz.park@utoronto.ca

December 19, 2024

A Report in the Matter of the Judicial Compensation and Benefits Commission

Prepared for Mr. Jean-Michel Boudreau and Mr. Étienne Morin-Lévesque

of IMK s.e.n.c.r.l./LLP

by

D.E. Hyatt Litigation Economics Inc*

* Professor Douglas E. Hyatt

I am a Professor Emeritus in the Joseph L. Rotman School of Management and the Centre for Industrial Relations, both of the University of Toronto. I was the Academic Director of Professional MBA Programs at the Rotman School of Management and was the Associate Chair of Economics for Management Studies in the Division of Management at the University of Toronto at Scarborough. I have a B.A. degree (economics), an M.A. degree (economics), and a Ph.D. (industrial relations), all from the University of Toronto.

I have been asked to provide my opinion on the following:

1. "The overall economic and current financial position of the federal government" in light of the letters from the Assistant Deputy Minister – Economic Policy Branch dated May 23 and November 29, 2024; and

2. Economic data regarding the increase in costs of living (particularly regarding the housing market) in Canadian Metropolitan Areas.

I have relied on my general knowledge of economics and economic statistics. I have also consulted or reviewed the following:

1. Letter of Ms. Julie Turcotte, Assistant Deputy Minister, Economic Policy Branch, Department of Finance, dated May 23, 2024;

2. Letter of Ms. Julie Turcotte, Associate Assistant Deputy Minister, Economic Policy Branch, Department of Finance, dated November 29, 2024;

3. Government of Canada, Budget 2024 Fairness for Every Generation;

4. Department of Finance Canada, 2024 Fall Economic Statement;

5. PEAP Memo 2024-8, Policy and Economic Analysis Program (PEAP), Rotman School of Management, University of Toronto dated November 4, 2024;

6. Statistics Canada, Employee Wages by Occupation, Annual, Table number 14-10-041701, https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410041701;

7. Consumer Price Index for Canada, Statistics Canada CANSIM series number V41690973;

8. Statistics Canada. Table 18-10-0003-01 Inter-city indexes of price differentials of consumer goods and services, annual;

9. Statistics Canada, *Inter-city indexes of price differentials, of consumer goods and services 2020, Methodology*. Inter-city indexes of price differentials, of consumer goods and services 2020; and

10. Statistics Canada, “Shelter in the Canadian CPI: An overview, 2023 update”, catalogue no. 62F0014M, December 19, 2023; and

11. Judicial Compensation and Benefits Commission, *Report and Recommendations*, August 30, 2021.

I organize my report into two sections.

I THE GOVERNMENT’S ECONOMIC AND FISCAL PROJECTIONS
II RELATIVE COSTS OF LIVING IN CANADIAN METROPOLITAN AREAS

I THE GOVERNMENT’S ECONOMIC AND FISCAL PROJECTIONS

1. The May 23, 2024, and November 29, 2024, letters of Julie Turcotte set out the Government of Canada’s projections for inflation as measured by the Consumer Price Index, industrial aggregate wage growth and the Government of Canada’s budget deficit. The time horizon for the projections is 2024 to 2028.

2. The Government also provides projections for growth in real Gross Domestic Product (GDP), the broadest measure of economic activity, as set out in the 2024 Budget. The Government appears to base its GDP forecast on the consensus (i.e., average) forecasts of 12 financial sector and academic organizations.

3. The Policy and Economic Analysis Program (PEAP) at the Rotman School of Management, University of Toronto, is a highly respected, independent economic forecasting group (and is one of the forecasters included in the Government’s consensus forecast). PEAP is one of the very few forecasters to project economic conditions over longer periods into the future. Further, PEAP regularly revises their forecasts to reflect new data, policy changes, interest rate revisions, and supply and demand shocks. The following compares the consensus/Government GDP forecasts with those of the more contemporary PEAP forecast (November 4, 2024).

Year	Consensus/ Gov’t	PEAP
2024	0.7%	1.1%
2025	1.9%	1.7%
2026	2.2%	2.0%
2027	2.1%	1.9%
2028	2.0%	2.0%

4. Over the forecast period, the average projected growth in real GDP is 1.7 percent per the Government of Canada and 1.9 percent per PEAP. I emphasize that the PEAP forecasts reflect more current information compared to the consensus forecasts relied upon by the Government.

5. Over the 2024 to 2028 period, the Government of Canada projects that the IAI will increase at an average annual rate of 3.0 percent. PEAP's IAI growth forecast is modestly more optimistic, at 3.1 percent per year.

6. With respect to the Government's fiscal position, as expressed in the two letters of Ms. Turcotte, the Department of Finance at the time of the spring 2024 budget projected budgetary deficits of 1.4 percent of GDP for the 2023-24 fiscal year, declining steadily to 0.6 percent of GDP by 2028-29. In the recent 2024 Fall Economic Statement, the budget deficit for 2023-2024 has been revised to 2.1 percent of GDP, declining to 0.8 percent of GDP by 2028-2029. Taking account of more recent information with respect to a larger than expected Federal deficit early in the year and reduced short-term interest rates, PEAP projects a deficit of 2.0 percent of GDP in 2024, declining thereafter to 1.2 percent in 2029 (i.e., double that of the Government's May 2024 projection). The Government's revised budget deficit forecast now more closely aligns with the PEAP forecast and as the PEAP projections suggest, the Government's revised budget deficit can be expected to have little impact on the key measures of economic activity – GDP growth and IAI growth.

7. The previous Quadrennial Commission was confronted with greater than typical uncertainty as to the future direction of the economy and fiscal position of the Government, attributable to the COVID-19 pandemic. At this time, it is evident that, based upon the assessment of the Department of Finance, economic conditions have largely coalesced around traditional longer-term trends.

II INFLATION AND RELATIVE COSTS OF LIVING IN CANADIAN METROPOLITAN AREAS

General Price and Shelter Inflation

8. Table 1 presents data on the growth of consumer prices, as measured by the Consumer Price Index (CPI), over the period 2019 to 2023.[1]

   8.1 Shown in Table 1 is the total percentage change in prices from 2019 to 2023 period, and the average annual percentage increase, for "All Items" and "Shelter". Shelter is further disaggregated into "Rented Accommodation" and "Owned Accommodation". The CPI data are presented for all of Canada and for each of 16 cities.

9. Between 2019 and 2023, the all-items CPI for Canada increased by 15.5 percent. The corresponding compound (average) annual rate of growth in the all-items CPI for Canada was 3.7 percent per year.

10. The average annual growth rate of prices was faster than the national average in Charlottetown and Summerside (4.4%), Halifax (4.0%), Québec City (3.8%), Montreal, Québec (4.2%), Ottawa-Gatineau (4.0%) and Calgary (3.8%). The all-prices index increased at a rate slower than the national average in the other cities.

11. Shelter prices, which include both rented accommodation and owned accommodation increased by 19.4% (4.5% per year) in Canada between 2019 and 2023. The price of rented accommodation grew at 3.6% per year, while the price of owned accommodation grew more rapidly at 4.8% per year.

12. The price of rented accommodation grew fastest in Charlottetown/Summerside (6.2% per year).

13. In all but five of the cities shown in Table 1, the price of owned accommodation grew more rapidly than the price of rented accommodation. In Ottawa-Gatineau, the average annual increase in the price of owned accommodation was 8.5% per year, in contrast to the price of rented accommodation, which grew at a much slower 2.6% annual pace.

[1] In addition to shelter, the all-items index includes: food; household operations, furniture and equipment; clothing and footwear; transportation; health and personal care; recreation, education and reading; and, alcoholic beverages, tobacco products and recreational cannabis.

14. The combined price of water, fuel and electricity, relevant to all forms of accommodation, grew at a pace of 5.0% per year across all of Canada during the 2019 to 2023 period. Edmonton and Calgary experienced the steepest annual rates of increase at 8.7% and 7.4%, respectively.

Relative Costs of Living

15. The data in Table 1 show how prices have grown within cities between 2019 and 2003, however, they offer no insight into the relative cost of living between cities. That is, between 2019 and 2023, the growth in the price of owned accommodation might have been more rapid in City A than in City B, the actual price of owned accommodation in City A may be less than the price of owned accommodation City B. Alternatively stated, the data in Table 1 provide no information on the relative prices of goods and services across Canadian cities.

16. Statistics Canada produces data that do provide some insight into the relative prices (price differentials) for consumer goods and services across 14 Canadian cities.[2]

17. Table 2 presents data on price differentials across Canadian cities for "All-Items" (more accurately, all goods and services that are sufficiently comparable across jurisdictions) and, separately, for "Shelter" (which is also included in the all-items index), for the years 2015 to 2019.[3] I note that 2019 is the most recent year of data for this series.

18. The index value across all jurisdictions, in a given year, is set equal to 100. The index values for each of the cities, in each year, is to be compared to 100. For example, in 2019, the all-items index value for Toronto was 107. The interpretation is that prices of all goods and services included in the comparable basket were 7 percent higher in Toronto than the average across all cities. Alternatively stated, a basket of comparable goods or services that cost $100, on average, across all cities, cost $107 in Toronto. In Winnipeg, the comparable basket would have cost $93.

    18.1 A useful feature of index numbers is that they allow for direct comparison between cities. For example, in 2019, the same basket of goods and services was [107 ÷ 93 =] 15 percent more expensive in Toronto than in Winnipeg.

[2] Statistics Canada. Table 18-10-0003-01 Inter-city indexes of price differentials of consumer goods and services, annual. Data for Iqaluit is collected but not reported.
[3] These data must be interpreted with caution because the prices of only a limited number of goods and services can be compared across jurisdictions.

19. Table 2 also shows that in 2019, Montreal was the lowest shelter cost city (shelter costs are 82% of the average across all cities), while Toronto was the highest shelter cost jurisdiction (114% of average), apart from Yellowknife (129% of average). Shelter costs in Toronto were [114 ÷ 82 =] 39 percent higher than corresponding shelter costs in Montreal.

Douglas E. Hyatt

Table 1

Annual Rates of Consumer Price Growth For Canada and Cities:
All-Items and Shelter, 2019 to 2023

	All Items	Shelter			Water/Fuel /Electricity
		All Shelter	Rented Accomm.	Owned Accomm.	
All Canada:					
Increase 2019 to 2023	15.5%	19.4%	15.0%	20.5%	21.4%
Compound annual growth rate	3.7%	4.5%	3.6%	4.8%	5.0%
St. John's NFLD					
Increase 2019 to 2023	13.9%	15.3%	17.4%	11.0%	22.2%
Compound annual growth rate	3.3%	3.6%	4.1%	2.7%	5.1%
Charlottetown and Summerside, PEI					
Increase 2019 to 2023	18.6%	25.5%	27.3%	19.0%	32.8%
Compound annual growth rate	4.4%	5.8%	6.2%	4.4%	7.3%
Halifax, Nova Scotia					
Increase 2019 to 2023	16.8%	21.6%	25.5%	17.5%	25.3%
Compound annual growth rate	4.0%	5.0%	5.9%	4.1%	5.8%
Saint John, New Brunswick					
Increase 2019 to 2023	15.6%	16.3%	16.6%	15.5%	16.8%
Compound annual growth rate	3.7%	3.8%	3.9%	3.7%	4.0%
Québec, Québec					
Increase 2019 to 2023	16.2%	17.2%	11.5%	21.5%	8.8%
Compound annual growth rate	3.8%	4.0%	2.8%	5.0%	2.1%
Montréal, Québec					
Increase 2019 to 2023	17.4%	23.3%	15.5%	30.6%	9.2%
Compound annual growth rate	4.1%	5.4%	3.7%	6.9%	2.2%
Ottawa-Gatineau, Ontario part,					
Increase 2019 to 2023	17.1%	27.5%	10.6%	38.6%	22.2%
Compound annual growth rate	4.0%	6.3%	2.6%	8.5%	5.1%

Table 1, cont'd …

	All Items	Shelter			Water/Fuel /Electricity
		All Shelter	Rented Accomm.	Owned Accomm.	
Toronto, Ontario					
Increase 2019 to 2023	14.5%	18.0%	15.9%	18.4%	20.6%
Compound annual growth rate	3.4%	4.2%	3.8%	4.3%	4.8%
Thunder Bay, Ontario					
Increase 2019 to 2023	13.9%	17.5%	18.2%	16.9%	18.6%
Compound annual growth rate	3.3%	4.1%	4.3%	4.0%	4.4%
Winnipeg, Manitoba					
Increase 2019 to 2023	16.1%	20.0%	13.3%	23.4%	18.5%
Compound annual growth rate	3.8%	4.7%	3.2%	5.4%	4.3%
Regina, Saskatchewan					
Increase 2019 to 2023	14.3%	13.0%	8.2%	11.9%	21.3%
Compound annual growth rate	3.4%	3.1%	2.0%	2.8%	4.9%
Saskatoon, Saskatchewan					
Increase 2019 to 2023	14.7%	15.2%	9.3%	15.6%	22.6%
Compound annual growth rate	3.5%	3.6%	2.2%	3.7%	5.2%
Edmonton, Alberta					
Increase 2019 to 2023	13.8%	15.9%	7.6%	11.8%	39.4%
Compound annual growth rate	3.3%	3.8%	1.8%	2.8%	8.7%
Calgary, Alberta					
Increase 2019 to 2023	16.1%	23.1%	14.3%	23.2%	33.1%
Compound annual growth rate	3.8%	5.3%	3.4%	5.4%	7.4%
Vancouver, British Columbia					
Increase 2019 to 2023	14.9%	20.2%	16.9%	21.5%	18.3%
Compound annual growth rate	3.5%	4.7%	4.0%	5.0%	4.3%
Victoria, British Columbia					
Increase 2019 to 2023	14.9%	20.3%	18.2%	22.6%	13.1%
Compound annual growth rate	3.5%	4.7%	4.3%	5.2%	3.1%

Table 2

Inter-City Indexes of Price Differentials, of Consumer Goods and Services, 2015 - 2019

Geography		2015	2016	2017	2018	2019
		Index, combined city average=100				
St. John's, Newfoundland and Labrador	All-items	98	98	96	95	96
	Shelter	91	86	82	83	87
Charlottetown and Summerside, Prince Edward Island	All-items	95	95	94	95	95
	Shelter	82	79	77	78	85
Halifax, Nova Scotia	All-items	101	100	98	98	98
	Shelter	98	92	89	89	89
Saint John, New Brunswick	All-items	95	93	92	91	92
	Shelter	77	69	70	71	74
Montréal, Quebec	All-items	94	92	92	93	93
	Shelter	85	78	80	81	82
Ottawa-Gatineau, Ontario part, Ontario/Quebec	All-items	103	103	102	102	101
	Shelter	108	106	101	100	99
Toronto, Ontario	All-items	109	108	110	109	107
	Shelter	119	117	118	118	114
Winnipeg, Manitoba	All-items	95	95	94	93	93
	Shelter	89	88	85	84	85
Regina, Saskatchewan	All-items	99	100	96	97	101
	Shelter	100	102	91	92	105
Calgary, Alberta	All-items	..	103	100	101	101
	Shelter	..	109	104	103	104
Edmonton, Alberta	All-items	101	100	97	99	100
	Shelter	111	104	98	101	107
Vancouver, British Columbia	All-items	104	102	103	104	104
	Shelter	114	109	112	112	105
Whitehorse, Yukon	All-items	..	..	103	100	102
	Shelter	..	..	99	96	103
Yellowknife, Northwest Territories	All-items	..	..	112	110	112
	Shelter	..	..	127	124	129
Iqaluit, Nunavut	All-items	..	..	..	..	..
	Shelter	..	..	..	..	..

EXHIBIT A

CURRICULUM VITAE

December 2024

A. BIOGRAPHICAL INFORMATION

NAME: Douglas Edward Hyatt

OFFICE ADDRESS:

Joseph L. Rotman School of Management
University of Toronto
105 St. George Street
Toronto, Ontario.
Canada. M5S 3E6

TELEPHONE:
Office: (416) 576-4712

E-MAIL: doug.hyatt@rotman.utoronto.ca

CITIZENSHIP: Canadian

B. PROFESSIONAL ACTIVITIES

DEGREES:

Ph.D., 1992, University of Toronto, Industrial Relations.
M.A., 1987, University of Toronto, Economics.
B.A., 1984, University of Toronto, Economics.
Ph.D. Thesis: "Issues in the Compensation of Injured Workers: Returns to Risk, Work Incentives and Accommodation."

Ph.D. Supervisor: Dr. Morley Gunderson

PROFESSIONAL EMPLOYMENT

July 2021 to present:	Professor Emeritus, Rotman School of Management and Centre for Industrial Relations, University of Toronto.
July 2006 to June 2021:	Professor, Rotman School of Management and Centre for Industrial Relations, University of Toronto.
October 2009 to present:	Academic Director (Rotman), Master of Science in Business Research and Doctor of Business Administration Program, Henley Business School, University of Reading.
August 2015 to June 2018:	Academic Director, Professional MBA Programs (Morning and Evening MBA, Executive MBA and OMNIUM Global Executive MBA), Rotman School of Management, University of Toronto.

July 2013 to June 2017:	Member, Academic Board of Governing Counsel, University of Toronto.
July 2002 to June 2006:	Professor, Rotman School of Management, Centre for Industrial Relations, University of Toronto and Division of Management, University of Toronto at Scarborough.
July 2001 to June 2004:	Associate Chair, Division of Management, University of Toronto at Scarborough.
July 2002:	Visiting Professor, Department of Management, University of Melbourne.
July 1997 to June 2002:	Associate Professor, Division of Management, Scarborough College, Rotman School of Management, and Centre for Industrial Relations, University of Toronto.
July 2000 to June 2001:	Visiting Associate Professor, School of Health Administration and Policy, College of Business, Arizona State University.
September 1997 to June 2000:	Senior Scientist, Institute for Work and Health.
January 1998 to December 1998:	Director of Research, Royal Commission on Workers' Compensation in British Columbia.
September 1995 to September 1997:	Scientist and Coordinator of Networks of Centres of Excellence program (HEAL*Net*), Institute for Work and Health.
September 1995 to June 1997:	Visiting Professor, Centre for Industrial Relations, University of Toronto.
August 1992 to June 1997:	Assistant Professor, Department of Economics and Industrial Relations Program, University of Wisconsin - Milwaukee.
April 1995 to August 1995:	Research Coordinator, Ontario Royal Commission on Workers' Compensation.
July 1994 to June 1995:	Visiting Assistant Professor, Centre for Industrial Relations, University of Toronto.
June 1989 to July 1992:	Economist, Ontario Workers' Compensation Board.
May 1991 to December 1991:	Instructor, Industrial Relations, University of Toronto.
January 1988 to March 1989:	Instructor, Personnel Association of Ontario.
October 1986 to September 1988:	Economist, Ontario Ministry of Treasury and Economics.

ACADEMIC HONOURS

Executive MBA Program, Professor of the Year:	EMBA 20 (2003), EMBA 21 (2004), EMBA 22 (2004), EMBA 23 (2005), EMBA 24 (2005), EMBA 25 (2006), EMBA 26 (2006), EMBA 27 (2007), EMBA 28 (2008), EMBA 29 (2009), EMBA 30 (2010), EMBA 31 (2011), EMBA 32 (2012), EMBA 33 (2013), EMBA 34 (2014), EMBA 35 (2015)
Global Executive MBA Program, Professor of the Year:	OMNIUM 2 (2006),OMNIUM 3 (2007), OMNIUM 4 (2008), OMNIUM 5 (2010), OMNIUM 8 (2013), OMNIUM 9 (2014), OMNIUM 10 (2015), OMNIUM 15 (2020)
Rotman School of Management Excellence in Teaching Award:	2003; 2004; 2005; 2006; 2007; 2008; 2009; 2010; 2011; 2012; 2013; 2014; 2015; 2016; 2017; 2018

2016:	University of Toronto, The Morley Gunderson Prize for Outstanding Professional Achievement
2006:	Roger Martin and Nancy Lang Award for Excellence in Teaching, Rotman School of Management, University of Toronto.
2001-2002:	Plumptre Faculty Research Award
1989-1992:	Social Sciences and Humanities Research Council Doctoral Fellowship
1990-1991:	Meredith Fellowship in Workers' Compensation
1988-1989:	Ontario Graduate Scholarship

PROFESSIONAL AFFILIATIONS AND RELATED ACTIVITIES

Research Associate:	Institute for Policy Analysis, University of Toronto
Member of:	The American Economic Association The Canadian Economics Association
Member of:	Ontario Workplace Safety and Insurance Board, President's Actuarial Advisory Committee, 2011 to 2023
Advisor to:	Ontario Rules of Civil Procedure Rule 53 Subcommittee.

RESEARCH GRANTS

Ontario Ministry of Labour. Research Opportunities Program (2014 – 2016). "A Survey of Factors Affecting Safety Performance in the ICI Construction Sector." (With Brenda McCabe).

"Assessment of the Human and Economic Burden of Workplace Cancer." Multisector Team Grants in Prevention Research, Canadian Cancer Society, 2012-2016, $998,872, co-investigator.

Workplace Safety and Insurance Board Research Advisory Council (2003-2005). "Attitudes and Incident Causal

Modeling for Construction." (With Brenda McCabe, Catherine Loughlin, and Susan Tighe). $252,000.

Social Sciences and Humanities Research Council of Canada (2003-2006). "An Analysis of the Production of Quality in Child Care." $45,055.

Department of Health and Human Services (1999). "Work-Related Musculoskeletal Disorders: Evaluating Interventions Among Office Workers." (With Donald Cole, Sheilah Hogg-Johnson and Harry Shannon) $400,000 US.

Child Care Visions, Human Resources Development Canada (1997). "A Policy-Evaluation Model of the Child Care Sector." (With Gordon Cleveland, Morley Gunderson and Michael Krashinsky) $275,000.

Institute for Work and Health (1997). "Administrative Issues in Workers' Compensation." (With Morley Gunderson) $21,800.

Donner Foundation (1996). "New Perspectives on Workers' Compensation Policy in Ontario." (With Morley Gunderson) $125,000.

W.E. Upjohn Institute for Employment Research (1996). "Pay at Risk: Increasing Compensation Risks for Workers in the United States and Canada." (With John Turner, Robert Friedland and Sophie Korczyk) $36,625 US.

Human Resources Development Canada (1995). "Demand and Supply Side Child Care Subsidies." (With Gordon Cleveland) $13,000.

Human Resources Development Canada (1995). "Child Care, Lone Parents, Social Assistance and the Employment Decision." (With Gordon Cleveland) $30,000.

Human Resources Development Canada (1994). "An Assessment of the Impact of Child Care Cost, Availability and Quality on Mothers' Employment." (With Gordon Cleveland) $25,000.

Graduate School Research Committee Award Program, University of Wisconsin - Milwaukee (1993-1994). "Labor Market Outcomes of Vocational Rehabilitation." $8,365 US.

Health and Welfare Canada (Child Care Initiatives Fund) (1992). "Child Care 2000." (With Gordon Cleveland) $325,412.

Statistics Canada (1991). "A Policy Simulation Model of the Child Care Choices of Working Mothers in Ontario." (With Gordon Cleveland) $75,000.

C. PUBLICATIONS AND WORK-IN-PROGRESS

(a) Refereed Journal Publications

"How Can Conflicts with Supervisors or Coworkers Affect Construction Workers' Safety Performance on Site? Two Cross-Sectional Studies in North America." *Buildings*, 2024, 14, 1245, published in the special issue, *The Impact of Organizational and Individual Factors on Construction Safety*, and on-line at: https://doi.org/10.3390/buildings14051245 (with Y. Chen, A. Shahi, A. Hanna and M. Safa).

"Correlations Between Interpersonal Conflicts at Work and Construction Safety Performance: Two Ontario Cross-Sectional Studies." *Proceedings of the Canadian Society of Civil Engineering 2019 Annual Conference*, 2019, CON5-1 to CON5-8, (with Y. Chen and B. McCabe).

"Benchmarking Construction Safety Performance at a Global Level: A Case Study of US, Canada and New Zealand." *Proceedings of the Canadian Society of Civil Engineering 2019 Annual Conference*, 2019, CON11-1 to CON11-8, (with Y. Chen A. Shahi, B. McCabe, A Hanna, Mahdi Safa, and Majeed Safa).

"A Resilience Safety Climate Model Predicting Construction Safety Performance." *Safety Science*, 2018 109 (November), 434-445 (with Y. Chen and B. McCabe).

"Impact of Individual Resilience and Safety Climate on Safety Performance and Psychological Distress of Construction Workers: A Case Study of the Ontario Construction Industry." *Journal of Safety Research*, No. 61 (2017), 167-176 (with Y. Chen and B. McCabe).

"The Relationship Between Individual Resilience, Interpersonal Conflicts at Work, Safety Performance and Stresses of Construction Workers." *Journal of Construction Engineering and Management*, 2017, 143(8) (with Y. Chen, and B. McCabe).

"Demographic and Indication-Specific Variables Have Limited Association with Social Network Engagement: Evidence from 24,954 Members of 4 Health Care Support Groups." *Journal of Medical Internet Research,* 2017, 19(2): e40 (with T. Van Mierlo, X. Li, and A. Ching).

"Safety Performance in the Construction Industry: A Quasi-Longitudinal Study." *Journal of Construction Engineering and Management*, 2017, 143(4) (with B. McCabe, E. Alderman, Y. Chen and A. Shahi).

"Behavioral Economics, Wearable Devices, and Cooperative Games: Results from a Population-based Intervention to Increase Physical Activity." *Journal of Medical Internet Research: Serious Games*, 2016 |vol. 4, issue 1 | e1 (with T. Van Mierlo, A. Ching, R. Fournier and R. Dembo).

"Employing the Gini Coefficient to Measure Participation Inequality in Treatment Focused Digital Health Social Networks." *Network Modeling Analysis in Health Informatics and Bioinformatics*, 2016, 5:32, DOI 10.1007/s13721-016-0140-7 (with T. Van Mierlo, and A. Ching).

"Mapping Power Distributions in Digital Health Networks: Methods, Interpretations and, Practical Implications." *Journal of Medical Internet Research*, 2015; 17(6):e160, with T. Van Mierlo and A. Ching.

"Wearables, Gamified Group Challenges and Behavioral Incentives: A Preliminary Study of An Engagement Program to Increase Physical Activity." *iProc*, 2015; 1(1):e1 (with T. Van Mierlo, A. Ching, R. Fournier and R. Dembo).

"Managing the supply of physicians' services through intelligent incentives." *Canadian Medical Association Journal* 184:E77-E80 (January 10, 2012, published ahead of print November 28, 2011) (with B. Golden and R Hannam).

"Consequences of the Performance Appraisal Experience." *Personnel Review*, 39, No. 3 (2010), 375-396 (with M. Brown and J. Benson).

"Workplace Violence and the Duration of Workers' Compensation Claims." *Relations Industrielles/ Industrial Relations*, 63, No. 1 (2008), 57-84 (with M. Campolieti and J. Goldenberg).

"Determinants of Stress in Medical Practice: Evidence from Ontario." *Relations Industrielles/ Industrial Relations*, 62, No. 2 (2007), 226-257 (with M. Campolieti and B. Kralj).

"Experience Rating, Work Injuries and Benefit Costs: Some New Evidence." *Relations Industrielles/ Industrial Relations*, 61, No. 1 (2006), 118-145 (with M. Campolieti and T. Thomason).

"Further Evidence for Interpreting the "Monday Effect" in Workers' Compensation." *Industrial and Labor Relations Review*, 59, No. 3 (2006), 438-450 (with M. Campolieti).

"Strike Incidence and Strike Duration: Some New Evidence from Ontario." *Industrial and Labor Relations Review*, 58, No. 4 (2005), 610-630, (with M. Campolieti and R. Hebdon).

"Child Care Subsidies, Welfare Reforms and Lone Mothers." *Industrial Relations*, 42, No. 2, (2003), 251-269, (with G. Cleveland).

"Symposium: The Effect of Work-Family Policies on Employees and Employers." *Industrial Relations*, 42, No. 2, (2003), 139-144, (with R. Drago).

"Union Impacts in Low-Wage Services: Evidence From Canadian Child Care." *Industrial and Labor Relations Review*, 56, No. 2 (2003), 295-305, (with G. Cleveland and M. Gunderson).

"Child Care Workers' Wages: New Evidence on Returns to Education, Experience, Job Tenure and Auspice." *Journal of Population Economics*, 15, No. 3 (2002), 575-597, (with G. Cleveland).

"Workplace Risks and Wages: Canadian Evidence from Alternative Models." *Canadian Journal of Economics*, 34, No. 2 (2001), 377-395, (with M. Gunderson).

"The Impact of Representation (and Other Factors) on Employee-Initiated Workers' Compensation Appeals." *Industrial and Labor Relations Review*, 53, No. 4 (July 2000), 665-683, (with B. Kralj).

"Privatization of Workers' Compensation: Will the Cure Kill the Patient?" *International Journal of Law and Psychiatry*, 22, No. 5-6 (1999), 547-565, (with M. Gunderson).

"Implications of Small Bargaining Units and Independent Unions for Bargaining Disputes: A Look into the Future?" *Relations industrielles/Industrial Relations*, 54, No. 3 (Summer 1999), 503-526, (with R. Hebdon and M. Mazerolle).

"Free Trade, Global Markets, and Alternative Work Arrangements." *Proceedings of the 51st Annual Meetings of the Industrial Relations Research Association (refereed papers in labor economics)*, 1999, 152-160, (with K. Roberts).

"The Effects of Industrial Relations Factors on Health and Safety Conflict." *Industrial and Labor Relations Review*, 51, No. 4 (July 1998), 579-593, (with R. Hebdon).

"Do Employees Actually Bear the Risk in Defined Benefit Pension Plans?" *Canadian Labour and Employment Law Journal*, 5, No. 1, (1997), 125-138, (with J.E. Pesando).

"Do Injured Workers Pay for Reasonable Accommodation?" *Industrial and Labor Relations Review*, 50, No. 1, (October 1996), 92-104, (with M. Gunderson).

"Work Disincentives of Workers' Compensation Permanent Partial Disability Benefits: Evidence for Canada." *Canadian Journal of Economics*, 29, No. 2 (May 1996), 289-308.

"Collective Bargaining in the Public Sector: Comment." *American Economic Review*, 86, No. 1 (March 1996), 315-326 (with M. Gunderson and R. Hebdon).

"The Distribution of Investment Risk in Defined Benefit Pension Plans: A Reconsideration." *Relations industrielles/Industrial Relations*, 51, No. 1 (Winter 1996), 136-157 (with J. Pesando).

"Child Care Costs and the Employment Decision of Women: Evidence for Canada." *Canadian Journal of Economics*, 29, No. 1 (February 1996), 132-151 (with G. Cleveland and M. Gunderson).

"On the Edge: Single Mothers' Employment and Child Care Arrangements for Young Children." *Canadian Journal of Research in Early Childhood Education. Special Issue on Child Care*, 5, No. 1, (February 1996), 13-25 (with G. Cleveland).

"Workplace Innovation in the Public Sector: The Case of the Office of the Ontario Registrar General." *Journal of Collective Negotiations in the Public Sector*, 25, No. 1 (1996), 63-81 (with R. Hebdon).

"Reasonable Accommodation Requirements Under Workers' Compensation in Ontario." *Relations industrielles/Industrial Relations*, 50, No. 2, (Spring 1995), 341-360 (with M. Gunderson and D. Law).

"The Impact of Workers' Compensation Experience Rating on Employer Appeals Activity." *Industrial Relations*, 34, No. 1, (January 1995), 95-106 (with B. Kralj).

"Determinants of Child Care Choice: A Comparison of Results for Ontario and Quebec." *Canadian Journal of Regional Science*, 16, No. 1 (1993), 53-67 (with G. Cleveland).

"Determinants of Fertility in Urban and Rural Kenya: Estimates and a Simulation of the Impact of Education Policy." *Environment and Planning A*, 25 (1993), 371-382 (with W. Milne).

"Re-Employment and Accommodation of Injured Workers under Ontario's Workers' Compensation Act." *Journal of Individual Employment Rights*, 1, No. 3 (1992), 253-262.

"Early Retirement Pensions and Employee Turnover: An Application of the Option Value Approach." *Research in Labor Economics*, 13 (1992), 321-337 (with J. Pesando and M. Gunderson).

"Wage-Pension Trade-Offs in Collective Agreements." *Industrial and Labor Relations Review*, 46, No. 1 (October 1992), 146-160 (with M. Gunderson and J. Pesando).

"Countercyclical Fertility in Canada: Some Empirical Results." *Canadian Studies in Population*, 18, No. 1 (1991), 1-16 (with W. Milne).

"Can Public Policy Affect Fertility?" *Canadian Public Policy*, 17, No. 1 (March 1991), 77-85 (with W. Milne).

(b) Refereed Monographs

"New Evidence about Child Care in Canada: Use Patterns, Affordability and Quality." Choices, Institute

for Research on Public Policy (IRPP), 4, No. 12 (October 2008), (with G. Cleveland, B. Forer, C. Japel and M. Krashinsky).

"Pay Differences between the Government and Private Sectors: Labour Force Survey and Census Estimates." CPRN Discussion Paper No. W|10, February 2000, (with Morley Gunderson and Craig Riddell).

"Subsidizing Child Care for Low-Income Families: A Good Bargain for Canadian Governments?" Choices, Institute for Research on Public Policy (IRPP), 4, No. 2 (May 1998), (with Gordon Cleveland).

"Using the NLSCY to Study the Effects of Child Care on Child Development." Research Paper T-97-6E, Applied Research Branch, Strategic Policy, Human Resources Development Canada, September 1997 (with G. Cleveland). Also available in French as Research Paper T-97-6F.

"Subsidies to Consumers or Subsidies to Providers: How Should Governments Provide Child Care Assistance?" Research Paper R-97-7E, Applied Research Branch, Strategic Policy, Human Resources Development Canada, May 1997 (with G. Cleveland). Also available in French as Research Paper R-97-7F.

"Child Care, Social Assistance and Work: Lone Mothers with Preschool Children." Working Paper W-96-2E, Applied Research Branch, Strategic Policy, Human Resources Development Canada, March 1996 (with G. Cleveland).

(c) Edited Volumes and Special Journal Issues

Symposium: The Effect of Work-Family Policies on Employees and Employers. *Industrial Relations*, Volume 42, No. 2 (April 2003).

Workers' Compensation: Foundations for Reform. (Toronto, Ont.: University of Toronto Press), 2000 (with M. Gunderson).

New Approaches to Disability in the Workplace. Industrial Relations Research Association, (Ithaca, NY: Cornell University Press for the IRRA), 1998 (with J.F. Burton Jr. and T. Thomason).

Public Sector Employment in a Time of Transition. Industrial Relations Research Association, (Ithaca, NY: Cornell University Press for the IRRA), 1996, (with D. Belman and M. Gunderson).

(d) Chapters in Books

"Consequences of the Performance Appraisal Experience." In New Perspectives in Employee Engagement in Human Resources. (Bingley, United Kingdom: Emerald Gems Series, Emerald Group Publishing Limited) 2015, (with M. Brown).

"Does Vocational Rehabilitation Have Much Impact on Helping People Return to Work." In D. Taras and K. Williams-Whitt (eds.) Perspectives on Disability and Accommodation. (Victoria, B.C.: National Institute of Disability Management and Research), 2011, 225-244, (with M. Campolieti).

"Strikes and Dispute Resolution." In M. Gunderson, A. Ponak and D. Taras (eds.), Union-Management Relations in Canada, sixth edition. (Don Mills, Ontario: Addison-Wesley Publishers Limited), 2009, 322-360, (with M. Gunderson, and R. Hebdon).

"Union Impact on Compensation, Productivity, and Management of the Organization." In M. Gunderson, A. Ponak and D. Taras (eds.), Union-Management Relations in Canada, sixth edition. (Don Mills, Ontario: Addison-Wesley Publishers Limited), 2009, 383-402, (with M. Gunderson).

"Employer-Based Health Insurance: A Way for the Future?" In C. Flood, M. Stabile and C. Tuohy (eds.), Exploring Social Insurance: Can a Dose of Europe Cure Canadian Health Care Finance. (Montreal, Que.: McGill-Queen's University Press) 2008, 91-113, (with M. Gunderson).

"The Comparison of Private Insurers and Public Insurers in Workers' compensation Systems." In M. Shinada (ed.), Workers' compensation and Moral Hazard. Law and Economic Analysis of Workers' Compensation Insurance in North America. Kyoto: Horitsu Bunkasha Publishers, 2006. (with M. Gunderson)

"Workers' Compensation and Return-to-Work." In M. Shinada (ed.), Workers' compensation and Moral Hazard. Law and Economic Analysis of Workers' Compensation Insurance in North America. Kyoto: Horitsu Bunkasha Publishers, 2006. (with M. Gunderson)

"Mandatory Retirement: Not as Simple as it Seems." In C.T. Gillin, D. MacGregor and T. Klassen (eds.), Time's Up! Mandatory Retirement in Canada. (Toronto: James Lorimer and Company Ltd. for the Canadian Association of University Teachers), chapter 8, 2005. (with M. Gunderson).

"Issues in Workers' Compensation Appeals System Reform." In K. Roberts, J.F. Burton, Jr. and M. Bodah (eds.), Workplace Injuries and Diseases: Prevention and Compensation – Essays in Honor of Terry Thomason. (Kalamazoo: W.E. Upjohn Institute for Employment Research), 2005, 117-140.

"Strikes and Dispute Resolution." In M. Gunderson, A. Ponak and D. Taras (eds.), Union-Management Relations in Canada, fifth edition. (Don Mills, Ontario: Addison-Wesley Publishers Limited), 2004, 332-370, (with M. Gunderson, R. Hebdon and A. Ponak).

"Union Impact on Compensation, Productivity, and Management of the Organization." In M. Gunderson, A. Ponak and D. Taras (eds.), Union-Management Relations in Canada, fifth edition. (Don Mills, Ontario: Addison-Wesley Publishers Limited), 2004, 394-413, (with M. Gunderson).

"Health and Coverage at Risk." In J. Turner (ed.), Pay at Risk: Compensation and Employment Risk in the United States and Canada. (Kalamazoo: W.E. Upjohn Institute for Employment Research), 2001, 83-114, (with R. Friedland, L. Summer and S. Korczyk).

"Risk Shifting in Workers' Compensation." In J. Turner (ed.), Pay at Risk: Compensation and Employment Risk in the United States and Canada. (Kalamazoo: W.E. Upjohn Institute for Employment Research), 2001, 161-190.

"Issues in the Professionalization of Child Care." In G. Cleveland and M. Krashinsky (eds.), Our Children's Future: Child Care Policy in Canada. (Toronto: University of Toronto Press), 2001, 394-396.

"Public Pension Plans in the United States and Canada." In W. Alpert and S. Woodbury (eds.), Employee Benefits and Labor Markets in Canada and the United States. (Kalamazoo, MI: The Upjohn Institute), 2000, 381-411, (with M. Gunderson and J.E. Pesando).

"Strikes and Dispute Resolution." In M. Gunderson, A. Ponak and D. Taras (eds.), Union-Management Relations in Canada, fourth edition. (Don Mills, Ontario: Addison-Wesley Publishers Limited), 2000,

314-358, (with M. Gunderson and A. Ponak).

"Union Impact on Compensation, Productivity, and Management of the Organization." In M. Gunderson, A. Ponak and D. Taras (eds.), Union-Management Relations in Canada, fourth edition. (Don Mills, Ontario: Addison-Wesley Publishers Limited), 2000, 385-413, (with M. Gunderson).

"Foundations for Workers' Compensation Reform: Overview and Summary." In M. Gunderson and D. Hyatt (eds.), Workers' Compensation: Foundations for Reform. (Toronto, Ont.: University of Toronto Press), 2000, 3-26, (with M. Gunderson).

"Unfunded Liabilities Under Workers' Compensation." In M. Gunderson and D. Hyatt (eds.), Workers' Compensation: Foundations for Reform. (Toronto, Ont.: University of Toronto Press), 2000, 162-186, (with M. Gunderson).

"Should Work Injury Compensation Continue to Imbibe at the Tort Bar?" In M. Gunderson and D. Hyatt (eds.), Workers' Compensation: Foundations for Reform. (Toronto, Ont.: University of Toronto Press), 2000, 327-360, (with D. Law).

.

"Workforce and Workplace Changes: Implications for Injuries and Compensation." In T. Sullivan (ed.), Injury and the New World of Work. (Vancouver, B.C.: UBC Press), 2000, 46-68, (with M. Gunderson).

"Disability in the Workplace." (With Terry Thomason and John F. Burton Jr.). In T. Thomason, D. Hyatt and J. Burton Jr. (eds.), New Approaches to Disability in the Workplace. Industrial Relations Research Association, (Ithaca, NY: Cornell University Press for the IRRA), 1998, 1-37, (with T. Thomason and K. Roberts).

"Disputes and Dispute Resolution in Workers' Compensation." (With Terry Thomason and Karen Roberts). In T. Thomason, D. Hyatt and J. Burton Jr. (eds.), New Approaches to Disability in the Workplace. Industrial Relations Research Association, (Ithaca, NY: Cornell University Press for the IRRA), 1998, 269-297, (with T. Thomason and K. Roberts).

"Labour Adjustment Policy and Health: Considerations for a Changing World." In Determinants of Health: Settings and Issues. (St.-Foy, Que.: Les Editions MultiMondes for the National Forum on Health), 1998 (with T. Sullivan, O. Uneke, J. Lavis, and J. O'Grady). Also available in French.

"Intergenerational Considerations of Workers' Compensation Unfunded Liabilities." In Miles Corak (ed.), Government Finances and Generational Equity. Statistics Canada Catalogue no. 68-513-XPB. (Ottawa: Minister of Industry), 1998 (with M. Gunderson). Also available in French.

"Workers' Compensation Costs in Canada: 1961-1993." In M. Abbott, C. Beach and R. Chaykowski (eds.), Transition and Structural Change in the North American Labour Market. (Kingston: Industrial Relations Centre and John Deutch Institute, Queen's University distributed by IRC Press), 1997, 235-255, (with T. Thomason).

"Public Sector Employment Relations in Transition." In D. Belman, M. Gunderson and D. Hyatt (eds.), Public Sector Employment in a Time of Transition. Industrial Relations Research Association, (Ithaca, NY: Cornell University Press for the IRRA), 1996, (with D. Belman and M. Gunderson).

"Canadian Public Sector Employment Relations in Transition." In D. Belman, M. Gunderson and D. Hyatt (eds.), Public Sector Employment Relations in a Time of Transition. Industrial Relations Research

Association, (Ithaca, NY: Cornell University Press for the IRRA), 1996, (with M. Gunderson).

"The Effect of Free Trade on Contingent Work in Michigan." In Karen Roberts and Mark I. Wilson (eds.), Policy Choices: Free Trade Among NAFTA Nations. (East Lansing, MI: Michigan State University Press), 1996, 235-260, (with K. Roberts and P. Dorman).

"The Evolution of Workers' Compensation Costs in Canada." In John F. Burton, Jr. (ed.), 1996 Workers' Compensation Yearbook. (Horsham, PA: LRP Publications), 1995, I-39 to I-48, (with T. Thomason).

"Alternative Methods for Modeling Regional Industrial Activity: Short Run Versus Long Run." In M. Popov (ed.), The Issues of Elaboration and Implementation of Regional Development Programs under the Transition to a Market Economy. (Donetsk, Ukraine: Donetsk Polytechnical Institute), 1995, 48-52. (Text in Russian).

"Union Impact on Compensation, Productivity, and Management of the Organization." In M. Gunderson and A. Ponak (eds.), Union-Management Relations in Canada, third edition. (Don Mills, Ontario: Addison-Wesley Publishers Limited), 1995, 311-337, (with M. Gunderson).

"Strikes and Dispute Resolution." In M. Gunderson and A. Ponak (eds.), Union-Management Relations in Canada, third edition. (Don Mills, Ontario: Addison-Wesley Publishers Limited), 1995, 373-411, (with M. Gunderson and A. Ponak).

"Re-Employment and Accommodation Requirements under Workers' Compensation." In T. Thomason and R. Chaykowski (eds.), Research in Canadian Workers' Compensation. (Kingston: Queen's University IRC Press), 1995, 141-157, (with M. Gunderson and D. Law).

"Measuring the Impact of Vocational Rehabilitation on the Probability of Post-Injury Return to Work." In T. Thomason and R. Chaykowski (eds.), Research in Canadian Workers' Compensation. (Kingston: Queen's University IRC Press), 1995, 158-180, (with R. Allingham).

(e) Conference Proceedings

"Safety and Age: a Longitudinal Study of Ontario Construction Workers" *Proceedings of the Construction Research Congress*, 2016, DOI: 10.1061/9780784479827.294, (with Y. Chen, and B. McCabe).

"Data collection framework for construction safety research." *Proc., CSCE International Construction Specialty Conference*, 2015, Paper 101, (with Y. Chen, E. Alderman and B. McCabe).

"Safety Impacts of a Mobile Labour Force", *4th Construction Specialty Conference, Proceedings of the Canadian Society of Civil Engineering 2013 Annual Conference*, (with B. McCabe).

"Employment Equity in Canada and the United States." *Proceedings of the 54th Annual Meeting of the Industrial Relations Research Association*, 2002, 146-153 (with M. Gunderson and S. Slinn).

"Contingent Work: The Role of the Market, Collective Bargaining and Legislation." *Proceedings of the 53rd Annual Meeting of the Industrial Relations Research Association*, 2001, 99-107 (with M. Gunderson).

"Child Care Choice for Pre-School Children of Employed Mothers in Ontario, Quebec and Alberta in 1988." *Proceedings of the 29th Conference of the Canadian Industrial Relations Association*, 1993, 355-366 (with G. Cleveland).

"Projections of the Effect of Government Child Care Policy on Parents Choice of Child Care Arrangements." *Proceedings From the Child Care Policy Research Symposium*, (Toronto: Child Care Resource and Research Unit), 1993 (with G. Cleveland).

"Workers' Compensation Costs and Competitiveness: Issues and Inter-Jurisdictional Comparisons." *Proceedings of the 28th Conference of the Canadian Industrial Relations Association*, 1992, 421-429 (with B. Kralj).

"Employer Appeals of Workers' Compensation Board Decisions: The Impact of Experience Rating." *Proceedings of the 27th Conference of the Canadian Industrial Relations Association*, 1991, 329-337 (with B. Kralj).

(f) Book Reviews

Labour Relations and Health Reform. A Comparative Study of Five Jurisdictions. Edited by Kurt Wetzel. *Relations Industrielles/ Industrial Relations*, 62, No. 4, 2007), 781-783.

Adequacy of Earnings Replacement in Workers' Compensation Programs. Edited by H. Allan Hunt. *Industrial and Labor Relations Review*, 59, No. 1 (2005), 160-161

(g) Non-Refereed Publications

"Safety in the Ontario Construction Industry." *Building Ontario*, Winter 2007/2008, 10-11 (with B. McCabe, C. Loughlin, and S. Tighe).

"Strategies for Engendering Healthy Workplaces." *Economic Issues Note*, Economic Analysis and Evaluation Division, Health Canada, July 2004, 1-9 (with B. Shapansky, J. Bourgeois, P. De Civita, and M. Gunderson).

"Economics and RSI/WMSD: Coming to Grips with Economic Causes, Costs and Efficiency." (With Donald C. Cole and Sandra Sinclair), 1998, Institute for Work and Health Working Paper.

"New Approaches the Disability in the Workplace." *Labor Law Journal*, 49, No. 7, 1998, 1175-1187 (with T. Thomason and J. Burton, Jr.).

"Assessing Federal Child Care Policy: Does the Arrow Reach its Target?" *Policy Options*, 17, No. 1, (January-February 1997), 20-24 (with G. Cleveland).

"The Evolution of Workers' Compensation Costs in Canada." *Workers' Compensation Monitor*, 9, No. 1, (May-June 1996), 4-13 (with T. Thomason).

(h) Reports to Governments, Commissions and Task Forces

"Feasibility Study To Develop a Tool to Assist in Projecting Insurable Earnings and Employment." (Ontario) Workplace Safety and Insurance Board, November 2014 (39 pages).

"An Overview of the Financial Impact of the Canadian Music Industry." Report to the Ontario Media Development Corporation (OMDC), May 2008 (report released June 6, 2008) (95 pages).

"An Economic Perspective on the Current and Future Role of Nonprofit Provision of Early Learning and Child Care Services in Canada." Final report to Human Resources and Skills Development Canada. (With G. Cleveland, B. Forer, C. Japel and M. Krashinsky), March 1, 2007 (83 pages).

"Attitudes and Incident Modeling for Construction Safety." A report to the Research Advisory Council of the Ontario Workplace Safety and Insurance Board (WSIB). (With B. McCabe, C. Loughlin and S. Tighe), July 2006.

"Canadian Commercial Radio Broadcasting: Historical Financial Performance and Projections." Paper prepared for L'Association quebecois de l'industrie du disque, du spectacle et de la video (ADISQ) and the Canadian Independent Record Production Association (CIRPA) for the Canadian Radio-television and Telecommunications Commission's Review of Commercial Radio Policy. (With Paul Audley), May 16, 2006 (40 pages).

"A Proposal to Revise the CRTC's Canadian Talent Development Policy for Canadian Commercial Radio Broadcasters." Paper prepared for L'Association quebecois de l'industrie du disque, du spectacle et de la video (ADISQ) for the Canadian Radio-television and Telecommunications Commission's Review of Commercial Radio Policy. (With Paul Audley), May 16, 2006 (30 pages).

"Economic Incentives: Strategies for Engendering Healthy Workplaces." A Report to Health Canada. (With M. Gunderson), March 2002.

"Issues in Workers' Compensation for 2001." A Report to the Workers' Compensation Board of Manitoba. January 2001.

"Final Report of the Child Care Policy-Evaluation Model Project." A Report to Child Care Visions, Human Resources Development Canada. (With G. Cleveland, M. Gunderson and M. Krashinsky), March 2001.

"Some Benefit Considerations in Workers' Compensation." A Report to the Royal Commission on Workers' Compensation in British Columbia. (With M. Gunderson), June 1998.

"Waiting Periods and Direct Payments in Workers' Compensation." A Report to the Royal Commission on Workers' Compensation in British Columbia. (With M. Gunderson), June 1998.

"Evidence on the Efficacy of Experience Rating in British Columbia." A Report to the Royal Commission on Workers' Compensation in British Columbia. (With T. Thomason), May 1998.

"Subsidies to Consumers or Subsidies to Providers: How Should Governments Provide Child Care Assistance?" A Report to the Applied Research Branch of the Social Policy Group of Human Resources Development Canada. (With G. Cleveland), March 1996.

"The Cost of Doing Nothing: Why an Active Labour Adjustment Strategy Makes Sense in Ontario's Health Sector." A Report to the Ontario Health Sector Training and Adjustment Program. (With M. Gunderson), February 1996.

"Final Report of the Child Care 2000 Project." A Report to Human Resources Development Canada (the Child Care Initiatives Fund). (With G. Cleveland), August 1995.

"The Alberta Child Care Demand Model." A Report to Human Resources Development Canada (the Child Care Initiatives Fund). (With G. Cleveland), July 1995.

"The Quebec Child Care Demand Model." A Report to Human Resources Development Canada (the Child Care Initiatives Fund). (With G. Cleveland), July 1995.
"Baseline Study for Canada." A Report to the Employment Department, Government of England. (With M. Gunderson), May 1995.

"Child Care, Social Assistance and Work: Single Parents with Preschool Children." A Report to Human Resources Development Canada. (With G. Cleveland), April 1995.

"An Assessment of the Impact of Child Care Cost, Availability and Quality on Mothers' Employment: Final Report." A Report to Human Resources Development Canada. (With G. Cleveland), November 1994.
"An Assessment of the Impact of Child Care Cost, Availability and Quality on Mothers' Employment: An Interim Report." A Report to Human Resources Development Canada. (With G. Cleveland), March 1994.

"The Ontario Child Care Demand Model: Final Report." A Report to Statistics Canada. (With G. Cleveland), August 1993.

"What is Success in Employment Equity? A Regression-Based Analysis of Factors Influencing the Representation of Designated Groups in Varying Employment Situations." A Report to Employment and Immigration Canada. (With E. Harvey), May 1992.

"Results of Estimation of Child Care Demand Model." A Report to Statistics Canada. (With G. Cleveland), September 1991.

"Modeling Child Care Demand Using the 1988 National Child Care Survey." A Report to Statistics Canada. (With G. Cleveland), June 1991.

"Collective Bargaining, Hours of Work and Overtime: A Report to the Ontario Task Force on Hours of Work and Overtime." (With E. Swimmer and M. Gunderson) Queen's Printer, 1988.

(i) Copyright Tariff Reports

CMRRA/SODRAC Inc. – Online Music Services 2008-2010.

CMRRA/SODRAC Inc. - Multi-Channel Subscription Radio Services, 2006-2009.

Access Copyright Reprographic Reproductions in Canada by Educational Institutions, 2005-2009.
CMRRA/SODRAC (CSI) On-Line Music Services, 2005-2007.

NRCC Background Music Tariff 3, 2003-2009.

CMRRA/SODRAC Pay Audio Services Tariff 4.

SOCAN/NRCC Commercial Radio Tariff 1.A, 2003-2007.

(j) Other Manuscripts

"Know Your ABCs: An academic's guide to successfully advancing innovative ideas from Academia to Business to Commercialization." With A. Ali and J. Grant, January 31, 2020.

"The Role of MNEs as Intermediates for Canadian Imports?" (With W. Hejazi and A. Ciologariu), July 2020.

"The Ties that Bind: When Do Affiliates Break with their Parent?" (With W. Hejazi and A. Ciologariu), October 2019.

PATENT APPLICATION

“Risk Stratification and Scoring for Non-Adherence in Digital Subjects.” USA Patent Application No. 62/315,352. With T. van Mierlo, A.T.T. Ching and R. Fournier.

RESEARCH IN PROGRESS

“Illuminating Puzzles in International Trade Using Highly-Disaggregated Customs Brokerage Data.”

“Determinants of Life Insurance Coverage.”

“Construction Safety Practices.”

CONFERENCE PAPERS AND OTHER PRESENTATIONS

“Individual Factors' Impact on Construction Safety Performance: Observations from US and Canada Sites.” With Y. Chen, B. McCabe and J. Wang. To be presented at The Construction Institute of America and American Society of Civil Engineers joint meetings, Virginia Tech, and published in refereed proceedings.

"The Role of MNEs as Intermediates for Canadian Imports.” With W. Hejazi and A. Ciologariu. To be presented at the 80th Annual Meetings of the Academy of Management, Vancouver, British Columbia, August 7-11, 2020.

"The Role of MNEs as Intermediates for Canadian Imports.” With W. Hejazi and A. Ciologariu. Presented at the Annual Conference of the Academy of International Business, Miami, Florida (presented on-line), July 6, 2020.

“The Role of U.S. Multinationals in Intermediating Trade with the MENA Region.” With W. Hejazi and A. Ciologariu, was to be presented at the ISA International Conference, 2020, Ifrane, Morocco, June 23-25, 2020 (postponed due to pandemic).

"The Ties that Bind: When Do Affiliates Break with their Parent?" With W. Hejazi and A. Ciologariu. Meetings of the Academy of International Business – U.S. West Chapter, San Diego State University, San Diego, California, February 28, 2020 (Competitive session).

"The Ties that Bind: When Do Affiliates Break with their Parent?" With W. Hejazi and A. Ciologariu. Annual Conference of the Academy of International Business – U.S. Northeast, Rutgers University, New Brunswick, New Jersey, October 11-12, 2019.

“Correlations Between Interpersonal Conflicts at Work and Construction Safety Performance: Two Ontario Cross-Sectional Studies.” With Y. Chen and B. McCabe 2019 Canadian Society for Civil Engineering Conference, Montreal, Qc., June 12-15, 2019.

“Benchmarking Construction Safety Performance at a Global Level: A Case Study of US, Canada and New

Zealand." With Y. Chen, A. Shahi, B. McCabe, A. Hanna, Mahdi Safa and Majeed Safa. 2019 Canadian Society for Civil Engineering Conference, Montreal, Qc., June 12-15, 2019.

"A Belief Network Model of Resilient Safety Climate in the Construction Industry." With Y. Chen and B. McCabe. 2017 Canadian Society for Civil Engineering Conference, Vancouver, B.C., June 1, 2017. Winner of the Best Paper Award.

"Leveraging Econometric Theory to Detect Adherence Patterns in Digital Health Social Networks." With T. Van Mierlo and A. Ching. Stanford Medical School, September 17, 2016.

"Safety and Age: a Longitudinal Study of Ontario Construction Workers." With Y. Chen and B. McCabe. 2016 Construction Research Congress, San Juan, Puerto Rico, May 31 to June 2, 2016.

"Wearables, Gamified Group Challenges and Behavioral Incentives: A Preliminary Study of an Engagement Program to Increase Physical Activity." With T. Van Mierlo, A. Ching, R. Fournier and R. Dembo. Partners HealthCare Connected Health. Boston MA, October 2015.

"Shopping Malls and Digital Health Networks: Predicting Patterns of Use." With T. Van Mierlo and A. Ching. Presented at Stanford Medical School, September 26, 2015.

"Data Collection Framework for Construction Safety Research." With Y. Chen, E. Alderman and B. McCabe. Presented at the 5th International/11th Construction Specialty Conference, Vancouver British Columbia, June 9, 2015.

"A Venture Capital Perspective on Intellectual Property." presented at IPgentsia, University of Waterloo Office of Research, April 2, 2008.

"Some Implication of Demographic Change for the Economics of Media." Ryerson University, September 12, 2007.

"Employer-Based Health Insurance: A Way for the Future?" (with M. Gunderson) presented at the Social Insurance for Health Care: Legal and Political Considerations conference, School of Public Policy and Governance, University of Toronto. November 9, 2006.

"Does Vocational Rehabilitation Have Much Impact on Helping People Return to Work." (with M. Campolieti), presented at the Accommodating Disability in the Workplace: Research, Policy and Practice, co-sponsored by the Institute for Advanced Policy Research, the Industrial Relations Research Group at the University of Calgary, the Workers Compensation Board of Alberta, and the Faculty of Management at the University of Alberta, Calgary, Alberta, June 14, 2006.

"Comments on Einhorn and McKie." Digital Copyright Reform in Canada: An International Perspective. Toronto, Ontario. March 3, 2006.

"Pricing Issues Facing Music Publishers and Recording Companies." Digital Music Summit, Toronto, Ontario. March 1, 2006.

"History and Economic Perspectives on Current Issues in Workers' Compensation Reform in Canada." Presentation to the Ministry of Health, Labor and Welfare, Government of Japan, Tokyo, Japan, August 10, 2004.

"Issues in Workers' Compensation Appeals System Reform," presented at Workers' Compensation: Current and Emerging Issues, A Conference in Memory of Terry Thomason, University of Rhode Island, Kingston Rhode Island,

March 27, 2004.

“Dysfunctional Aspects of Performance Appraisal,” (with M. Brown and J. Benson), presented at the meetings of the Canadian Industrial Relations Association, Halifax, Nova Scotia, June 1, 2003.

“The Recipe for Good Quality Early Childhood Care and Education: Do We Know the Key Ingredients?” (with G. Cleveland), presented at the meetings of the Canadian Economics Association, Ottawa, Ontario, May 31, 2003.

“Lessons from Some "Contingent Workers" who Sought Union Certification,” (with S. Slinn), presented at the meetings of the Industrial Relations Research Association, Atlanta, GA, January 6, 2002.

“Employment Equity in Canada and the U.S.” (with M. Gunderson and S. Slinn), presented at the meetings of the Industrial Relations Research Association, Atlanta, GA, January 5, 2002.

“Strike Duration: Theory and Evidence,” (with R. Hebdon), presented at the meetings of the Canadian Industrial Relations Association, Laval Quebec, May 27,2001.

“Contingent Work: The Role of the Market, Collective Bargaining and Legislation,” (with M. Gunderson), presented at the meetings of the Industrial Relations Research Association, New Orleans, LA, January 5, 2001.

“Simulating the Effects of Child Care Policy in Canada,” presented at the meetings of the Canadian Employment Research Forum, Vancouver, British Columbia, June 1, 2000.

“Should Experience Rating Be Abolished,” Invited speaker, Canadian Bar Association – Ontario Workers’ Compensation Group. February 9, 2000.

“Does the Child Care Labor Market Work? Provocative Evidence From Canada,” presented at the Institute for the Study of Labor (IZA) conference, The Economics of Childcare, Bonn, Germany, November 15, 1999.

“Intergenerational Considerations of Workers’ Compensation Unfunded Liabilities in Ontario,” presented at the meetings of the Workers’ Compensation Research Group, Toronto, Ontario, June 6, 1999.

“Working with Young Children: Comments,” presented at the Good Child Care Symposium, Toronto, Ontario, May 30, 1999.

“Translating Cancer Epidemiology Findings into Workplace Policy,” presented at the meetings of the Canadian Society for Epidemiology and Biostatistics, Vancouver, BC, May 6, 1999 (invited speaker).

“Free Trade, Global Markets and Alternative Work Arrangements: Canada versus the United States”, (with K. Roberts), presented at the meetings of the Industrial Relations Research Association, New York, NY, January 5, 1999.

“Disputes and Dispute Resolution in Social Security and Workers’ Compensation,” (with T. Thomason and K. Roberts), presented at the meetings of the Industrial Relations Research Association, Chicago, IL, January 5, 1998.

“Inter-Generational Considerations of Workers' Compensation Unfunded Liabilities,” (with M. Gunderson), presented at the Statistics Canada/Human Resources Development Canada conference, Inter-Generational Equity in Canada, Ottawa, Ontario, February 20, 1997.

“Economics and RSI/WMSD: Coming to Grips with Economic Causes, Costs and Efficiency,” (with D. Cole and

S. Sinclair), presented at the Ontario Physiotherapy Association Internal Symposium on Global Rehabilitation Trends, Toronto, Ontario, January 17, 1997.

"Public Pensions, Age and Gender: A U.S. Canada Comparison," (with M. Gunderson and J. Pesando), presented at the meetings of the American Economic Association, San Francisco, CA, January 6, 1996.

"Canadian Public Sector Employment Relations in Transition," (with M. Gunderson), presented at the meetings of the Industrial Relations Research Association, San Francisco, CA, January 6, 1996.

"Free Trade, Global Markets and Alternative Work Arrangements: Canada Versus the United States," (with Karen Roberts), presented at the Biennial Conference of the Association of Canadian Studies in the United States, Seattle, Washington, November 18, 1995.

"Child Care and Work Decisions of Lone Parent Mothers," (with G. Cleveland), presented at the meetings of the Canadian Economics Association, Montreal, Quebec, June 1995.

"Legal Structure, Dispute Resolution and Compensation in the Canadian Public Sector," presented at the World Congress of the International Industrial Relations Association, Washington, D.C., June 1, 1995.

"Post-Injury Labour Market Outcomes of Workers' Compensation Recipients," (with T. Thomason), presented at the Transition and Structural Change in the North American Labour Market conference, Queen's University, Kingston, Ontario, May 26, 1995.

"The Effect of Economic Integration on Contingent Work," (with K. Roberts and P. Dorman) presented at the Free Trade Among Nations: NAFTA Implications for Michigan conference, East Lansing Michigan, November 14, 1994.

"Public Pension Plans in the United States and Canada," (with M. Gunderson and J.E. Pesando) presented at the Upjohn Institute Project on Employee Benefits, Labor Costs and Labor Markets in Canada and the United States conference, Kalamazoo, Michigan, November 4, 1994.

"Workplace Restructuring in the Public Sector," (with R. Hebdon), presented at the Collective Bargaining Group conference, Toronto, Ontario, October 15, 1994.

"Does Child Care Policy Matter?" (with G. Cleveland), presented at the Canadian Law and Economics Association Conference, Toronto, Ontario, October 1, 1994.

"Optimum Child Care Choice and Mother's Labour Force Participation: A Nested Logit Analysis," (with G. Cleveland), presented at the meetings of the Canadian Economics Association, Calgary, Alberta, June 10, 1994.

"Child Care Choice and Labour Force Participation of Mothers: A Canadian Regional Perspective," (with G. Cleveland) presented at a joint session of the Canadian Economics Association and the Canadian Regional Science Association, Calgary, Alberta, June 10, 1994.

"Determinants of Child Care Choice: A Comparison of Results for Ontario and Quebec," (with G. Cleveland), presented at the Pacific Regional Science Association Meetings, Whistler, B.C., July 13, 1993.

"Alternative Methods for Modeling Regional Industrial Activity: Short Run Versus Long Run," presented at the conference, The Issues of Elaboration and Implementation of Regional Development Programs under the Transition to a Market Economy, Donetsk Polytechnical Institute, Donetsk, Ukraine, May 19, 1993.

“Measuring the Impact of Vocational Rehabilitation on the Probability of Post-Injury Return to Work,” (with R. Allingham) presented at the conference, Challenges to Workers' Compensation in Canada, Queen's University, Kingston, Ontario, April 29, 1993.

“Re-Employment and Accommodation Requirements Under Workers' Compensation,” (with M. Gunderson and D. Law) presented at the conference, Challenges to Workers' Compensation in Canada, Queen's University, Kingston, Ontario, April 29, 1993.

“Child Care Use Patterns of the Pre-School Children of Employed Single Mothers,” (with G. Cleveland) presented at a joint session of the Canadian Economics Association and the Canadian Industrial Relations Association, Charlottetown, P.E.I., June 6, 1992.

“Child Care Choice for Pre-School Children of Employed Mothers in Ontario, Alberta and Quebec,” (with G. Cleveland) presented at a joint session of the Canadian Economics Association and the Canadian Industrial Relations Association, Charlottetown, P.E.I., June 6, 1992.

“The Distribution of Investment Risk in Defined Benefit Pension Plans: A Re-Examination,” (with J. Pesando) presented at the Current Pension Policy Issues conference, Centre for Pension and Retirement Research, Miami University, Miami, Ohio, March 27-8, 1992.

“Workers' Compensation Costs and Competitiveness: Issues and Inter-Jurisdictional Comparisons,” (with B. Kralj) presented at the meetings of the Canadian Industrial Relations Association, Kingston, Ontario, June 4, 1991.

“Projections of the Effect of Government Child Care Policy on Parents Choice of Child Care Arrangements,” (with G. Cleveland) presented at the meetings of the Canadian Society for the Study of Education, Kingston, Ontario, June 3, 1991.

“The Effect of Price on Choice of Child Care Arrangements,” (with G. Cleveland) presented at the meetings of the Canadian Economics Association, Kingston Ontario, June 3, 1991.

“The School to Labour Force Transition: Preliminary Results for Columbia,” (with L. Kumaranayake) presented at the meetings of the Canadian Economics Association, Kingston Ontario, June 2, 1991.

“Labour Force Participation and Earnings of Men and Women in Kenya,” (with W. Milne) presented at the meetings of the Canadian Economics Association, Kingston Ontario, June 2, 1991.

“Urban and Rural Fertility Differentials in Kenya: An Econometric Analysis Using Micro Data,” (with W. Milne) presented at the meetings of the North American Regional Science Association, Boston Mass. November 10, 1990.

“Employer Appeals of Workers' Compensation Board Decisions: The Impact of Experience Rating,” (with B. Kralj) presented at the meetings of the Canadian Industrial Relations Association, University of Victoria, Victoria B.C., June 4, 1990.

“The Impact of Early Retirement Pensions on Employee Turnover: Evidence from The Ontario Public Service,” (with J. Pesando and M. Gunderson) presented at the meetings of the Canadian Economics Association, University of Victoria, Victoria B.C., June 3, 1990.

“Estimating the Impact of Desired Family Size on Fertility Behaviour: Preliminary Results for Kenya,” (with W. Milne) presented at the meetings of the Canadian Economics Association, Laval University, Quebec City, Quebec,

June 4, 1989.

"Time Series Estimation of Fertility: Public Policy and the Opportunity Cost of Children," (with W. Milne) presented at a joint session of the Canadian Economics Association and the Canadian Population Association, McMaster University, Hamilton, Ontario, June 5, 1987.

Policy and Economic Analysis Program
ROTMAN SCHOOL OF MANAGEMENT / UNIVERSITY OF TORONTO
105 St. George Street, Toronto, ON M5S 3E6
Tel: (416) 978-4182

EXHIBIT B

PEAP Memo 2024-8 November 4, 2024

Subject: Updated Forecast for Canada, New Forecast for Ontario – Not a Long Shelf Life

Attached is an updated economic forecast for Canada, and a new forecast for Ontario, based on the 2024 2nd quarter economic accounts released by the Ontario Ministry of Finance, as well as subsequent monthly data releases. This forecast remains very much a work in progress. However, given that new historical annual numbers for Canada and Ontario will be released by Statistics Canada later this week, which will be inconsistent with the quarterly numbers upon which our FOCUS models are based, we are releasing this "best we can do at this time" forecast. Admittedly, given this data issue, and the significant number of uncertainties currently swirling, this forecast almost certainly will have a very short shelf life.

Before discussing the forecast numbers, we will first lay out the challenges/uncertainties we are facing in attempting to producing a consistent and sensible economic forecast. First, the international situation remains very unstable. The situation in the Middle East could change dramatically at any moment. The outcome of tomorrow's U.S. election, whenever it is eventually decided, is too close to call. But frankly even if we could call it, we do not really have a good sense of what the outcome means for Canada, particularly if the Republican candidate is the victor. Weaponized uncertainty may be the order of the day for the next four years from south of the border. Or not. Our forecast, as is usually the case for our forecasts of the international situation, is that the U.S. and the world will "muddle through".

The second big challenge in preparing this forecast has been attempting to implement the recently announced immigration and non-permanent resident reduction targets. We had previously assumed that the reductions would take place over a longer period than the newly announced targets suggest. While these new targets are, to our mind, extremely aggressive, we are taking the government at its word. This is clearly viewed by the federal government as politically important and even if this government does fall, it is hard to see the one that might replace it as any less motivated. We are facing two problems in implementing the announced changes. First, within our population projection program getting the age/sex mix of the massive changes to the non-permanent residents "right". Second, once we are happy with the population numbers, we have to translate them into population numbers used in Statistics Canada's Labour Force Survey (LFS), which are used in the FOCUS models. In its latest LFS release in early October, Statistics Canada highlighted a timing issue in how non-permanent residents are included in the LFS population count versus the "true" population numbers. Stats Can recognizes the problem, but do not appear as yet appear to have a solution, which may or may not come when historical revisions of the LFS occur in late January 2025. We are still working on our new population projection, so the numbers included in this forecast are subject to significant revision, particularly for Ontario.

The third challenge is more a head's up and a data implementation issue which will impact the quarterly pattern of growth on the income side of GDP (particularly the net operating surplus of corporations (YNOS) which acts as a residual in the income side of the model). The federal government has announced that they will send more than $2.5 billion to about 600,000 Canadian businesses in December. The payments will return a portion of the carbon price revenue from 2019-20 through 2023-24 to small businesses in jurisdictions where the federal fuel charge applies. It appears that Statistics Canada will probably treat this as subsidy to business, but it is unclear if it will be applied across the quarters/years it was collected or just all be returned in 2024Q4. Given the challenges Stats Can has in opening up previous years for revision, we are assuming federal business subsidies will surge (by $10 billion, given the number has to be annualized for the FOCUS models) in the 4th quarter, then fall back. This, all else being equal, would have a negative impact on the income side of GDP as subsidies are included as a negative (if it is treated as a transfer to business it would not impact GDP – the joy of income and expenditure accounting) in measuring GDP. But because the income and expenditure sides of nominal GDP need to be the same, this negative is made up for an increase in YNOS. For any PEAP members who use our forecast for YNOS as a proxy for corporate profit growth, beware!

Fourth on the challenge front, we have had to make an assumption on what happens to the household savings rate in capturing the quarterly impact of the (to our minds at least) ill-advised, but one assumes expected to be politically popular, Ontario $200 rebate coming in early 2025. The policy has an announced cost of a sizeable $3 billion ($12 billion in 2025Q1 in our annualized FOCUS models), which we have implemented as a non-taxable provincial transfer to households. To somewhat smooth over the quarterly impact of transfer, we have increased the household savings rate, particularly in Ontario, from what it otherwise would have expected to have been in the quarter. We admit the impact could be very different from the response that we have assumed.

The final challenge is the 4th quarter "Taylor Swift" effect. We have assumed some modest impact on international services trade, but given our lack of knowledge of the phenomenon have not done much else. There is already some anecdotal evidence that hospitality rates are being impacted in Toronto and Vancouver. We expect the aggregate impact on Canada and Ontario to be muted, but of course we could just be out of touch.

Our near-term forecast for Canada is similar to the one we produced in late September. However, given the expected lower population numbers over the next couple of years (really only kicking in during 2025) we now expect GDP growth in Canada to be somewhat weaker than previously expected from 2025-2029. The only way to get stronger GDP growth will be to see a surge in labour productivity, which we do not foresee on an extended basis. Of course, given the very different labour market than we were previously expected, it is indeed possible. But we have reached a state where we will believe it when we see it. The forecast for Canadian GDP growth remains at 1.1% (as in September) in 2024 and but is now only 1.7% in 2025, 2.0% in 2026, 1.9% in 2027 and 2.0% in 2028 and 2029 (vs 1.8%, 2.3%, 2.2%, 2.0%, 2.3%, respectively, in September) in 2025. By 2029, the level of real GDP is seen to be roughly 1% lower than in our September memo. Remember though that our population forecast remains very much a work in progress so these numbers could change significantly when we finish all of our work on this.

The first estimate for Ontario economic growth for 2024Q2, at 0.3%, came in exactly at the rate we were forecasting in August. The success ends there. We badly overestimated household consumption growth (it actually fell) but underestimated export weakness. We expect third quarter growth to slightly strengthen as employment growth has remained strong. Solid household consumption growth and business investment spending are seen to mitigate continued weakness in net trade.

We see a very similar growth path for both Ontario and Canada as-a-whole for the next few quarters, although some components of growth are seen to be somewhat different. Household consumption growth is supported by continued expected employment growth although higher interest rates continue to impact. We continue to expect that business investment will grow, albeit somewhat modestly. Announced policies from all levels of government should encourage growth in housing investment but with less demand pressure given announced international migrant restrictions.

The quarterly pattern of growth yields an annual growth rate for Ontario real GDP of 1.4% in 2024, slightly higher than the 1.3% we forecast in August, and higher than the whole country (1.1%). After 2024, Ontario growth is seen to slightly surpass national growth in 2025 (1.8% vs 1.7%) but slightly trail it in 2026 (1.9% vs 2.0%). For 2027 through 2029 Ontario GDP growth is expected to match or surpass national growth. Ontario CPI inflation is expected to fall from 3.8% in 2023 to 2.4% in 2024, 1.8% in both 2025 and 1.9% in 2026, and then 2.0% thereafter. After the near term, annual employment growth is seen to be somewhat weaker relative to our August forecast, as assumed population restrictions impact. The unemployment rate is expected to average over 7% from the latter half of 2024 through the middle of 2026, before falling to average 6.0% in 2029. As in the national forecast but with a slightly greater effect, by 2029 the level of Ontario real GDP is lower (1.1%) than in our previous provincial forecast. Given the very preliminary nature of our new Ontario population forecast, and how it has been translated to the population as captured by the Labour Force Survey, we caution that this forecast is subject to significant revision.

For further information please contact Steve Murphy (steve.murphy@rotman.utoronto.ca) or Peter Dungan (416-978-4182 or pdungan@rotman.utoronto.ca).

FOCUS Model - Policy and Economic Analysis Program
CANADA: Base Forecast - November 4, 2024

		History	Forecast												History	Forecast					
Summary of Forecast	2024:1	2024:2	2024:3	2024:4	2025:1	2025:2	2025:3	2025:4	2026:1	2026:2	2026:3	2026:4	2021	2022	2023	2024	2025	2026	2027	2028	2029
Real Gross Domestic Product (Chained $17 Bill)	2366.4	2378.9	2385.8	2395.5	2406.4	2413.2	2425.5	2440.4	2453.1	2464.2	2475.8	2487.9	2240.9	2326.5	2355.6	2381.6	2421.4	2470.2	2518.4	2567.5	2619.0
Real Gross Domestic Product (%ch)	0.4	0.5	0.3	0.4	0.5	0.3	0.5	0.6	0.5	0.5	0.5	0.5	5.3	3.8	1.2	1.1	1.7	2.0	1.9	2.0	2.0
Expenditure by Households	0.9	0.2	0.5	0.5	0.7	0.3	0.6	0.4	0.4	0.5	0.5	0.4	5.2	5.1	1.7	2.0	2.1	1.8	1.8	2.3	2.4
Expenditure by NPISH	1.9	0.1	0.5	0.5	0.5	0.8	0.5	0.5	0.4	0.6	0.4	0.4	1.4	3.8	1.3	4.1	2.1	1.9	1.7	1.7	1.6
Expenditure by Governments	0.6	1.8	0.1	0.5	0.5	0.4	0.4	0.4	0.4	0.3	0.3	0.3	4.8	3.2	1.9	2.5	2.0	1.5	1.4	1.4	1.4
Investment Expenditure	0.5	0.5	0.3	0.9	0.9	0.8	0.8	0.8	0.7	0.7	0.7	0.7	11.2	-3.5	-4.8	-0.5	3.1	3.0	2.6	2.4	2.4
Residential Structures	0.0	-1.9	0.7	0.9	0.9	0.9	0.9	0.9	0.8	0.8	0.8	0.7	14.6	-12.1	-10.3	-0.4	2.8	3.3	2.9	2.8	2.6
Non-Residential Structures	0.9	0.5	0.7	0.9	0.8	0.8	0.7	0.7	0.6	0.6	0.6	0.6	5.2	6.7	2.6	-2.2	3.1	2.6	2.2	2.1	2.1
Machinery and Equipment	0.0	6.5	-1.4	1.0	1.0	1.0	0.9	0.9	0.8	0.8	0.8	0.8	14.0	-0.3	-6.4	0.1	4.1	3.5	2.6	2.1	2.1
Intellectual Property	1.8	0.3	0.7	0.8	0.7	0.7	0.7	0.7	0.6	0.6	0.6	0.6	10.8	6.0	0.3	2.4	2.8	2.5	2.3	2.2	2.2
Exports	0.5	-0.4	0.0	0.7	0.6	0.7	0.7	0.7	0.6	0.6	0.6	0.6	2.7	3.2	5.4	0.7	2.0	2.6	2.5	2.4	2.4
Imports	0.0	-0.1	0.0	0.7	0.6	0.5	0.5	0.4	0.6	0.8	0.7	0.6	8.1	7.6	0.9	0.6	1.8	2.4	2.3	2.8	2.8
Inventory - Non-Farm (Chained $17 Bill)	28.4	24.0	20.0	14.0	8.0	2.0	-1.0	0.5	2.0	3.0	4.0	5.0	10.9	50.4	39.8	21.6	2.4	3.5	5.1	5.1	5.2
Inventory - Farm (Chained $17 Bill)	-2.3	0.8	0.8	0.9	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	-6.4	5.3	-0.4	0.0	1.0	1.0	1.0	1.1	1.1
Residual Error (Chained $17 Bill)	1.4	2.2	2.0	1.8	1.5	1.2	1.0	0.8	0.5	0.2	0.0	0.0	0.4	0.6	0.4	1.8	1.1	0.2	0.0	0.0	0.0
Gross Domestic Product ($ Bill)	2954.6	3005.4	3026.0	3052.5	3080.4	3102.2	3131.0	3163.0	3193.8	3222.9	3252.4	3282.7	2517.1	2813.3	2892.1	3009.6	3119.2	3237.9	3362.2	3496.7	3639.7
Gross Domestic Product (%ch)	0.1	1.7	0.7	0.9	0.9	0.7	0.9	1.0	1.0	0.9	0.9	0.9	13.4	11.8	2.8	4.1	3.6	3.8	3.8	4.0	4.1
Implicit Price Deflator for GDP (%ch)	-0.4	1.2	0.4	0.5	0.5	0.4	0.4	0.4	0.4	0.5	0.4	0.4	7.7	7.7	1.5	2.9	1.9	1.8	1.9	2.0	2.0
Real GDP per Capita (%ch)	-0.2	-0.1	-0.3	0.0	0.2	0.4	0.5	0.7	0.6	0.5	0.5	0.5	4.7	2.1	-1.5	-1.8	0.8	2.3	1.8	1.1	1.1
Unemployment Rate	5.9	6.3	6.5	6.8	7.0	7.0	7.0	6.9	6.8	6.7	6.5	6.4	7.5	5.3	5.4	6.4	7.0	6.6	6.2	5.8	5.8
Employment (%ch)	0.4	0.6	0.2	0.3	0.1	0.2	0.2	0.1	0.2	0.2	0.2	0.2	5.0	4.0	2.4	1.7	0.9	0.7	0.9	0.9	1.0
Labour Force (%ch)	0.5	1.0	0.4	0.7	0.3	0.2	0.1	0.0	0.0	0.1	0.1	0.1	2.5	1.5	2.6	2.7	1.6	0.3	0.4	0.6	0.9
Participation Rate (%)	65.3	65.4	65.0	65.0	65.0	65.0	65.0	65.1	65.1	65.1	65.2	65.2	65.4	65.5	65.6	65.2	65.0	65.2	65.2	65.2	65.2
3-Month Treasury Bill Rate (%)	5.0	4.8	4.2	3.4	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	0.1	2.3	4.8	4.3	3.0	3.0	3.0	3.0	3.0
10-Year Gov't of Canada Bond Rate (%)	3.4	3.7	3.1	3.2	3.2	3.3	3.3	3.4	3.6	3.7	3.9	4.0	1.4	2.8	3.3	3.4	3.3	3.8	4.2	4.3	4.3
Inflation Rate - CPI (%)	0.3	0.6	0.5	0.3	0.4	0.5	0.5	0.5	0.5	0.6	0.5	0.5	3.4	6.8	3.9	2.3	1.8	1.9	2.0	2.0	2.0
Annual Wage per Employee - Pvt (%ch)	1.6	0.9	0.6	0.7	0.7	0.7	0.7	0.7	0.8	0.8	0.8	0.8	4.6	5.8	4.0	3.6	2.9	3.0	3.0	3.0	3.0
Real Ann Wage per Emp - Pvt (%ch)	1.3	0.3	0.2	0.4	0.3	0.2	0.3	0.3	0.3	0.2	0.3	0.3	1.2	-0.9	0.1	1.2	1.1	1.0	1.0	1.0	1.0
Labour Productivity (%ch)	0.1	-0.1	0.1	0.1	0.3	0.1	0.4	0.5	0.4	0.3	0.3	0.3	0.3	-0.1	-1.1	-0.6	0.8	1.3	1.0	1.0	1.0
Exchange Rate (US $/Cdn $)	0.741	0.731	0.733	0.720	0.718	0.725	0.730	0.738	0.745	0.752	0.760	0.767	0.798	0.768	0.741	0.731	0.727	0.756	0.780	0.784	0.784
Terms of Trade (%ch)	-1.4	-0.1	0.1	0.2	0.1	-0.1	0.0	-0.1	-0.1	0.0	0.0	0.0	13.4	4.7	-6.0	-0.8	0.2	-0.2	0.0	0.3	0.4
Balance on Current Account ($ Bill)	-21.5	-33.9	-34.8	-34.0	-35.0	-36.0	-37.0	-38.0	-40.8	-45.0	-47.5	-48.7	0.4	-10.3	-21.0	-31.0	-36.5	-45.5	-45.8	-47.7	-49.9
Consolidated Government Balance ($ Bill)	-143.3	-41.8	-32.8	-33.8	-27.4	-20.2	-25.9	-28.5	-23.1	-27.4	-34.8	-37.9	-73.5	3.1	-16.6	-62.9	-25.5	-30.8	-34.8	-31.6	-28.0
Federal Gov't Balance (NA Basis) ($ Bill)	-151.7	-24.5	-28.4	-33.9	-24.6	-27.8	-32.8	-34.8	-32.5	-36.1	-41.8	-43.8	-80.3	-14.6	-20.3	-59.6	-30.0	-38.6	-43.0	-42.7	-42.2
Federal Balance as % of GDP	-5.1	-0.8	-0.9	-1.1	-0.8	-0.9	-1.0	-1.1	-1.0	-1.1	-1.3	-1.3	-3.2	-0.5	-0.7	-2.0	-1.0	-1.2	-1.3	-1.2	-1.2
Ratio: Federal Debt to GDP (%)	31.9	31.5	31.6	31.6	31.5	31.5	31.5	31.4	31.4	31.4	31.4	31.4	33.8	31.2	30.9	31.6	31.5	31.4	31.5	31.5	31.4
Prov'l Gov't Balance (NA Basis) ($ Bill)	-33.6	-35.9	-25.3	-23.1	-34.8	-26.7	-29.7	-32.0	-32.6	-35.2	-38.7	-39.7	-22.7	-6.7	-32.3	-29.5	-30.8	-36.5	-38.8	-37.5	-36.1
Household Savings Rate (%)	6.7	7.2	6.7	6.6	6.6	6.2	6.2	6.2	5.9	5.7	5.7	5.6	10.5	5.4	5.5	6.8	6.3	5.7	5.6	5.5	5.4
Real Household Disposable Income (%ch)	1.2	0.5	0.4	0.7	1.1	0.3	1.0	0.8	0.4	0.7	0.8	0.7	0.5	-0.1	1.9	3.3	2.8	2.6	2.7	2.8	2.6
Net Operating Surplus - Corporations (%ch)	-10.0	3.6	-0.3	2.6	-3.7	-0.7	0.9	2.1	0.2	0.8	0.8	0.9	33.2	14.7	-17.4	-3.6	-0.7	3.3	3.0	3.8	4.1
U.S. Real GDP Growth (%)	0.4	0.7	0.7	0.7	0.6	0.6	0.5	0.5	0.5	0.5	0.5	0.5	6.1	2.5	2.9	2.8	2.6	2.2	2.1	2.0	2.0
U.S. Inflation (GDP Deflator) (%)	0.7	0.6	0.4	0.4	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	4.6	7.1	3.6	2.4	2.0	2.1	2.1	2.1	2.1
U.S. 3-Month Treasury Bill Rate (%)	5.2	5.2	5.0	4.4	4.0	3.8	3.5	3.3	3.0	3.0	3.0	3.0	0.0	2.0	5.1	5.0	3.6	3.0	3.0	3.0	3.0
U.S. 10-Year Gov't Bond Rate (%)	4.2	4.4	3.9	4.1	4.1	4.1	4.1	4.1	4.2	4.2	4.3	4.3	1.4	3.0	4.0	4.2	4.1	4.2	4.3	4.3	4.3
U.S. Unemployment Rate (%)	3.8	4.0	4.2	4.2	4.3	4.2	4.1	4.0	4.0	4.0	4.0	4.0	5.4	3.6	3.6	4.0	4.2	4.0	4.0	4.0	4.0

Percentage changes are period to period

Policy and Economic Analysis Program
ONTARIO: Base Forecast - November 4, 2024

		History	Forecast												History	Forecast					
Summary of Forecast	2024:1	2024:2	2024:3	2024:4	2025:1	2025:2	2025:3	2025:4	2026:1	2026:2	2026:3	2026:4	2021	2022	2023	2024	2025	2026	2027	2028	2029
Real Provincial Product (Chained $17 Bill)	929.1	932.0	935.5	940.3	946.3	947.2	951.8	957.4	962.4	966.4	970.6	975.0	875.0	909.1	921.7	934.2	950.7	968.6	987.4	1007.9	1031.5
Real Provincial Product (%ch)	0.7	0.3	0.4	0.5	0.6	0.1	0.5	0.6	0.5	0.4	0.4	0.5	5.4	3.9	1.4	1.4	1.8	1.9	1.9	2.1	2.3
Expenditure by Households	1.3	-0.2	1.0	0.8	1.2	-0.1	0.4	0.4	0.3	0.3	0.4	0.4	4.6	7.1	1.7	2.4	2.5	1.3	1.9	2.5	2.8
Current Expenditure by NPISH	0.8	0.1	0.5	0.5	0.5	0.8	0.5	0.5	0.4	0.6	0.4	0.4	0.5	3.9	2.6	1.6	2.1	1.9	1.7	1.7	1.6
Capital Expenditure by NPISH	-0.5	0.8	0.7	0.5	0.6	1.1	0.3	0.3	0.3	0.7	0.3	0.3	6.3	-5.5	-6.4	2.2	2.7	1.8	1.5	1.6	1.7
Current Expenditure by Governments	0.7	2.0	0.3	0.5	0.5	0.4	0.4	0.3	0.3	0.3	0.3	0.3	5.5	3.5	4.2	3.3	2.2	1.3	1.3	1.3	1.4
Capital Expenditure by Governments	-0.3	2.7	0.7	0.7	0.7	0.7	0.7	0.7	0.6	0.6	0.6	0.6	-2.2	3.5	3.5	3.5	3.3	2.6	2.4	2.4	2.4
Investment Expenditure	0.3	-0.1	0.5	0.9	0.9	0.9	0.9	0.9	0.8	0.8	0.8	0.8	11.6	-9.2	-5.1	-0.8	3.2	3.3	2.9	2.7	2.6
Residential Structures	-0.2	-2.4	0.7	0.8	1.0	1.0	1.0	0.9	0.9	0.9	0.9	0.8	13.9	-16.9	-6.9	-2.4	2.8	3.7	3.3	3.0	2.8
Non-Residential Structures	1.1	0.6	0.8	1.0	0.9	0.8	0.7	0.7	0.7	0.7	0.7	0.7	-0.1	1.2	3.7	-0.6	3.3	2.9	2.5	2.4	2.4
Machinery and Equipment	-0.6	5.4	-0.7	1.1	1.1	1.0	0.9	0.9	0.8	0.8	0.8	0.8	18.8	-3.6	-13.4	0.6	4.4	3.5	2.8	2.4	2.4
Intellectual Property	2.1	0.3	0.7	0.9	0.7	0.7	0.7	0.7	0.6	0.6	0.6	0.6	11.5	4.6	-0.2	3.0	2.9	2.6	2.5	2.5	2.5
Exports	1.5	-1.4	-0.7	0.8	0.5	0.5	0.6	0.6	0.6	0.7	0.6	0.6	3.5	4.1	4.6	-0.6	1.2	2.5	2.1	2.2	2.5
Imports	-0.2	-0.5	-0.3	0.6	0.6	0.5	0.5	0.5	0.6	0.7	0.6	0.6	6.3	5.2	2.8	-0.6	1.5	2.4	2.2	2.6	2.6
Inventory - Non-Farm (Chained $17 Bill)	12.2	12.5	10.0	6.8	3.2	0.8	-0.4	0.2	0.8	1.2	1.6	2.0	3.4	18.4	18.2	10.4	0.9	1.4	2.0	2.1	2.1
Inventory - Farm (Chained $17 Bill)	-0.6	0.1	0.1	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.0	-0.3	-0.1	0.0	0.2	0.2	0.2	0.2	0.2
Residual Error (Chained $17 Bill)	-0.2	2.0	1.8	1.5	1.2	1.0	0.8	0.5	0.2	0.0	0.0	0.0	1.0	0.6	0.3	1.3	0.9	0.1	0.0	0.0	0.0
Real GDP - Canada (%ch)	0.4	0.5	0.3	0.4	0.5	0.3	0.5	0.6	0.5	0.5	0.5	0.5	5.3	3.8	1.2	1.1	1.7	2.0	1.9	2.0	2.0
Provincial Product ($ Bill)	1122.7	1139.9	1149.4	1160.3	1172.8	1179.7	1190.8	1203.5	1215.7	1226.9	1238.4	1250.1	960.2	1048.3	1093.5	1143.1	1186.7	1232.8	1282.1	1335.6	1395.3
Provincial Product (%ch)	0.8	1.5	0.8	0.9	1.1	0.6	0.9	1.1	1.0	0.9	0.9	0.9	9.8	9.2	4.3	4.5	3.8	3.9	4.0	4.2	4.5
Implicit Price Deflator for GDP (%ch)	0.1	1.2	0.5	0.4	0.4	0.5	0.5	0.5	0.5	0.5	0.5	0.5	4.3	5.1	2.9	3.1	2.0	2.0	2.0	2.1	2.1
Real GDP per Capita (%ch)	-0.1	-0.3	-0.2	0.2	0.5	0.2	0.5	0.7	0.6	0.5	0.5	0.5	4.7	2.0	-1.6	-1.7	1.0	2.2	1.8	1.1	1.4
Unemployment Rate	6.5	6.9	6.9	7.2	7.4	7.4	7.3	7.2	7.1	7.0	6.9	6.8	8.1	5.6	5.7	6.9	7.3	6.9	6.5	6.2	6.0
Employment (%ch)	0.2	1.0	0.7	0.5	0.1	0.2	0.2	0.1	0.1	0.2	0.2	0.2	5.2	4.6	2.4	1.7	1.3	0.6	0.9	1.0	1.3
Employment ('000)	7951	8032	8086	8128	8137	8151	8165	8172	8183	8198	8214	8232	7396	7734	7916	8049	8156	8207	8282	8364	8474
Labour Force (%ch)	0.5	1.4	0.8	0.8	0.4	0.2	0.1	0.0	0.0	0.1	0.1	0.1	3.3	1.8	2.4	2.9	1.9	0.2	0.4	0.6	1.1
Participation Rate (%)	64.9	65.2	65.0	64.9	64.9	65.0	65.0	65.1	65.1	65.2	65.2	65.2	65.2	65.5	65.5	65.0	65.0	65.2	65.3	65.2	65.3
Population (%ch)	0.8	0.6	0.6	0.3	0.2	-0.1	-0.1	-0.1	-0.1	-0.1	0.0	-0.1	0.6	1.9	3.1	3.1	0.7	-0.3	0.2	0.9	1.0
Population ('000)	15944	16034	16124	16178	16206	16188	16179	16169	16156	16139	16132	16123	14840	15117	15581	16070	16185	16138	16164	16311	16471
Source Population (%ch)	1.0	1.0	1.0	0.8	0.4	0.2	0.0	-0.1	-0.1	0.0	0.0	0.0	1.0	1.4	2.3	3.8	1.9	-0.1	0.3	0.7	1.1
Inflation Rate - CPI (%)	0.1	1.5	0.3	-0.1	0.2	1.4	0.3	0.0	0.2	1.4	0.3	0.0	3.5	6.8	3.8	2.4	1.8	1.9	2.0	2.0	2.0
Annual Wage per Employee (%ch)	1.2	0.9	0.6	0.6	0.7	0.7	0.7	0.7	0.7	0.7	0.7	0.7	4.2	4.4	4.1	3.8	2.8	3.0	3.0	3.0	3.0
Labour Productivity (%ch)	0.5	-0.7	-0.3	0.0	0.5	-0.1	0.3	0.5	0.4	0.2	0.2	0.2	0.2	-0.7	-1.0	-0.3	0.4	1.3	1.0	1.1	1.0
Household Savings Rate (%)	4.0	4.9	4.5	4.3	5.0	3.9	4.1	4.1	3.9	3.9	3.9	3.9	11.0	3.2	3.5	4.5	4.3	3.9	3.7	3.6	3.5
Real Household Disposable Income (%ch)	1.2	0.6	0.9	0.9	2.3	-0.8	1.0	0.7	0.5	0.6	0.8	0.6	0.1	-1.1	2.3	3.3	3.6	2.4	2.6	2.8	3.0
Net Operating Surplus - Corporations (%ch)	-8.6	3.3	-1.2	3.5	-3.0	-1.5	1.8	3.4	0.4	0.9	0.6	1.1	5.5	-5.9	-12.8	-1.6	0.4	4.8	3.7	4.4	5.1

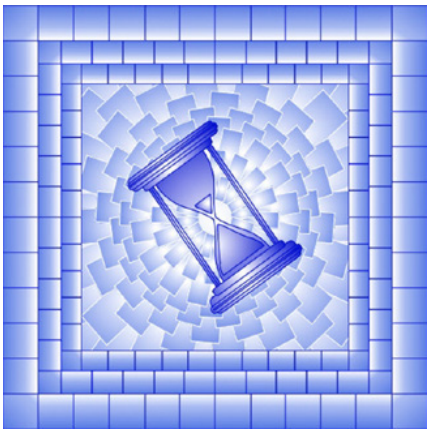
Percentage changes are period to period

EXHIBIT C

Catalogue no. 62F0014M
ISSN 1706-7723
ISBN 978-0-660-68984-5

Prices Analytical Series

Shelter in the Canadian CPI: An overview, 2023 update



by Rebecca Lehto

Release date: December 19, 2023

Statistics Canada Statistique Canada

Canada

How to obtain more information

For information about this product or the wide range of services and data available from Statistics Canada, visit our website, www.statcan.gc.ca.

You can also contact us by

Email at infostats@statcan.gc.ca

Telephone, from Monday to Friday, 8:30 a.m. to 4:30 p.m., at the following numbers:

- Statistical Information Service 1-800-263-1136
- National telecommunications device for the hearing impaired 1-800-363-7629
- Fax line 1-514-283-9350

Standards of service to the public

Statistics Canada is committed to serving its clients in a prompt, reliable and courteous manner. To this end, Statistics Canada has developed standards of service that its employees observe. To obtain a copy of these service standards, please contact Statistics Canada toll-free at 1-800-263-1136. The service standards are also published on www.statcan.gc.ca under "Contact us" > "Standards of service to the public."

Note of appreciation

Canada owes the success of its statistical system to a long-standing partnership between Statistics Canada, the citizens of Canada, its businesses, governments and other institutions. Accurate and timely statistical information could not be produced without their continued co-operation and goodwill.

Published by authority of the Minister responsible for Statistics Canada

An HTML version is also available.

Cette publication est aussi disponible en français.

Shelter in the Canadian CPI: An overview, 2023 update

by **Rebecca Lehto**

The Canadian Consumer Price Index (CPI) is an indicator that measures price change experienced by Canadian consumers by comparing, through time, the cost of a fixed basket of goods and services. This fixed basket contains goods and services that typical households purchase over a specified period of time. Prices for goods and services across the country are collected on a monthly basis.[1] These collected prices are used to calculate price indices and produce the CPI according to international standards and methods, which are regularly updated and reviewed by price statistics experts.

The CPI basket of goods and services is organized into eight major components: food; shelter; household operations, furnishings and equipment; clothing and footwear; transportation; health and personal care; recreation, education and reading; and alcoholic beverages, tobacco products, and recreational cannabis.

Shelter has the largest basket weight of the eight major components in the CPI. As shown in Table 1 below, it accounts for nearly one-third of the total expenditures on goods and services in the CPI basket. Rented accommodation and owned accommodation are the most important components of the shelter index.

This article attempts to clarify concepts and practices related to the construction of the shelter component of the Canadian CPI and discuss precautions to be taken when making comparisons to other measures of housing prices.

Table 1
Relative shares of shelter and its subcomponents in the 2022 CPI basket

Components	Relative share in the CPI basket of goods and services[1]
	percent
Shelter	28.34
Rented accommodation	7.03
Owned accommodation	17.96
Water, fuel and electricity	3.35

1. Weights at basket link month prices.
Source: Statistics Canada, Table 18-10-0007-01 Basket Weights of the Consumer Price Index.

Basket weights

The CPI includes all goods and services in scope for all Canadian consumers, whether they own their homes or not. Each of these goods and services is assigned a relative importance (or weight) in the CPI, which is determined by actual expenditures of Canadian consumers across the country.

The shelter index is a weighted average of sub-indexes representing price changes associated with shelter-related expenditure categories. Basket weights are derived primarily using consumer expenditures from the national Household Final Consumption Expenditure (HFCE) series, in addition to data from the Survey of Household Spending (SHS). Alternative sources of data, including external measures of housing prices, are also used at more detailed levels for some CPI components, such as the homeowners' replacement cost index and the other owned accommodation expenses index. More information on the CPI basket weights can be found in the following paper: An Analysis of the 2023 Consumer Price Index Basket Update, Based on 2022 Expenditures. Detailed weights for shelter sub-indexes can be found in Table 18-10-0007-01.

Rented accommodation

The largest weighted component in the CPI's measure of rented accommodation is the rent index, which has a 2022 basket weight of 6.79% of the entire CPI basket.

1. Some goods and services are on an intermittent basis (quarterly, semi-annual, etc).

Rent data are collected using a supplementary questionnaire included in the Labour Force Survey (LFS). Each month, the LFS contacts roughly 56,000 households to gather information on the Canadian workforce. Households in sample are surveyed for a period of 6 months and one-sixth of the sample is replaced every month. The dwellings are followed (not the households), so the tenants might change during the survey period. Approximately one-quarter of the selected households (approximately 12,500 units) rent their dwelling and can therefore be considered for the calculation of the CPI rent index. Subsidized dwellings, retirement homes and units used for business purposes are excluded from the rent sample. After taking into consideration all exclusions and non-responses, approximately 8,000 units can be used in the CPI rent index calculations each month.

Starting with the January 2019 CPI, the Canadian rent index is calculated using a characteristics approach hedonic methodology. This is a type of statistical modelling that decomposes the variables being measured, in this case the rental price, into its contributing characteristics. The hedonic model is a log-linear regression in which the explanatory variables include observed dwelling characteristics such as services included, age of dwelling, number of bedrooms, dwelling type and locational characteristics captured by postal codes.

The regression specification is as follows:

$$y^* = \beta_0 + \beta_1 services + \beta_2 age + \beta_3 bedrooms + \beta_4 dwelling + \beta_5 FSA + \in$$

where:

y^* is the log of observed rent,

$services$ represents whether the rent cost includes furniture, a washing machine, a refrigerator, cable or heat,

age represents the age of the building,

$bedrooms$ represents the number of bedrooms,

$dwelling$ represents the type of the building, and

FSA (forward sortation area) is a vector of dummies defined from the first three digits of the postal codes.

The intercept (β_0) represents the baseline observation that all others are compared to, which is a studio in a high-rise apartment that is over 40 years old with no included services, in FSA C1A, which is the most sampled FSA in the LFS data.

More information on the hedonic model and aggregation methodology can be found in the paper on the New approach for estimating the rent component of the Consumer Price Index.

The CPI rent index takes into account both new and existing rental leases, as it is designed to measure changes in rental costs incurred by all renting Canadians. This means that the CPI rent component includes rent paid by new tenants who take over a unit, existing tenants who renew their lease and existing tenants that are in the middle of their lease. In the case of a new tenancy arrangement, the current market price is reflected. When a tenant renews an existing lease, they might be living in a rent-controlled unit. When a tenant is in the middle of the lease, there is usually no change from one month to the next. As a result, the rent index reflects what Canadians actually report paying.

Price changes in the rent component of the CPI are often compared with changes in average rent prices from other data sources, which may show different results. These other rent price statistics may be different because of differences in methodologies used. For example, they do not take into account quality changes in the stock of rental units, often resulting from renovations or new units having entered the market, leading to a difference in price. Moreover, some comparison data correspond to advertised rental costs for vacant units. Research shows that large rental price increases occur when a new tenant takes over a unit. Unlike new tenants that typically face market prices, tenants renewing a lease are often protected by government regulations restricting the extent of rent increases. As a result, rental cost indicators based on advertised prices for vacant units may overestimate average rental costs faced by all renters.

Owned accommodation

This section will discuss approaches to measuring owned accommodation, as well as the approach used by the Canadian CPI.

Approaches to measuring owned accommodation

Determining what "owned accommodation" measures and how it is measured is one of the most complex and challenging issues faced by national statistical agencies when developing consumer price indices.

There is no clear consensus regarding the best methodology for measuring price change for owned accommodation. However, there are a number of internationally recognized approaches:[2] payment, net acquisition, rental equivalence, user cost, and simply excluding owned accommodation from the CPI. As to which approach should be used, the suitability of an approach depends on the main purpose of a country's CPI (indexation, deflation of expenditures or incomes, monitoring monetary policies), as well as data availability and the characteristics of the housing market. Depending on these factors, statistical agencies adopt a version of one of these approaches to measure price change in owned accommodation.

The **payment** approach is based on the assumption that owned accommodation services correspond exactly to the actual payments made by homeowners such as mortgage interest payments and operating expenses like maintenance and repairs and homeowners' insurance. An advantage of this approach is that it reflects actual transaction costs, and not imputed costs. Some economists argue that the payment approach is not fully consistent with cost-of-living indexing since it ignores replacement cost. The payment approach is considered to be appropriate for a CPI that is primarily used for indexing monetary incomes. Currently, the Republic of Ireland uses this approach.

The **net acquisition** approach treats owner-occupied dwellings like all other durable goods in the CPI. It includes the consumable part (the structure) of the house and excludes the asset part (the land) from the CPI. In this approach, dwelling purchase costs are only attributed to the acquisition period, even though the useful life of the dwelling spans well beyond this period. As a result, net dwelling purchases in the reference year would be used as the expenditure weight for owned accommodation. Since the net acquisition approach does not take into account the stream of services generated by owned accommodation, or the ongoing costs of owning a home, across time, it is less favoured for a CPI that is used primarily for indexation. Currently, Australia and Finland use this approach.

The **rental equivalence** approach estimates the cost of services derived from an owner-occupied dwelling to be the same as the cost of services from a similar dwelling on the rental market. Since this cost does not correspond to any financial transaction, it must be imputed using the rent paid by tenants for similar accommodations. It is assumed that services generated by owned dwellings and rented dwellings are the same. In this case, the asset component to owning a home is not included. This approach may not be suitable where the rental market is small or not well established, the type of housing available for rent differs from that owned by households (e.g., condominiums versus single-family homes), or the rental market is affected by rent controls. Given that this approach does not directly reflect changes in house prices on the CPI, it has limited usefulness for monitoring monetary policy. However, it is beneficial for a CPI that is primarily used for indexation. Currently, United States, Mexico, United Kingdom, Germany, Japan and South Africa use this approach.

The **user cost** approach estimates the cost of owned accommodation services as the costs of owning and occupying a dwelling. It includes interest costs (mortgage interest and/or opportunity cost associated with funds that are attached to the dwelling that could have otherwise earned interest), replacement costs and other operating costs such as maintenance and repairs, property taxes and homeowners' insurance premiums. The user cost approach also includes the expected capital gain, which is simply the expected change in the price of the dwelling over the observation period. This anticipated capital gain is challenging to measure and can create volatility in the index and is the reason this approach is not widely used. Currently, Sweden and Iceland use a variation of this approach.

2. The four approaches that have gained recognition are highlighted in paragraphs 11.87-11.145, p. 246-254 of the International Monetary Fund's Update of the Consumer Price Index Manual.

Owned accommodation in the Canadian CPI

Given all the options and data sources available and considering the structure and composition of the housing market in Canada, the owned accommodation index in the official Canadian CPI is based on a variant of the user cost approach, measuring changes in the cost of using a fixed stock of dwellings. The CPI does not include the purchase of property because it is not considered a consumer good. Instead, an owned dwelling is considered a capital good, which is an asset. Although the purchase price of a house is not directly included, changes in the housing market are reflected through the majority of owned accommodation components. Furthermore, the capital gain and the opportunity cost associated with capital invested in the dwelling are excluded, since they are considered investments rather than consumer goods. This approach is most suitable for the Canadian CPI, due to data availability and the combined uses of the index, such as indexation and contract escalation as well as a tool for setting and monitoring economic policy.

Nearly all elements of the owned accommodation index in the official Canadian CPI represent monetary payments and would therefore be covered by the payment approach. These include mortgage interest costs, property taxes, homeowners' insurance premiums, maintenance and repairs, and other owned accommodation expenses. The only exception is that the Canadian CPI includes a measure of homeowners' replacement cost, which represents essential expenditures to replace the loss of value due to normal depreciation of the dwelling.

The owned accommodation index of the Canadian CPI covers six essential components:

1. Mortgage interest cost
2. Homeowners' replacement cost
3. Property taxes and other special charges
4. Homeowners' home and mortgage insurance
5. Homeowners' maintenance and repairs
6. Other owned accommodation expenses

Mortgage interest cost

The mortgage interest cost index estimates the impact of price changes on the amount of mortgage interest owed by the target population on their mortgage balance. It is the product of two components: a component estimating the impact of changing house prices and another measuring the impact of changes in interest rates. When house prices increase, the amount of the loan required to finance the purchase of a dwelling increases, which results in a corresponding increase in the interest cost, provided that the interest rate is constant. On the other hand, an increase in mortgage interest rates, with the mortgage balance remaining constant, also results in an increase in the interest amount owed.

Consequently, the monthly mortgage interest cost index, $M_{t/t-1}$, is defined as a product of two monthly indices:

$$M_{t/t-1} = H_{t/t-1} \times I_{t/t-1}$$

where:

$H_{t/t-1}$ is an index that estimates the effect of changes in dwelling prices between t and $t-1$ on the amount of principal outstanding, assuming a fixed stock of mortgaged dwellings and constant conditions of their financing, and

$I_{t/t-1}$ is an index that estimates the effect of changes in interest rates between t and $t-1$ on the amount of mortgage interest owed, assuming a fixed amount of principal outstanding.

Since the total value of houses purchased during a given period is always a small proportion of the total stock of dwellings with mortgages, the total amount of mortgage interest owed each month continues to reflect the impact of past changes in house prices for a very long period. The house prices that enter into the estimation of the mortgage interest cost index each month represent the weighted average house price of the previous 25 years. The weights reflect the distribution of mortgage balances by mortgage vintage, such that older mortgages have a relatively lower weight. This is because newer mortgages generally have a higher principal owing than older

mortgages. Past mortgage interest rates also continue to be reflected in the current month index, because new interest rates only affect the index through mortgages newly initiated or renegotiated. These are generally a rather small proportion of the stock of existing mortgages. The following sections examine these two components of the mortgage interest cost model in greater detail.

The House sub-index

The House sub-index ($H_{t/t-1}$) compares weighted average housing prices over 300 months between the current and previous period, making the assumption that a standard mortgage is amortized over 25 years (300 months) at a fixed rate.

As of the release of the February 2021 CPI, prices for both new and resale housing are incorporated into the model for the previous 25 years. Prior to the February 2021 CPI, the model used only the New Housing Price Index (NHPI) as a measure of the change in residential housing prices. The NHPI measures the change over time in builders' selling prices of newly built houses (single/semi-detached and row) in 27 census metropolitan areas (CMAs).

With the March 2022 CPI release, the Canadian Real Estate Association (CREA) MLS Home Price Index (HPI) replaced Statistics Canada's Resale Residential Property Price Index (RRPPI) as the source for resale data. Resale housing prices are now incorporated into the mortgage interest cost model, along with the NHPI, for six CMAs: Montreal, Ottawa, Toronto, Calgary, Vancouver and Victoria. For the remaining 21 CMAs, the NHPI is the indicator used for housing prices. Research is under way to evaluate adding resale housing prices for additional cities.

For the CMAs that include resale data, monthly NHPI and Resale House Price Index (RHPI) data are combined using a weighted average prior to entering the House sub-index calculation. In general, the RHPI is allocated a weight of approximately three-fourths, with the remaining one-fourth assigned to the NHPI. The weights represent the value share of new and resale properties and are updated annually.

To construct the 300-month history required by the mortgage interest cost model, published data from the CREA's MLS HPI are supplemented by data from the Teranet-National Bank House Price Index.

The sub-index $H_{t/t-1}$ can therefore be written as follows:

$$H_{t/t-1} = \frac{\sum_{g=1}^{300}(\alpha NHPI_{t+1-g}(1-\beta\omega_{RHPI}) + \beta RHPI_{t+1-g}(1-\alpha\omega_{NHPI}))(\gamma_g \times \varphi_g)}{\sum_{g=1}^{300}(\alpha NHPI_{t-g}(1-\beta\omega_{RHPI}) + \beta RHPI_{t-g}(1-\alpha\omega_{NHPI}))(\gamma_g \times \varphi_g)}$$

where:

α and β represent dummy variables indicating whether data is available for $NHPI$ and $RHPI$ respectively for a given city or geographical region,

$NHPI_{t+1-g}$ and $NHPI_{t-g}$ represent the New Housing Price Index (NHPI) respectively for month $t+1-g$ and month $t-g$,

$RHPI_{t+1-g}$ and $RHPI_{t-g}$ represent the Canadian Real Estate Association (CREA) MLS Home Price Index (HPI) or Teranet-National Bank House Price Index for month $t+1-g$ and month $t-g$,

ω_{NHPI} and ω_{RHPI} represent the annual weights associated with the value share of new and resale properties respectively, where $\omega_{NHPI} + \omega_{RHPI} = 1$,

γ_g represents the proportion of principal that remains to be paid on a mortgage initiated g months ago. This proportion is based on a standard mortgage amortized over 300 months at a fixed interest rate, and

φ_g is the proportion of households that hold a mortgage initiated g months ago. This information is taken from the SHS and would be the only data coming from that survey. It is approximated as of the date on which the household moved into the dwelling.

The Interest sub-index

The Interest sub-index ($I_{t/t-1}$) employs A4 data collected monthly by the Bank of Canada to measure changes in interest rates. This dataset provides the amounts of new mortgage loans as well as the corresponding interest rates for the country's nine largest banks. In addition to allowing for monthly updates of mortgage loans by term, this information covers a broad spectrum of interest rates, including variable rates and a variety of term fixed rates.

Estimation for index $I_{t/t-1}$ relies on a standardized function of the amounts of residential mortgage interests charged by banks, A_t, defined as follows:

$$A_t = \sum_{j=1}^{9}\left[\left(B_j - L_{j,t}\right)\times r_{j,t-1}^{eff}\right] + \sum_{j=1}^{9}\left(L_{j,t}\times r_{j,t}\right)$$

where:

B_j is the balance of mortgage loans for bank j. The amount B_j is obtained from the Bank of Canada's A4 database. The balance of mortgage loans B_j remains fixed throughout the period of the CPI basket to ensure that changes in A_t are solely the result of changes in interest rates and in the distribution of mortgage loans by term,

$L_{j,t}$ represents the amount of new loans issued by bank j in month t. It is obtained from the Bank of Canada's A4 database,

$r_{j,t-1}^{eff}$ is the effective interest rate in the previous month $(t-1)$, for bank j. It is calculated by establishing the ratio between the interest amount for the previous month and the loan balance, and

$r_{j,t}$ indicates the interest rate negotiated by bank j for its new mortgage loans. This information is also obtained from the Bank of Canada's A4 data.

Thus, the index $I_{t/t-1}$, which measures the impact of changes in mortgage interest rates on interest amounts between t and $t-1$, can be calculated as follows:

$$I_{t/t-1} = \frac{A_t}{A_{t-1}}$$

Homeowners' replacement cost

Since the owned accommodation index in the Canadian CPI seeks specifically to reflect the costs of using owned accommodation, the measure includes a "replacement cost" (or depreciation) component.

The replacement cost index measures the portion of the housing stock that is consumed, during a given period, that owners did not replace through maintenance and repairs. Homeowners' replacement cost differs from other owned accommodation components in the CPI because it is not an out-of-pocket expense.

Since depreciation is not an actual payment, but rather a conceptual expense, it must be derived. It corresponds to the hypothetical amount required to replace the portion of the stock of owned accommodation used each year by the target population. The basket weight is derived from data extracted from the SHS, in which respondents are asked how much they would expect to receive for their house if they were to sell it. It is also derived from external measures of housing prices up to the current basket reference year, which are captured by the CREA, as well as the change in owner occupied dwelling units collected from the Census and the Canada Mortgage and Housing Corporation's Starts and Completions Survey. This amount is multiplied by a ''house/property'' ratio to obtain an estimate of the value of the house, excluding the land, to which a depreciation rate of 1.5% is applied.

For monthly price movements associated with replacement cost, a version of the NHPI which excludes price changes associated with the land (the 'house only' index) is used.

Property taxes and other special charges

The property tax index measures changes through time in the amount of taxes levied on a constant sample of owner-occupied dwellings in selected municipalities. This sample of property taxes paid, obtained from municipal offices, is used to obtain an estimate of the average property taxes by city. These average values, which are a function of municipal and provincial tax rates and residential property values, are entered as prices in the current and previous periods' unit value index calculation. Changes in property taxes and related special charges are reflected once a year, in the October reference month of the CPI.

Homeowners' home and mortgage insurance

The homeowners' home and mortgage insurance price index calculates pure price changes in the cost of insuring a home and its contents against loss, using prices for a broad range of consumer profiles extracted from an alternative data source. Prices for these policies are determined based on the value of the structure being insured and the factors that affect the risk of a loss, such as the location of the home.

Homeowners' maintenance and repairs

The homeowners' maintenance and repairs index measures price changes for material and labour costs in relation to the home. This includes materials such as paint, flooring, carpet, stain, drywall compound, furnace filters, shingles, driveway sealant, caulking and lumber, as well as the labour costs associated with these materials like roofing and painting labour. Data sources for these sub- indexes include price data collected from retailers and the Construction Union Wage Rate Index.

Other owned accommodation expenses

Commissions on the sale of real estate are included in the other owned accommodation expenses price index. Data sources for the sub-indexes in this category include the NHPI and CREA's MLS HPI.

The owned accommodation index and other measures of residential housing prices

The owned accommodation index is often the subject of discussion, as to whether it properly reflects the impact of changes in dwelling prices on the overall inflation level. More specifically, it is compared to data on the selling prices of homes, and it is sometimes argued that housing inflation is under-estimated in the CPI.

However, the owned accommodation component of the official Canadian CPI was not specifically designed to be an indicator of housing price inflation nor housing affordability. Alternative approaches for measuring housing inflation and affordability are available in a number of Statistics Canada products, including the housing statistics portal, indicators of household wealth and affordability, and distributions of household economic accounts.

The treatment of owned accommodation in the Canadian CPI serves well in quantifying the rise in price of owning and occupying a dwelling. In particular, it is meant to measure the impact of price changes on a selection of costs specific to homeowners to determine changes in the cost of using a stock of dwellings.

While the cost of purchasing a home is not directly included in the CPI, several components of the ongoing consumer costs of home ownership are influenced by prices in the housing market, so they are included indirectly. The following are a few examples of how changes in housing prices are reflected in the owned accommodation index:

- An increase in the price of newly built homes across the country is reflected in the homeowners' replacement cost index, as the amount of money that would be required to maintain the market value of a home on an existing piece of land would also increase.
- A rise in housing prices contributes to higher mortgage interest costs when consumers initiate a mortgage.

- An increase in home prices impacts the commissions on the sale of real estate, which are included in the other owned accommodation expenses index.
- Higher home prices increase property values, which factor into the calculation of the property taxes and other special charges index and the homeowners' home and mortgage insurance index.

There are a number of other measures available, from both Statistics Canada and external sources, that measure the cost or price of housing. A description and intended use of these indicators are available in Table 2 below.

Table 2
Indexes measuring residential housing prices

Index name	Source	Frequency and availability	Description	Intended use
Consumer Price Index: owned accommodation index	Statistics Canada, Table 18-10-0004-01	Monthly, national data starting January 1949, sub-national and city level data starting January 1971	The CPI is an indicator of the change in consumer prices. It measures price change by comparing through time the cost of a fixed basket of consumer goods and services. The owned accommodation index is based on a variant of the user cost approach to measure the price change arising from the ongoing costs of homeownership.	To provide insight into overall economic conditions and is used for indexation and contract escalation. The owned accommodation index in the CPI is used to measure the impact of price changes on a selection of costs specific to homeowners in order to provide an indicator of price-induced changes in the costs of owning and occupying a dwelling.
New Housing Price Index (NHPI)	Statistics Canada, Table: 10-10-0205-01	Monthly, starting January 1981 for 27 CMAs	This survey measures changes over time in the contractors' selling prices of new residential houses, where detailed specifications pertaining to each house remain the same between two consecutive months. It includes the following dwelling types: new single homes, semi-detached homes and townhomes. The survey also collects contractors' estimates of the current value (evaluated at market price) of the land. These estimates are independently indexed to provide the published series for land. The current value of the structure is also independently indexed and is presented as the house series.	To monitor price trends in the construction sector for new homes.
Building Construction Price Index (BCPI)	Statistics Canada, Table 18-10-0135-01	Quarterly, starting 2017 Q1 for 11 CMAs	This survey measures change over time in contractors' prices to construct residential structures including a single detached house, a townhouse, a high rise apartment building and a low rise apartment building. The contractor's price reflects the value of all materials, labour, equipment, overhead and profit to construct a new building. It excludes value added taxes and any costs for land, land assembly, building design, land development and real estate fees.	To evaluate the impact of price changes on capital expenditures related to housing construction.

Table 2
Indexes measuring residential housing prices

Index name	Source	Frequency and availability	Description	Intended use
Canadian Real Estate Association's (CREA) MLS Home Price Index (HPI)	External to Statistics Canada	Monthly, available starting January 2005 for 61 areas	The index is produced using transactional data for home sales, available through MLS Systems at participating Canadian Real Estate Boards and Associations. The index is calculated using a hybrid modeling approach that merges the Repeat-sales and hedonic price approaches.	To measure price trends in local real estate markets, primarily for resale home sales.
Teranet–National Bank House Price Index	External to Statistics Canada	Monthly, earliest series starts June 1990, 11 cities	The index is calculated by applying a Repeat-sales approach to property records from public land registries. Only homes that have been sold twice can be incorporated into the model.	To measure price trends in local real estate markets for resale home sales.

Sources: Statistics Canada, Consumer Price Index, New Housing Price Index and Building Construction Price Index.
Canadian Real Estate Association MLS Home Price Index.
Teranet-National Bank House Price Index.

Value of the Judicial Annuity

Prepared for the Judicial Compensation and Benefits Commission

December 20, 2024

Table of Contents

Pierre Bienvenu, AD. E.
Senior Counsel
IMK s.e.n.c.r.l/LLP
3500 Boul de Maisonneuve Ouest
Montreal QC H3Z 3C1

December 20, 2024

Value of the Judicial Annuity

Dear M^{e} Bienvenu,

We have been engaged by IMK LLP (“IMK”) in your capacity as counsel to the Canadian Superior Courts Judges Association and the Canadian Judicial Council (the “Judiciary”) in connection with the inquiry of the seventh Judicial Compensation and Benefits Commission (the “Commission”), which commenced on October 11, 2024.

The analysis contained in this report focuses on estimating the value of the annuity of federally appointed judges. We have estimated the value of the judicial annuity to be 28% of a judges’ annual salary. Information about our methodology and the underlying assumptions used to derive the estimate are summarized in this report.

We are available to answer any questions you may have on the information contained in our report.

Yours sincerely

Ernst & Young LLP

Carol Wong
Partner*

* Carol Wong is a limited partner of Ernst & Young LP, which provides services to Ernst & Young LLP

Introduction

EY has been engaged by IMK to assist in their representation of the Judiciary during the inquiry of the Judicial Compensation and Benefits Commission. This report has been prepared for IMK. The purpose of this report is to perform an analysis and present results related to the value of the judicial annuity.

We understand that as an expert, we are to provide an opinion that is independent, objective and related to matters within our area of expertise. We are Fellows of the Canadian Institute of Actuaries and of the Society of Actuaries and have experience in pension actuarial calculations.

- Carol Wong has been a Fellow of the Canadian Institute of Actuaries since 2012, with over 17 years of pension industry experience. She is an actuary practicing primarily in the area of pension plans. Carol has served as the lead actuary for various pension plans, providing consulting services on the ongoing maintenance and operations of pension plans. This includes advising plan sponsors in plan governance, regulatory compliance, administration and funding of pension plans. Since 2012, Carol has been involved in the valuation of pension plans as a signing actuary and led her team in overseeing and completing actuarial valuations and financial projections for pension plans.
- Sze-King Fong has over 9 years of relevant pension industry experience and has been a Fellow of the Canadian Institute of Actuaries since 2021. She has assisted in the preparation and review of pension valuations for regulatory and funding purposes, as well as for financial reporting purposes. She provided consulting services on pension plan administration and actuarial valuation and estimation.

The intended users of this report are IMK, the Commission, and the various parties appearing before the Commission. The report should not be provided to any party who is not an intended user. The results and analysis within this report should not be relied upon by any party other than an intended user.

Pursuant to the *Judges Act*, the Commission is to inquire into the adequacy of judicial compensation. For the purposes of this inquiry, IMK has requested that we estimate the value of the judicial annuity of federally appointed judges. We have determined this value based on our understanding of the judicial annuity provisions, as summarized in Appendix A. We have also established a set of our "best-estimate" assumptions used to determine the value of the judicial annuity, which are summarized in Appendix B.

To prepare this report, IMK provided us with information and data from various sources, as shown in Appendix C. Overall, the data provided is sufficient and reliable for the purposes of this report.

Judicial Annuity

Federally appointed judges are entitled to an annuity at retirement equal to two-thirds of their final year salary. The benefits may be reduced based on their age and service (time held in office) at the time of their retirement. The judicial annuity and contributions are established under the *Judges Act*. Key provisions of the judicial annuity benefit are summarized in Appendix A.

Judges are required to contribute to the judicial annuity during their time in office. A judge's contribution rate is 7% of salary if not eligible for an unreduced annuity, but reduces to 1% of salary after they become eligible for full benefit.

We understand that, when comparing the total compensation of federally appointed judges with the total compensation of lawyers in private practice, prior Commissions have deemed it appropriate to consider the value of the judicial annuity. You have therefore asked us to estimate the value of the judicial annuity as a proportion of judges' salaries for the period from 2019 to 2023.

Annuity Value for Prior Commissions

In the context of the last Commission (sixth Commission), the parties ultimately agreed to value the judicial annuity at 34.1% of the judicial salary, in order to compare total judicial compensation with the compensation of lawyers in the private sector.

For that Commission, the Government's expert, Mr. Gorham, originally opined that the judicial annuity should be valued at 37.84%. In arriving at this value, he included the value of the disability benefit, an approach that had never been adopted by prior Commissions and which was objected to by the Judiciary. The expert for the Judiciary, Mr. Newell, stated that the value of the judicial annuity, without including the disability benefit, was 34.1 % of the judicial salary, a value that was ultimately retained for the purposes of the sixth Commission. The set of assumptions used by Mr. Newell to determine the 34.1% figure are summarized in Appendix B.

We further observed that it is usual for experts for different Commissions to arrive at different conclusions regarding the value of the judicial annuity. For instance, in the context of the fifth Commission, Mr. Newell valued the judicial annuity at 30.6%, while the Government's expert valued it at 32.0%.

As detailed below, changes in assumptions, which stem from different prevailing economic conditions for our reference period, justify a lower valuation of the judicial pension (28%) than the one accepted for the purposes of the last Commission.

Assumptions and Methodology

In general, we have followed a similar methodology as the one adopted by the experts in the prior Commission (without the disability benefit), where we estimated, over a range of ages of judicial appointment, a benefit value of the judicial annuity over a judge's career. The benefit values of the judicial annuity are then weighted based on historical data of the ages of judicial appointment to derive the benefit value of the judicial annuity.

For the purposes of the analysis performed in this report, there is no prescribed method for developing actuarial assumptions. There may be more than one set of reasonable actuarial assumptions for the purposes of determining an actuarial value of the judicial annuity. In our opinion, the assumption-setting approach discussed in Mr. Newell's Report is reasonable and we have followed a similar approach. For the current Commission, we have determined a set of "best-estimates" based on current conditions and updated information available, as detailed in Appendix B. An actuary's best-estimate assumption refers

to a realistic and unbiased prediction of future events or outcomes based on available data and professional judgment.

Where it is reasonable to do so, it is appropriate to refer to the set of assumptions used in the Office of the Chief Actuary's (the "OCA") Reports, given the OCA's expertise and access to data to assess appropriate assumptions for the plan members. The OCA is an independent actuarial centre of excellence of the Government of Canada that provides regular actuarial reports and studies on the various pension plans sponsored by the Government of Canada, including the Pension Plan for Federally Appointed Judges (i.e. the judicial annuity). As of the last Commission, the most recent actuarial valuation report conducted by the OCA was as at March 31, 2019 (the "2019 OCA Report"). In line with industry standards of performing actuarial valuations for pension plans at least triennially, the OCA prepared an actuarial valuation as at March 31, 2022 (the "2022 OCA Report").

At the time of the last Commission, Mr. Newell referenced the 2019 OCA Report when setting certain best-estimate assumptions. Given the OCA's access to relevant data and actuarial expertise, it is reasonable to reference the OCA Report in establishing certain best estimate demographic assumptions. Mr. Newell deviated from the 2019 OCA Report where he felt there was a reasonable best-estimate assumption.

Since the 2019 OCA Report, the OCA updated several actuarial assumptions in their valuation as summarized in the 2022 OCA Report. Our estimate of the value of judicial annuity utilizes certain assumptions from the 2022 OCA Report in addition to EY's best estimate assumptions. Highlighted below are assumptions that changed since the prior Commission:

	EY best estimate assumptions for the current Commission	Mr. Newell's best estimate assumptions for the prior Commission
Economic assumptions:		
Interest rate	6.0%	5.0%
Demographic assumptions:		
Gender	55% male, 45% female (based on the headcount data of female and male judges provided in the 2022 OCA Actuarial Report)	60% male, 40% female *(source unknown)*
Retirement	As per the 2022 OCA Actuarial Report	As per the 2019 OCA Actuarial Report
Surviving spouse	As per the 2022 OCA Actuarial Report, as determined at the judge's retirement	Judges assumed to be 85% married at retirement *(source unknown)*

Interest rate (discount rate)

The terms "interest rate" and "discount rate" are often used interchangeably when discussing the time value of money because they both relate to the concept of valuing money at different points in time.

The interest rate used to account for the time value of money represents the rate of return over the investment's lifetime. Investors can choose from various portfolios based on their risk tolerance. Consider two judges who will receive the same judicial annuity upon retirement. Assuming all other factors are equal, the amount of money needed to fund these annuities would be the same at retirement. However, the time available for the funds to be set aside and earn interest varies depending on the judge's age at appointment. A judge appointed at a younger age has a longer period for the investments to grow

compared to a judge appointed at an older age. Therefore, the funds for the younger judge are discounted over a longer period.

It is reasonable to assume that a judge, considering the age at which individuals are appointed, should behave as a relatively prudent investor, and therefore would invest in a balanced portfolio of fixed income and equities. Since the last Commission, return expectations have increased.

A discount rate of 5.0% was used at the last Commission. This represented a reasonable expected rate of return, amongst a range of reasonable assumptions, for a balanced portfolio as of 2019. To develop a reasonable assumption range for the current Commission, we have analyzed the change in bond yields since the last Commission as a proxy for a change in expected return on fixed income assets. In addition, we have estimated the expected return on equities at the current Commission by loading a reasonable equity risk premium onto a risk-free rate.

Fixed income portion of a balanced portfolio
Below is a summary of various bond yield rates as at January 1, 2020 and January 1, 2024:

	January 1, 2020	January 1, 2024	Change
Government of Canada long-term bonds[1]	1.45%	3.27%	1.82%
Government of Canada mid-term bonds[2]	1.32%	3.32%	2.00%
Canadian investment grade bonds[3]	2.77%	4.83%	2.06%

Since the last Commission, bond yields have increased by approximately 2%. With these higher yields, it is reasonable to expect that the return on the fixed income portion of a balanced portfolio would also increase.

Equity portion of a balanced portfolio
To develop a reasonable increase in the expected return on the equity portion of a balanced portfolio, we have referenced a range of equity risk premium of 2.5% to 5%[4] that is generally accepted in the industry. Using a risk-free rate represented by yield on long-term Canadian government bonds as of January 1, 2024, we estimate that the expected return on the equity portion of a balanced portfolio is 5.8% - 8.3%.

Expected return of a balanced portfolio
Given the increase in the risk-free rate and fixed income returns since January 1, 2020, it would be reasonable to posit an increase of up to 2.0% from the discount rate of 5.0% at the last Commission.

Based on market conditions as of January 1, 2024, the range of expected returns of a balanced portfolio is shown below:

	Allocation	Expected return
Equity returns	60%	5.8% - 8.3%
Bond returns	40%	4.8%
Balanced portfolio		5.4% - 6.9%

The updated discount rate of 6.0% used in our report is a reasonable long-term view of expected returns of a balanced portfolio, reflecting the market conditions as of January 1, 2024.

[1] Government of Canada benchmark bond yields – long term (V122544)
[2] Government of Canada benchmark bond yields – 7 year (V122542)
[3] S&P Canada Investment Grade Corporate Bond Index
[4] Revisiting the Equity Risk Premium by the CFA Institute Research Foundation, 2023

In our field of work, which involves reviewing actuarial assumptions used in valuations of pension liabilities and costs, we often evaluate the expected return on assets assumptions set by Canadian actuaries within the pension context. For plans invested in a balanced portfolio, a 6.0% return on assets assumption falls within the range of assumptions established by pension actuaries as of January 1, 2024. Additionally, we have compared this rate using our internally developed analyses to establish a reasonable range of expected future return on assets assumptions. These analyses are also utilized in our assessments of clients' assumptions used to report pension plan obligations on their financial statements.

In our opinion, a 6.0% discount rate is a reasonable assumption for the purposes of determining the present value of the future judicial annuity payments. The same discount rate is also applied to determine the present value of future contributions and judicial salaries. This approach in setting the assumption is reasonable and in line with the assumption-setting approach used at the last Commission.

Overall, the use of an updated discount rate resulted in an approximate 7% decrease in the benefit value of the judicial annuity since the last Commission.

Commentary on other assumption changes since last Commission

In our opinion, all assumptions selected for our estimates of the judicial annuity are reasonable long-term assumptions. These assumptions are detailed in Appendix B.

Retirement assumption

The OCA analyzed the experience during the inter-valuation period (i.e. 31 March 2019 to 31 March 2022) and assessed whether assumptions should be updated to reflect recent experience. It is common for actuaries to update assumptions based on recent membership experience or a refreshed outlook on expected member behaviour or business plans. The OCA updated assumptions, including the retirement assumption, based on a review of the plan's experience during the inter-valuation period. We have relied on this updated retirement assumption in our calculations.

Gender and Surviving spouse assumptions

- Gender: Our best-estimate assumption is based on the membership data of judges in office in the 2022 OCA Report. This updated assumption (55% male, 45% female) reflects the recent data which indicates that more female judges are being appointed.
- Spouse assumption: In the last Commission, the survivor benefit related to the judicial annuity was based on spousal assumptions at the time of the judge's retirement – this approach is in line with our interpretation of the judicial annuity provisions. As such, for the proportion of judges assumed to be married at retirement, we have referenced the OCA assumption based on the sample ages disclosed in the 2022 OCA Report.

In aggregate, the use of these updated demographic assumptions resulted in an approximate 1% increase in the benefit value of the judicial annuity since the last Commission.

In our opinion, the set of best-estimate assumptions outlined in Appendix B are appropriate for the purposes of estimating a value of the judicial annuity as a percentage of a judge's annual salary.

The Annual Value of the Judicial Annuity

Overall results
The benefit value of the judicial annuity, net of judges' contributions, is estimated to be **28%** of salary each year from appointment to retirement.

Background
In the pension industry, the value of retirement benefits earned by members of a retirement plan in a given year is commonly expressed as a level average percent of members' salary each year. In other words, an actuarial methodology is used to estimate the amount that needs to be set aside each year to fund a stream of annuity payments at a future date. Consequently, in this exercise, our estimation of the annual value of the judicial annuity is represented as a percentage of judges' salary, rather than as a dollar value, to remove current salary level as a factor.

Beginning from a judge's appointment, funds (expressed as a percentage of judicial salary) are set aside and invested so that the future value of funds at retirement will be sufficient to fund the judge's annuity. The methodology described below considers the present values of a judge's future annuity payments, contributions, and salary to estimate the cost of funding a judge's annuity evenly over their entire working life. Since the annual value of the judicial annuity depends on a judge's age at appointment, our estimate reflects judges' age at judicial appointment, based on actual historical data from January 1, 1997 to March 31, 2024.

This approach is reasonable and consistent with the approach taken in the prior Commission.

Methodology
Similar to the approach taken in the prior Commission and as described in Mr. Newell's Report, we calculate the annual value of the judicial annuity as follows:

$$\text{Benefit Value}_{\text{Age x}} = [\text{PVFBen}_{\text{Age x}} - \text{PVFCont}_{\text{Age x}}]/\text{PVFSal}_{\text{Age x}}, \text{ where}$$

$\text{PVFBen}_{\text{Age x}}$ is the actuarial present value of the expected future Judicial Annuity benefit as of the date of judicial appointment, for a judge appointed at age x,

$\text{PVFCont}_{\text{Age x}}$ is the actuarial present value of the judge's expected future contributions into the judicial annuity as of the date of judicial appointment, for a judge appointed at age x,

$\text{PVFSal}_{\text{Age x}}$ is the actuarial present value of the judge's expected future salary as of the date of judicial appointment, for a judge appointed at age x.

The judicial annuity's benefit value at each appointment age is calculated as the total actuarial present value of the benefits provided by the judicial annuity, reduced by the total actuarial present value of the contributions required to be made by a judge, then dividing the resulting value by the actuarial present value of the judge's salary during their judicial appointment.

For the purposes of this calculation, we have used a calculation date of January 1, 2024. That is, our calculation of the benefit value of the judicial annuity, estimated to be 28% of salary, is determined with information available and market conditions at January 1, 2024.

1. *$\text{PVFBen}_{\text{Age x}}$*
   It should be noted that disability benefits have been excluded from the calculation, which is in line with the approach taken by prior Commissions.

   A population of 30 representative judges was established, with age of appointment ranging from 40 to 69. For each representative judge, an expected future benefit is derived from a projection of the annuity benefits accrued as a straight-line average year-over-year, as determined from the age of

appointment until their expected retirement. For judges appointed at younger ages (for example, age 40), their future benefit would be distributed over a longer period of time, resulting in a lower annual value than a judge appointed at a later age.

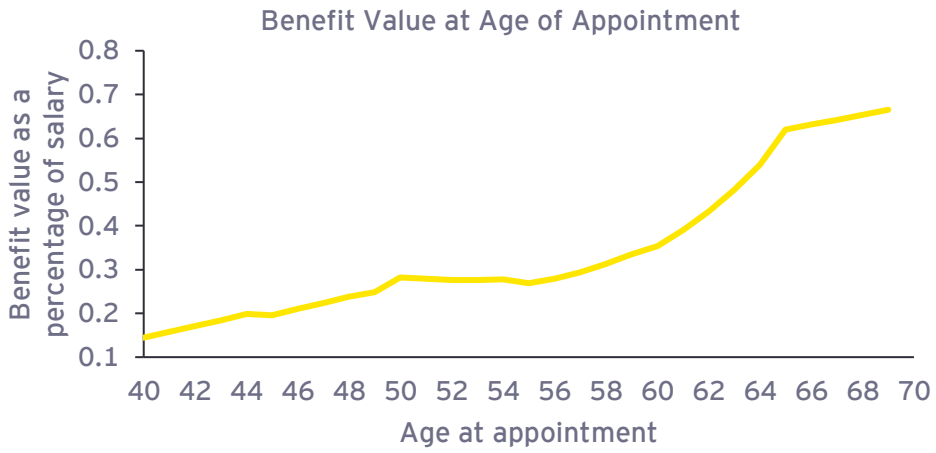
2. *PVFCont*$_{Age\ x}$
   This is calculated using a similar approach as the one used to calculate the PVFBen$_{Age\ x}$. The present value of contributions is calculated for each representative judge, with age of appointment ranging from 40 to 69, over the course of the judge's judicial appointment. A judge's contribution rate is 7% of salary if not eligible for an unreduced annuity, but reduces to 1% of salary after they become eligible for full benefit.

3. *PVFSal*$_{Age\ x}$
   The present value of salary is calculated for each representative judge based on the salary increase assumption in Appendix B, with age of appointment ranging from 40 to 69, over the course of the judge's judicial appointment.

The benefit value at each age of judicial appointment is determined based on the formula above. Finally, to ensure that the benefit value is reflective of the actual ages at appointment, we applied weights to the benefit value at each age of appointment (ages 40 to 69) based on historical data, as further explained below. See Table A for weightings.

Assumptions
As noted in the prior section, the benefit value for each age of judicial appointment is based on a set of actuarial assumptions, as summarized in Appendix B. These assumptions represent our best-estimate assumptions based on current market conditions and information available. The key assumption, discount rate, is set with reference to an expected rate of return of a typical balanced portfolio of investments.

Benefit Value$_{Age\ x}$
The chart below illustrates the Benefit Value$_{Age\ x}$ at each age of appointment from age 40 to 69.



Referencing historical ages of judicial appointments
The actual value of a particular judge's annuity will vary individually based on each judge's demographics (e.g., age, date of retirement, spousal status, gender, etc.).

To provide a representative annual value of judicial annuity for the purposes of this report, we referenced historical appointments and applied weights based on these data points. Since the annual value of the judicial annuity is an average over a judge's career, the age of appointment is a critical component. By

weighting the annual value of judicial annuity on the historical number of judges appointed at each age, we ensure the result reflects overall ages of judicial appointment.

Appointment age data from January 1, 1997 to March 31, 2024 was incorporated to have a sufficiently large sample size for the analysis. The prior Commission referenced appointment age data from January 1, 1997 to October 23, 2020. For this report, the appointment age data is based on: (1) the table provided in Appendix C of the Mr. Newell's Report for judicial appointment ages from January 1, 1997 to October 23, 2020, and (2) more recent data provided during the current inquiry for judicial appointment ages from October 24, 2020 to March 31, 2024.

The following table illustrates judicial appointments by age from January 1, 1997 to March 31, 2024. We applied weights to the benefit value at each age of judicial appointment (ages 40 to 69) based on this historical data.

Table A: Headcount at age of appointments from January 1, 1997 to March 31, 2024			
Age at appointment	**Number of appointments**	**Age at appointment**	**Number of appointments**
40 and below	10	55	86
41	17	56	86
42	16	57	74
43	37	58	64
44	53	59	53
45	72	60	53
46	78	61	38
47	87	62	18
48	82	63	24
49	88	64	16
50	91	65	13
51	109	66	3
52	100	67	6
53	102	68	1
54	98	69	0
		Total	**1,575**

Results

Based on the methodology described above, assumptions outlined in Appendix B, and our understanding of the judicial annuity provisions as outlined in Appendix A, we have estimated the value of the judicial annuity to be 28% of a judges' annual salary.

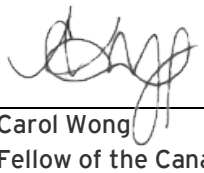
We understand that, when comparing the total compensation of federally appointed judges (including the value of judicial annuity) with the total compensation of lawyers in private practice, the current Commission will use a reference period that includes years 2019 to 2023. Our calculations, as of January 1, 2024, provide a point-in-time estimate. While results may vary with changing market conditions and updated data, this estimate is reasonable for the current Commission. Although different benefit values could theoretically be determined for each year from 2019 to 2024, doing so is impractical and would not significantly alter the conclusion. We believe the judicial annuity value is a reasonable estimate for the Commission's purposes.

December 20, 2024

Statement of Actuarial Opinion

In our opinion:

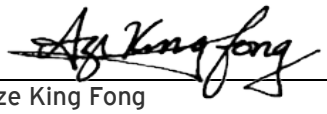
- The data provided is sufficient and reliable for the purposes of this report;
- The assumptions, in aggregate, are appropriate for the purposes of this report;
- The methods employed are appropriate for the purposes of this report; and
- The report has been prepared in accordance with accepted actuarial practice in Canada.



December 20, 2024

Carol Wong
Fellow of the Canadian Institute of Actuaries
Fellow of the Society of Actuaries

Date



December 20, 2024

Sze King Fong
Fellow of the Canadian Institute of Actuaries
Fellow of the Society of Actuaries

Date

Appendix A Summary of Judicial Annuity Benefits

Contributions	7% of salary if not eligible for an unreduced pension, and 1% of salary thereafter
Full benefit	Two-thirds of judge's final year salary
Full benefit eligibility	1. Age 75 with at least 10 years of service, 2. 80 points (sum of age and service) with at least 15 years of service, 3. For a judge of the Supreme Court of Canada, at least 10 years of service, or 4. Permanent disability
Reduced benefit	1. Age 75 with less than 10 years of service: Pro rata of full benefit by years of service 2. At least age 55 with 10 or more years of service: a. Age 60 to 74: pro rata of full benefit by years of service based on the number of years to reach 80 points b. Prior to age 60: benefit is further reduced from (a) by 5% per year prior to age 60
Termination	Refund of judge's contributions with interest. Interest is based on the specified rate applied under the *Income Tax Act* on refunds of overpayments of tax
Death before retirement	Surviving spouse: a. A lump sum equal to one-sixth of salary, plus b. an annuity equal to one-third of the judge's final year salary If the judge has no surviving spouse, the lump sum is paid to the estate or succession of the judge. Eligible dependent child: receives an annuity equal to 20% of the surviving spouse annuity (subject to reduction if there are more than 4 eligible children in the same family), if there is no surviving spouse, the amount is doubled.
Death after retirement	Surviving spouse annuity equal to 50% of the amount payable to the judge will continue for the surviving spouse's lifetime
Refund of contributions	If both the judge and their spouse should die prior to receiving a total benefit of at least the judge's contributions with interest, the remaining difference is paid as a lump sum
Indexation	Adjusted based on 12-month average Consumer Price Index ("CPI") as of 30 September of the previous year, but cannot be negative (i.e., the annuity will not be reduced should CPI change be negative)

Appendix B Actuarial Assumptions

There are no prescribed assumptions that must be used to determine the value of the judicial annuity. Actuarial assumptions are set with reference to available data, industry practice, and guidance/standards from the Canadian Institute of Actuaries.

As the Pension Plan is unfunded (i.e., pay-as-you-go plan), there are no legislative requirements to guide the development of the discount rate assumption. As noted in prior sections, EY's best estimate discount rate has been set with reference to the expected return on assets.

Commentary on assumptions that deviate from the 2022 OCA Report

We note that a long-term discount rate of 4.0% is used in the OCA Actuarial Report, but it is selected to satisfy the requirements of the Public Sector Accounting Standards ("PSAS"), which are meant to determine a value of these benefits as a liability of the Government of Canada, to be disclosed in the Public Accounts (government's financial reporting). Under PSAS, the discount rate is set as the Government's expected cost of borrowing, which is based on Government bond yields – the Government can borrow monies by issuing bonds and the interest/yields on such bonds would constitute the Government's cost of borrowing. As the OCA's assumption setting approach is specific to the Government's financial reporting (accounting purposes) requirements, the assumption-setting basis used by the OCA to determine the discount rate would not be relevant to determining the value of the judicial annuity for the purposes of establishing fair compensation for the judges. Instead, it is more appropriate to set the discount rate by referencing the expected long term return on a balanced portfolio, in which a relatively prudent investor would invest. Further, this approach for setting the discount rate assumption is consistent with what was done for the prior Commission.

The salary increase and inflation rates are based on our long-term best estimate expectations. While they may differ from the 2022 OCA Report, they are within the reasonable range of actuarial assumptions used for this purpose. Further, these assumptions are consistent with those from the prior Commission.

Commentary on assumptions that are the same as the 2022 OCA Report

Demographic assumptions (e.g., gender, retirement, death, and spousal assumptions) used to determine the Judicial Annuity value are based on the assumptions used in the 2022 OCA Actuarial Report, except where indicated otherwise. Given the Office of the Chief Actuary's access to data and their expertise, these assumptions would be representative of the overall long-term demographic expectations of the judges.

Below is a summary of EY's best-estimate assumptions for the current Commission. For reference, we have also outlined the best-estimate assumptions from the 2019 Newell Report from the prior Commission.

	EY best estimate assumptions for the current Commission	**Mr. Newell's best estimate assumptions for the prior Commission**
Interest rate	6.0%	5.0%
Salary increase	2.5%	2.5%
Inflation rate/post-retirement indexation	2.0%	2.0%

	EY best estimate assumptions for the current Commission	Mr. Newell's best estimate assumptions for the prior Commission
Gender	55% male, 45% female based on the headcount data of female and male judges provided in the OCA Actuarial Report	60% male, 40% female
Retirement	Varies by age and service per the sample rates provided in the 2022 OCA Actuarial Report	Varies by age and service per the sample rates provided in the 2019 OCA Actuarial Report
Disability	Nil	Nil
Non-vested termination	Nil	Nil
Death	Canadian Pensioner Mortality Table (Combined) with CPM-B mortality improvement scale, adjusted by 74% for males and 92% for females for judges and unadjusted for surviving spouses. No pre-retirement death is assumed.	Canadian Pensioner Mortality Table (Combined) with CPM-B mortality improvement scale, adjusted by 74% for males and 92% for females for judges and unadjusted for surviving spouses. No pre-retirement death is assumed.
Surviving spouse	Varies by age and gender per the sample rates provided in the OCA Actuarial Report[5], as determined at the judge's retirement	Judges assumed to be 85% married at retirement; male spouses assumed to be 3 years older than female spouse

[5] The OCA Actuarial report references the age at member death for the surviving spouse assumptions. Based on our interpretation of the judicial annuity provisions, our understanding is that the eligible surviving spouse is determined at the date of retirement for the judge, rather than at their date of death.

Appendix C Documents Referenced

The following documents were provided to EY to support our analysis:

1. Excel file "2024-12-17-IMK Tables-CFJA 6b_Revised_QUAD Appointments without elevations (2020/04/01 to 2024/03/31) - Clean"

   This Excel file contains data on the number of judicial appointments by age from April 1, 2020, to March 31, 2024.

The following documents were referenced by EY to conduct the analysis:

1. Guide for Candidates, Office of the Commissioner for Federal Judicial Affairs Canada, September 2022 (https://www.fja-cmf.gc.ca/appointments-nominations/guideCandidates-eng.html)
2. "Compensation Review of Federally Appointed Judges – Department of Justice regarding the 2020 Judicial Compensation and Benefits Commission" by JDM Actuarial, March 26, 2021
3. "Report and Recommendations Submitted to the Minister of Justice of Canada" by the Judicial Compensation and Benefits Commission, August 30, 2021
4. "Joint Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council" for the Judicial Compensation and Benefits Commission, April 30, 2021
5. "Judicial Compensation and Benefits Commission – Value of the Judicial Annuity – Review of Gorham Report" by Dean Newell, April 29, 2021
6. Actuarial Report on the Pension Plan for the Federally Appointed Judges as at March 31, 2022 (https://www.osfi-bsif.gc.ca/en/oca/actuarial-reports/pension-plan-federally-appointed-judges-31-march-2022)
7. Actuarial Report on the Pension Plan for the Federally Appointed Judges as at March 31, 2019 (https://www.osfi-bsif.gc.ca/en/oca/actuarial-reports/pension-plan-federally-appointed-judges-31-march-2019)
8. *Judges Act*, as amended to June 20, 2024
9. Bank of Canada Canadian bond yields: 10-year lookup, long-term V122544 and 7 year V122542 (https://www.bankofcanada.ca/rates/interest-rates/lookup-bond-yields/)
10. S&P Canada Investment Grade Corporate Bond Index (https://www.spglobal.com/spdji/en/indices/fixed-income/sp-canada-investment-grade-corporate-bond-index/)
11. Revisiting the Equity Risk Premium by the CFA Institute Research Foundation, 2023 (https://rpc.cfainstitute.org/sites/default/files/-/media/documents/article/rf-brief/Revisiting-the-Equity-Risk-Premium.pdf)

Appendix D Curriculum Vitae

Carol Wong, FSA, FCIA

PARTNER
Toronto

EDUCATION

Bachelor of Mathematics, Actuarial Science from the University of Waterloo (2007)

Fellow of the Society of Actuaries (2012) and the Canadian Institute of Actuaries (2012)

Carol Wong is a Partner in EY's People Advisory Services Rewards practice in Toronto, Canada. She has over 17 years of pension industry experience.

Carol advises clients on a wide range of HR and pension issues, whether in the context of mergers and acquisitions, financial reporting, or as part of on-going advisory services. She helps clients identify key financial risks and exposure areas relating to pension and benefits plans, HR policies, incentive programs. She leads a team of actuaries to deliver solutions to Canadian and multinational companies, governments and public sector entities, private equity firms and others.

Prior to joining EY, Carol worked at an actuarial consulting firm where she was a consultant advising on plan design, funding, accounting and administration.

Experience

- Advised pension committees and executives on the strategy and execution, ongoing maintenance and operations of pension plans. Advised plan sponsors on pension policy, pension reform, de-risking and plan sustainability.
- Conducted numerous reviews of risks and controls of pension plans. These reviews included assessments of risks in plan governance, administration, funding, accounting, reporting, member communication, benefit calculation and regulatory compliance.
- Served as the lead actuary for various pension plans, and led her team in fulfilling plan sponsors' regulatory filing requirements. This includes the valuation of pension plan and benefit plan obligations. She also has extensive experience in overseeing financial projections for pension and advised pension committees and executives on the strategy and execution, ongoing maintenance and operations of pension plans.
- Extensive experience in the review of financial reporting of pension and benefit plan obligations; she has advised on a diverse range of pension issues for purposes of financial reporting under various accounting standards.
- M&A diligence and integration, supporting clients by identifying and measuring HR risks and costs related to compensation, severance, pensions and retirement programs, and employee benefits for transactions. She identified key financial risks and exposure areas relating to HR policies, pension and benefits plans, incentive programs, and advised on purchase price adjustments, and advised clients on the cash and balance sheet implications of carving out an entity or of acquiring a target company.

Sze-King Fong, FSA, FCIA

SENIOR MANAGER
Toronto

EDUCATION

Bachelor of Mathematics, Double Major in Actuarial Sciences and Statistics from the University of Waterloo (2015)

Bachelor of Business Administration, Major in Insurance and Risk Management and Minor in Economics from Wilfrid Laurier University (2015)

Fellow of the Society of Actuaries (2020) and the Canadian Institute of Actuaries (2021)

Sze-King Fong is an actuarial senior manager in EY's Reward practice in Toronto, Canada with over 9 years of experience in the pension industry. Her primary focus is in the following areas:

- Pension and benefits plans financial statement audit and internal audit;
- Funding and accounting valuations of pension and benefit liabilities of company-sponsored plans;
- Consulting services for the maintenance and operation of retirement benefit plans; and
- M&A due diligence of employee benefit programs.
- Experienced in human resources consulting roles with demonstrated knowledge of pension plan valuation, implementation and ongoing administration.

Experience

Prior to joining EY, Sze-King worked at an actuarial consulting firm advising on funding, accounting and administration with expertise in special projects such as annuity purchase and bulk lump sum campaigns. At EY, she continues to provide actuarial consulting services to pension plan sponsors, including funding and accounting valuations and ongoing administration.

Sze-King has been involved in providing actuarial support to EY audit teams, including assisting with auditing pension and benefit plan financial statements, assessment of actuarial assumptions, accounting mechanics / methodologies, testing actuarial liabilities of pension benefits as part of the audit procedures and the accounting for special events.

She has experience with preparing and reviewing accounting valuations and disclosures for pension and benefit plans under various accounting standards.

She has experience with defined benefit pension plans of varying sizes and is a part of the core group of consultants serving EY's audit practice for actuarial subject matter expertise.

EY | Building a better working world

EY exists to build a better working world, helping to create long-term value for clients, people and society and build trust in the capital markets.

Enabled by data and technology, diverse EY teams in over 150 countries provide trust through assurance and help clients grow, transform and operate.

Working across assurance, consulting, law, strategy, tax and transactions, EY teams ask better questions to find new answers for the complex issues facing our world today.

ey.com/ca

Report on Private Sector Compensation

Prepared for the Judicial Compensation and Benefits Commission

20 December 2024

Table of Contents

20 December 2024

Me Jean-Michel Boudreau
IMK LLP

3500, boulevard De Maisonneuve Ouest

Montreal QC H3Z 3C1

Report on Private Sector Compensation

Dear Me Boudreau,

We have been engaged by IMK LLP ("IMK"), in your capacity as counsel to the Canadian Superior Courts Judges Association and the Canadian Judicial Council (the "Judiciary") in connection with the inquiry of the seventh Judicial Compensation and Benefits Commission (the "Commission"), which commenced on October 11, 2024.

The analysis contained in this report focuses on analyzing multiple data sources to ascertain the income levels of unincorporated and incorporated self-employed lawyers in private practice. Our analysis shows that there is a significant gap between the salary of puisne judges relative to the income of self-employed lawyers in private practice.

Information about our methodology and the data sources used in our analysis are summarized in this report.

We are available to answer any questions you may have on the information contained in this report. Yours sincerely,

Ernst & Young LLP

Uros Karadzic
Partner*

Marvin Reyes
Compensation Consulting Leader

* Uros Karadzic is a limited partner of Ernst & Young LP, which provides services to Ernst & Young LLP

1. INTRODUCTION AND CONTEXT

EY has been engaged by IMK in connection with their representation of the Judiciary during the inquiry of the Judicial Compensation and Benefits Commission. This report has been prepared for IMK. The purpose of this report is to perform an analysis of multiple data sources in order to compare judicial compensation with that of self-employed lawyers in private practice.

We understand that as experts, we are to provide an opinion that is independent, objective, and related to matters within our areas of expertise. We are Fellows of the Canadian Institute of Actuaries and of the Society of Actuaries as well as compensation and total rewards consultants and have experience in compensation reviews for organizations across many industries.

- Uros Karadzic has been a Fellow of the Canadian Institute of Actuaries since 2006. As the leader of EY's Reward practice, Uros has advised companies, governments, private partnerships and professional bodies on a diverse range of pension and compensation issues. A pension actuary leader with over 25 years of industry experience, Uros leads a diverse team of actuaries, lawyers practicing in tax, pension and employment law, and compensation professionals. Uros has advised clients on compensation matters, both executive and broad-based.
- Marvin Reyes brings a wealth of expertise in data analysis and strategic comparisons within the compensation sector. His specialization lies in analyzing compensation data to uncover trends, disparities, and opportunities for optimization. By leveraging advanced analytical tools and methodologies, he provides insightful and informed recommendations that help organizations align their compensation strategies with industry standards and best practices. His strategic approach ensures that compensation packages are competitive, equitable, and aligned with organizational goals, ultimately driving employee satisfaction and retention.

The intended users of this report are IMK, the Commission, and the various parties appearing before the Commission. The report should not be provided to any party who is not an intended user. The results and analysis within this report should not be relied upon by any party other than an intended user.

To prepare this report, IMK provided us with information and data from various sources, as shown in Appendix IV. Overall, the data provided is sufficient and reliable for the purposes of this report.

The prior Commissions' reports on the adequacy of judicial salaries in Canada utilized multiple data sources, including national figures to determine the income of unincorporated self-employed lawyers in private practice. The Turcotte Commission highlighted the necessity of incorporating data on the incomes of self-employed lawyers practicing through a professional law corporation to provide a more accurate view of self-employed lawyers' income levels. In this report, EY analyses that additional data for incorporated lawyers, in addition to the data on unincorporated self-employed lawyers used by prior Commissions.

This report is structured as follows. It begins by providing details into the various data sources utilized, including insights from the Canada Revenue Agency (CRA) and Statistics Canada (StatsCan) on private sector lawyers, both unincorporated and incorporated, which are instrumental in assessing income levels and trends. Following this, the report outlines the market best practice for benchmarking of compensation, focusing on specific age groups to ensure relevance and accuracy. It also discusses the establishment of a minimum income threshold, which serves as a baseline for competitive salary determination. By integrating these elements, the report presents a detailed comparison of current judicial salary levels with those of self-employed lawyers in private practice, both incorporated and unincorporated.

2. DATA SOURCES REGARDING THE INCOME OF SELF-EMPLOYED LAWYERS

EY was provided with various data sources. We received comprehensive data on the income of unincorporated and incorporated self-employed lawyers from both CRA and StatsCan, spanning several years, across Canada and Census Metropolitan Areas (CMAs). The CRA and StatsCan data include various metrics, age groups, and income filters. EY has conducted detailed analyses, with the support from experienced tax professionals, to identify the most appropriate data sources for our evaluation and inform the findings and conclusions set out in this report.

The data provided regarding the income of self-employed lawyers is segmented into various categories, with the rationale for each segmentation choice further elaborated in Section 3:

Geography:

- **Description**: The data is segmented into two geographies, all of Canada and Census Metropolitan Areas (CMAs) across Canada.
- **Relevance:** This geographical segmentation allows for an analysis of regional income disparities and trends, which informs our understanding of the economic landscape in which self-employed lawyers operate.

Salary Cut Offs:

- **Description**: The data includes various salary cut-off filters. For the reasons set out later in this report, our analysis will focus on data filtered with the $90,00 income cutoff *(see Section 3.1: Low-income Cutoff).*
- **Relevance**: This information is necessary for filtering earnings data so that it focuses on lawyers in the pool that are potential candidates to the judiciary.

Target Positioning:

- **Description**: The data is based on different target positions (deciles) within the legal profession. Our Analysis will focus on the metric of 75th percentile *(see Section 3.2: Appropriate Percentile)*, as was done for prior Commissions.
- **Relevance**: The 75th percentile is consistent with the goal of attracting outstanding candidates to the judiciary.

Age Groups:

- **Description**: The data is divided into different age groups. Our Analysis will focus on the age group of 44-56 *(see Section 3.3: Age Range Filter).*
- **Relevance**: The 44-56 age group continues to be the range from which the majority of appointments are made. In our view, the alternative approach – age-weighing – presents too many flaws to be the relevant age filter.

2.1 SUMMARY OF THE DATA PROVIDED

The various datasets provided to EY offer a comprehensive view of the professional earnings landscape within the legal profession in Canada. By analyzing the data received from the Canada Revenue Agency (CRA) and Statistics Canada (StatsCan), and along with the various demographic and positional cuts, we can derive a well-informed and equitable compensation comparator regarding the income of self-employed lawyers in private practice in Canada.

Below is a summary table of the data sources received, their descriptions and the data referenced for each source if applicable.

Table 0: Received Data Sources Summary

Received Data Sources	Description	Data Reference
Judicial Salary	▸ Historic judicial annual salary from 2004 to 2024	▸ Section 2.2 Judicial Salary
CRA: Unincorporated Self-Employed Lawyers	▸ Individual-level net professional income data for unincorporated self-employed lawyers across Canada and in the top 10 Census Metropolitan Areas*. ▸ Includes data filtered with income threshold of $90,000. ▸ Presents data for certain age groups, in particular the 35-69 and 44-56 age groups. ▸ Includes key metric of 75th percentile.	▸ Section 2.3.1 Analysis of CRA Data on Self-employed Lawyers
CRA: Legal Corporations	▸ Dataset derived from T2 filings for corporations with NAICS Code 541110 (Offices of Lawyers). ▸ Net income for legal corporations across Canada. ▸ Includes data filtered with income threshold of $90,000. ▸ Includes key metric of 75th percentile for age group 35-69.	▸ Appendix I Summary of Unused Data Sources
StatsCan: Incorporated and Unincorporated Partner Income	▸ Unincorporated Partner income data across Canada and in the top 10 Census Metropolitan Areas. ▸ Partnership income data across Canada and in the top 10 Census Metropolitan Areas. ▸ Includes data filtered with income threshold of $90,000. ▸ Includes key metric of 75th percentile.	▸ Appendix I Summary of Unused Data Sources
	▸ Incorporated Partner income data across Canada and in the top 10 Census Metropolitan Areas. Includes data filtered with income threshold of $90,000. Includes key metric of 75th percentile.	▸ Section 2.4.1 Analysis of StatsCan Data on Incorporated Lawyers
StatsCan: Legal Corporations	▸ Dataset derived from T2 filings for corporations with NAICS Code 541110 (Offices of Lawyers) across Canada and in the top 10 Census Metropolitan Areas. ▸ Includes data filtered with income threshold of $90,000. ▸ Includes age filters of 44-56 and 35-69 and key metric of 75th percentile.	▸ Appendix I Summary of Unused Data Sources

2.2 Judicial Salary

The following table illustrates the yearly salary of puisne judges from 2019 through 2024[1].

Table 1: Salary of Puisne Judges from 2019 to 2024

Year	Judicial Salary	IAI Adjustment
2019	**$329,900**	**--**
2020	**$338,800**	**2.7%**
2021	**$361,100**	**6.6%**
2022	**$372,200**	**3.1%**
2023	**$383,700**	**3.1%**
2024	**$396,700**	**3.4%**

As shown in Table 1, the yearly IAI adjustment to judicial salaries has averaged 3%, except for 2021, which was affected by the pandemic and where salaries were adjusted by 6.6%.

[1] The amount of the judicial salary in 2019 was provided to EY in the file titled "Joint-Submission-of-the-CSCJA-and-CJC-March-29-2021." Salaries from 2020 to 2024 were sourced from the Guide for Candidates of the Office of the Commissioner for Federal Judicial Affairs.

2.3 UNINCORPORATED LAWYERS

2.3.1 ANALYSIS OF CRA DATA ON SELF-EMPLOYED LAWYERS

Canada Revenue Agency: Net Professional Income of Unincorporated Self-Employed Lawyers

- **Description**: The dataset includes net income information for unincorporated self-employed lawyers. It includes data with a filter for $90,000 low-income threshold.
- The CRA self-employed lawyer data is filtered for individuals aged 35-69 with NAICS code 541110, excluding those from abroad, with zero gross/net incomes, employment income over 50% of net professional/business incomes, social/employment assistance claims, and Canada Pension Plan/Quebec Pension Plan amounts exceeding net professional/business incomes or 50% of total incomes[2].

Data Sourcing and Validation

- The data is sourced from tax filings submitted by individuals. It is 100% self-reported by taxpayers. To ensure the accuracy of the data and identify discrepancies, CRA conducts audits and other verification processes to ensure tax slip information prepared by third parties, such as T5013 partnership information returns, has been accurately self-reported by the taxpayer.

Relevant Data Source File Received:

All Canada: The *"net90k_prov_20tiles_5age"* series data (2019-2023) provides net income data above $90,000 for self-employed individuals across Canada. Key data includes the "count" and "75th percentile" for the age groups 35-69 and 44-56.

The following tables summarize the key data received from the CRA on unincorporated self-employed lawyers:

Table 2A: CRA – Unincorporated Self-Employed Lawyers, Age Group 44-56 – ALL CANADA

Year	Count (N)	75th Percentile (P75) Net Income
2019	3,760	$513,305
2020	3,490	$579,035
2021	3,550	$613,130
2022	3,220	$569,330
2023	2,980	$589,445
Average	3,400	$572,849

[2] Excel file "net90k_prov_20tiles_5age_2019a" by Canada Revenue Agency.

Table 2B: CRA – Unincorporated Self-Employed Lawyers, Age Group 35-69 – ALL CANADA

Year	Count (N)	75th Percentile (P75) Net Income
2019	9,370	$420,535
2020	8,950	$464,150
2021	9,180	$496,690
2022	8,530	$464,140
2023	7,990	$462,835
Average	8,804	$461,670

- **Top CMAs:** The *"net90k_cma_10tiles_5age"* series data (2019-2023) provides net income data above $90,000 for self-employed individuals in the top 10 Census Metropolitan Areas. Key data includes the "count" and "75th percentile" for the age groups 35-69 and 44-56.

The following table summarizes data for the Top 10 CMAs received from the CRA on unincorporated self-employed lawyers.

Table 3A: CRA – Unincorporated Self-Employed Lawyers, Age Group 44-56 – TOP CMAs

Year	Count (N)	75th Percentile (P75) Net Income
2019	3,020	$579,000
2020	2,830	$652,880
2021	2,860	$695,430
2022	2,600	$651,475
2023	2,400	$648,800
Average	2,742	$645,517

Table 3B: CRA – Unincorporated Self-Employed Lawyers, Age Group 35-69 – TOP CMAs

Year	Count (N)	75th Percentile (P75) Net Income
2019	7,320	$474,025
2020	7,060	$519,265
2021	7,190	$555,655
2022	6,710	$514,485
2023	6,260	$519,020
Average	6,908	$516,490

Advantages of Using This Data Source for Unincorporated Lawyer Net Income:

- Past Commissions have used the CRA self-employed net income as a basis for determining the adequacy of the salaries and other amounts payable under the *Judges Act*. Therefore, using this dataset for unincorporated self-employed lawyers would provide a consistent foundation for fair year-to-year comparisons of income increases or decreases of such unincorporated lawyers.

- The CRA dataset includes age filters, offering a more detailed breakdown of net income for self-employed lawyers, in addition to providing data from 2019 to 2023. This allows for a more accurate and precise analysis (outlined in section 4.1 of this report).

2.3.2 CONCLUSION ON DATA ON UNINCORPORATED LAWYERS

Opinion: EY was provided with data on the income of unincorporated self-employed lawyers from both CRA and StatsCan. In line with the practice of past Commissions, we have chosen to use CRA data on self-employed lawyers' net income as the sole source for the analysis of unincorporated lawyers.

2.4 INCORPORATED LAWYERS

For the first time, data on incorporated lawyers has been provided to the Commission, offering a view of the earnings of lawyers who practice through professional law corporations (PLCs). The relevant data included in EY's analysis is sourced from Statistics Canada (StatsCan). The data encompasses various types of reported income across different datasets, including T5013 partnership tax returns.

- T5013 forms detail partnership earnings received by partners in a legal partnership including incorporated lawyers and represent the most accurate and independent source of professional income as it does not capture ancillary income and strictly focuses on income that is earned as a practicing legal professional.

To have a complete picture of compensation received by the full spectrum of self-employed lawyers, it is necessary to include incorporated lawyers into our analysis. It is common practice for higher-earning lawyers to incorporate a professional law corporation to better manage their income and expenses. Advised by tax specialists, these lawyers can take advantage of various tax planning strategies, such as income splitting, deferring income, and accessing the small business deduction. This allows them to optimize their tax liabilities and retain more earnings within the corporation.

2.4.1 ANALYSIS OF STATSCAN DATA ON INCORPORATED LAWYERS

Statistics Canada: Income of Incorporated Partners in a Legal Partnership

- **Description**: This dataset includes the income of partners practicing through professional corporations, classified under the North American Industry Classification System (NAICS) code 541110, which pertains to Offices of Lawyers[3].
- This data is crucial to arrive at credible, reliable, up-to-date and relevant figures regarding the income of self-employed lawyers, including those practicing through a professional law corporation.

Data Sourcing and Validation

- Data is provided from the Economic Analysis Division (EAD) of Statistics Canada, who sources data from various income tax filings, including T1, T2, and T5013 forms, as well as associated schedules. This data is compiled and merged manually to focus on professional law corporations (PLCs) under NAICS code 541110 - Offices of lawyers. The EAD utilizes the Canadian Employer-Employee Dynamics Database (CEEDD) and the National Account Longitudinal Microdata File (NALMF) to consolidate firm-level data which is maintained by EAD to provide matched data between employees and employers in Canada, ensuring comprehensive and accurate information. Before releasing final results, appropriate record linkage approval is obtained to validate the data[4].

Relevant Data Source File Received:

- **All Canada**: *The "partners_cma_2018_2022_NEW" - "corporations_canada_90k_ni",* provides incorporated partner net income share across Canada, including information on partner count and 75th percentile net income above $90,000 for the entire reported population from 2019 to 2022.

[3] Word document "DoJ Quad 2024 notes" by Economic Analysis Division, Statistics Canada, June 2024.
[4] Letter of Agreement, file"6-44800-6728-2425_Quadrennial Commission_LOA_NEW_Signed_Stats Can and Justice", Statistics of Canada.

Table 4: StatsCan – Incorporated Partners – All Canada

Year	Count (N)	75th Percentile (P75) Net Income
2019	6,000	$723,000
2020	6,240	$803,000
2021	6,590	$891,000
2022	7,050	$830,000
Average	6,470	$811,750

- **Top CMAs**: The "*partners_cma_2018_2022_NEW*" - "*corporationsl_top_cma_90k_ni*" provides incorporated partner net income share in the top 10 Census Metropolitan Areas in Canada, including information on partner count and 75th percentile net income above $90,000 for the entire reported population from 2019 to 2022.
    - The data from StatsCan on partners in top CMAs is relevant but it is not a reliable source to derive a helpful comparator to judicial salaries, because much of the data was suppressed by StatsCan for confidentiality reasons. In particular, the spreadsheet contains no data for 6 of the top CMAs (Calgary, Edmonton, Halifax, KCWH, Montreal and Quebec City).

Advantages of Using this Data Source for Incorporated Lawyers

- The StatsCan data provides robust information on partnership data. Partnership data is a true representation of the partnership income earned by the law professionals as the amount on the T5013 slip indicates their share of income directly from practicing legal activities. The T5013 slip is to a partner of a partnership what a T4 is to an employee of a corporation. Due to this, net partnership income share is considered the best representation of the actual income of partners/lawyers.
- The StatsCan data provided more insight into employees earning over $90,000, which is the minimum income cut-off used in the analysis.

2.4.2 CONCLUSION ON DATA OF INCORPORATED LAWYERS

Opinion: Based on our analysis, the assessment of incorporated lawyers' net income should primarily rely on StatsCan partnership data rather than on CRA or StatsCan legal corporation data derived from T2 filings[5].

StatsCan data on partnerships offers a more accurate and comprehensive representation of incorporated lawyer income, as it truly reflects the income earned by incorporated legal professionals. In particular, of the incorporated and unincorporated partner income data captured in the "partners_cma_2018_2022_NEW" file, EY recommends focusing on the corporation's data only.

[5] See Appendix I, for our assessment of unused data sources.

2.5 CONCLUSION ON ALL SELF-EMPLOYED LAWYERS DATA SOURCES

Opinion: Use data from both the Canada Revenue Agency (CRA) and Statistics Canada (StatsCan) to compare with judicial salary. We believe that unincorporated self-employed lawyers from the CRA database remains a fundamental data source, but we will also include incorporated lawyers from the StatsCan database in the analysis.

3 SELECTION OF APPROPRIATE DATA FILTERS

This section examines which filters should be applied to the chosen data sources in order to derive the most accurate private sector income comparator.

3.1 LOW-INCOME CUTOFF

Minimum Income Threshold Determination

In the 2021 Quadrennial Commission Report, it was noted that the $60,000 per annum low-income cutoff, established by the McLennan Commission in 2004, had remained unchanged. The report states that the Consumer Price Index (CPI) was used to determine this threshold, aligning it with the indexing of Canadian personal income tax brackets[6]. To determine an appropriate minimum net income threshold for the current year analysis, two different sources of wage increases were used:

1. **Consumer Price Index (CPI):** The CPI measures the average change in prices paid by consumers for a standard basket of goods and services, including food, clothing, shelter, and transportation. It is a key indicator of inflation, reflecting the cost of living and economic health[7]. This source of data was utilized in the last report to help in determining a minimum income threshold value.

2. **Industrial Aggregate Increase (IAI):** The IAI measures the number of working Canadians and their average weekly earnings. Earnings are tracked and the Industrial Aggregate is updated monthly. The Industrial Aggregate can be considered as similar to the CPI except the CPI tracks prices of items that are typically purchased by Canadian consumers whereas the Industrial Aggregate tracks the number of workers in Canada and their earnings. This source of data was utilized in the last report to help in determining a minimum income threshold value.

Table 5: Calculated CPI and Income Threshold up to 2023[8]

Year	CPI%	Income Threshold
--	--	$80,000
2020	1.9%	$81,559
2021	0.7%	$82,144
2022	3.4%	$84,933
2023	6.8%	$90,711

The CPI rates in the table above are calculated based on the weekly earnings of all employees, as provided by Statistics Canada, under the category of "All-items". The calculation is based on the 12-month average of the calendar year prior to the year of judicial salary increase. For example, the CPI of 6.8% effective April 1, 2023, is calculated using the change from the average monthly value during January 2021 to December 2021 to the average monthly value during January 2022 to December 2022.

[6] judicial Compensation and Benefit Commission, Report and Recommendations Page 52
[7] Statistics Canada - Consumer Price Index (CPI)
[8] Statistics Canada, Consumer Price Index, monthly, not seasonally adjusted (Table: 18-10-0004-01)

Table 6: Calculated IAI and Income Threshold up to 2023[9]

Year	IAI%	Income Threshold
--	--	$80,000
2020	2.7%	$82,158
2021	6.6%	$87,566
2022	3.1%	$90,258
2023	3.1%	$93,046

The IAI rates in the table above are calculated based on the weekly earnings of all employees, as provided by Statistics Canada, under the category of "Industrial Aggregate excluding unclassified businesses" for the group "All employees, including overtime". The calculation is based on the 12-month average of the calendar year prior to the year of judicial salary increase. For example, the IAI of 3.1% effective April 1, 2023, is calculated using the change from the average monthly value during January 2021 to December 2021 to the average monthly value during January 2022 to December 2022. However, due to rounding, numbers may be slightly different from above by 0.1% - 0.2%.

Opinion: Based on the analysis in Tables 5 and 6, the income threshold should be increased from $80,000 to $90,000, which reflects CPI and IAI increases over the relevant period.

[9] The IAI rates are sourced from Statistics Canada, Average weekly earnings by industry, monthly, unadjusted for seasonality (Table: 14-10-0203-01) for the group "All employees, including overtime"

3.2 APPROPRIATE PERCENTILE

We understand that past Commissions have used compensation data from the private sector at the 75th percentile in order to establish a comparison with judicial salaries.

The question of establishing fair and competitive compensation is faced by all organizations, regardless of sector or type of work. There are established market practices and principles that organizations use to guide this process. These leading practices are relevant, and should be considered, when determining competitive compensation levels for judges in Canada.

Market compensation benchmarking principles apply similarly to both government and public sector entities, as well as private sector entities, by ensuring that compensation packages are competitive and aligned with market.

If positions have certain requirements or skillsets that are niche in the market, making it more challenging to attract and retain talent, target positioning should be in the higher quartile of the market.

Organizations will utilize select market percentiles that help determine competitive compensation levels, aligned to their compensation philosophy, and address attraction/retention challenges and the niche skillset required.

- **75th percentile and above** – this is where organizations will target in the market for specific jobs where highly qualified talent with specialized and niche skillsets are required, low source of good talent, attraction/retention issues, skills premium etc.

- **90th percentile and above** – this is where organizations will target where it is extremely difficult to attract talent to a specific position for a number of reasons, and pay is the key driver to bring talent to the role.

The talent pool of qualified judicial candidates is well defined and is composed of highly qualified lawyers. If compensation is not competitive to attract lawyers from the private sector and/or private practice law firms, highly qualified and highly performing individuals may elect not to apply for a judicial position.

For judges, there is also no opportunity to provide incentive compensation such as performance bonuses, requiring the base salary to be sufficiently competitive to attract and retain high quality talent.

Further, IMK has informed us that the Commission, in its inquiry, must consider the need to attract "outstanding candidates" to the judiciary, a category of applicants that was defined by an earlier Commission as "the best and brightest".

Opinion: The 75th percentile of the market or higher represents an appropriate data point to reflect the talent pool of qualified candidates for the judiciary.

3.3 AGE RANGE FILTER

In his report submitted to the previous Commission (Turcotte), the Government's expert, Mr. Gorham, favored an age-weighted approach to estimate compensation in private practice. He put forth a method whereby he assigned a different weight to each of the seven age groups represented in the CRA data. We understand that prior Commissions had instead applied a strict age filter to the CRA data, focusing on the 44 to 56 age group.

Mr. Gorham argued that, while a large number of judicial appointees come from the 44-56 age range, younger and older appointees should not be excluded. The previous Commission ultimately adopted the age-weighted approach presented by Mr. Gorham, instead of the 44-56 age filter.

While an age-weighted approach could yield precise results with granular data, in our opinion, considering the very coarse data on age distribution provided by the CRA, an age-weighted approach is not appropriate under the circumstances because it assigns too much weight to the salaries of younger lawyers.

Generally speaking, the weighted average approach is a statistically valid method and is often preferred over a straight average, when considering different datasets with a different number of records. However, in order to properly apply such a method here, we would need the salary (value), and number of appointees (weight), *for every single age*. Only then would the age-weighted approach yield correct results. In other words, age-weighting of self-employed lawyer income would require income data for each and every age from 35 to 69, to align with how the data is provided in terms of the numbers of appointees at each age. This would yield 35 data points, one for each age (35 through 69). This method would allow the income for each age to be weighted based on the actual number of appointees corresponding to that age.

However, the income data provided is grouped into broader age groups rather than by individual years. The age-weighted approach accepted by the Turcotte Commission relied on income data from seven age groups: 35-43, 44-47, 48-51, 52-55, 56-59, 60-63, and 64-69.

Table 7A: Age at Appointment to Federal Judiciary 2011 to 2020[10]

Age	Number Appointed 1 Apr 2011 to 23 Oct 2020	Percentage Appointed 1 Apr 2011 to 23 Oct 2020
35	--	--
36	--	--
37	1	0.2%
38	--	--
39	--	--
40	3	0.5%
41	5	0.8%
42	4	0.7%
43	13	2.2%
44	19	3.2%
45	26	4.3%
46	30	5.0%
47	32	5.4%
48	26	4.3%
49	36	6.0%
50	29	4.8%
51	42	7.0%
52	36	6.0%
53	39	6.5%
54	32	5.4%
55	37	6.2%
56	37	6.2%
57	24	4.0%
58	26	4.3%
59	20	3.3%
60	23	3.8%
61	16	2.7%
62	8	1.3%
63	10	1.7%
64	8	1.3%
65	8	1.3%
66	3	0.5%
67	4	0.7%
68	1	0.2%
69	--	--
70	--	--
Total	**598**	**100%**

[10] Gorham Report of Compensation Review of Federally Appointed Judges, Page 78-79

Table 7B: Age at Appointment to Federal Judiciary 2011 to 2020 – Seven Bands[11]

	Number Appointed	Percentage Appointed
Age	**1 Apr 2011 to 23 Oct 2020**	**1 Apr 2011 to 23 Oct 2020**
35-43	26	4.3%
44-47	107	17.9%
48-51	133	22.2%
52-55	144	24.1%
56-59	107	17.9%
60-63	57	9.5%
64-69	24	4.0%
Total of Appointments of all ages	**598**	**100%**

Table 7C: Age at Appointment to Federal Judiciary 2011 to 2020 – Broad Bands[12]

	Number Appointed	Percentage Appointed
Age	**1 Apr 2011 to 23 Oct 2020**	**1 Apr 2011 to 23 Oct 2020**
35-46	101	16.9%
47-54	272	45.5%
55-69	225	37.6%
44-56	421	70.4%
35-69	598	100.0%

The mismatch between the number of values and weights (35 vs 7) necessarily creates distortions.

Taking the example of the first age group (35-43) in Table 7B, there are a total of nine distinct ages in that group (35, 36, …, 42, 43), but all ages composing that category are equally weighted relative to each other. In practice, however, the number of nominations varies significantly across these ages. As illustrated in Table 7A above, from 2011 to 2020, there was only 1 nomination at age 37 compared to 13 nominations at age 43 (none at 35). Despite this, the age-weighted approach gives the exact same weight to the income for lawyers aged 35 and for those aged 43. To be correct, the weight given to the income of those aged 37 should be 13 times less than the weight of the income of those aged 43, and the income of lawyers aged 35 should receive no weight at all.

A similar bias is created with the last age group (64-69). While there were 8 nominations at age 64, there was only 1 at age 68 (none at 69). This time, income at age 68 is overweighted within that group. The same phenomenon is skewing the results for age group 60-63.

In sum, the weighted average approach as applied in the prior Commission produces a compensation comparator that is unduly weighed down by over-representation of younger lawyers, who earn less given that they are earlier in their careers. By utilizing the weighted average approach, a higher weight is placed on the younger age range where very few judicial candidates come from, leading to compensation values that are understated.

[11] Gorham Report of Compensation Review of Federally Appointed Judges, Page 78-79
[12] Gorham Report of Compensation Review of Federally Appointed Judges, Page 78-79

Based on recent data, the average age of appointed judges was approximately 52 years of age[13]. This, in combination with the minimum 10 years as a lawyer required to be considered as a candidate, supports the need to focus on the most relevant age range vs. a broader age range.

As illustrated in Table 7C above, historical data from 2011 to 2020 indicates that the age bracket of 44-56 includes 421 appointees, which constitutes 70% of the total appointees.

The table below displays the headcount of judges by age of appointment from 2020 to 2024[14].

Table 7D: Headcount at age of appointments from 1 April 2020 to 31 March 2024

Age at appointment	Number of Appointments
40 and below	3
41 to 45	29
46 to 50	67
51 to 55	86
56 to 60	69
61 to 65	16
Over 65	0
Total	270

By focusing on the 44-56 age range to establish the private sector comparator, the approach becomes more targeted and effective compared to taking a weighted average across different age groups. This approach avoids the distortion that can occur when a significant count in a smaller, less representative age group is included, ensuring that income data reflects the most relevant and impactful segment of candidates.

Opinion: The main focus should be given to the age range of 44-56, which is around the age when qualified candidates typically get appointed to be a judge (see Table 7C). By focusing on this age range, it eliminates potential outliers at the bottom and top of the judicial candidate pool and focuses on the age range where most candidates typically get appointed.

[13] Gorham Report of Compensation Review of Federally Appointed Judges, Page 77
[14] Data sourced from Tables derived from Appointment Demographics provided by the Commissioner for Federal Judicial Affairs.

4 COMPARISON WITH JUDICIAL SALARY

4.1 FINAL COMPARATOR FOR UNINCORPORATED LAWYERS

The CRA data provided includes the net income of unincorporated self-employed lawyers from 2019 to 2023. The tables below present the compensation levels of unincorporated self-employed lawyers aged 44-56 in Canada nationwide and in the top Census Metropolitan Areas (CMAs). It compares their compensation at the 75th percentile to judicial salaries.

A trend analysis has been conducted to predict the growth of unincorporated lawyer income for 2024. For this analysis, we applied a linear regression which estimates the growth of the net income of unincorporated self-employed lawyers for 2024 based on the market data from 2019 to 2023. The findings from this trend analysis offer insights into the expected income trajectory.

Table 8A: Unincorporated Lawyer Net Income vs Judicial Salary for Age Group 44-56 – ALL CANADA

Year	Judicial Salary	75th Percentile (P75) Net Income	Difference between Judicial Salary and the P75 Net Income	
			$	%
2019	$329,900	$513,305	-$183,405	-36%
2020	$338,800	$579,035	-$240,235	-41%
2021	$361,100	$613,130	-$252,030	-41%
2022	$372,200	$569,330	-$197,130	-35%
2023	$383,700	$589,445	-$205,745	-35%
2024	*$396,700*	*$615,622*	*-$218,922*	*-36%*

Table 8B: Unincorporated Lawyer Net Income vs Judicial Salary (with Annuity) for Age Group 44-56 – ALL CANADA

Year	Judicial Salary (with Annuity Valuation of 28%)	75th Percentile (P75) Net Income	Difference between Judicial Salary and the P75 Net Income	
			$	%
2019	$422,272	$513,305	-$91,033	-18%
2020	$433,664	$579,035	-$145,371	-25%
2021	$462,208	$613,130	-$150,922	-25%
2022	$476,416	$569,330	-$92,914	-16%
2023	$491,136	$589,445	-$98,309	-17%
2024	*$507,776*	*$615,622*	*-$107,846*	*-18%*

Observations:

- **Judicial Salary with Annuity vs. 75th Percentile Net Income:**
  - Including the judicial annuity valuation, the judicial salary is well below the 75th percentile net income of self-employed lawyers, with differences ranging from $91,033 to $150,922 between 2019 and 2023. For example, in 2019, the judicial salary was 82% of the 75th percentile net income for self-employed lawyers, which was $513,305.
  - Trend analysis predicts that for 2024, the judicial salary is likely to be 82% of the 75th percentile net income, which means $107,846 below the 75th percentile net income.

- **Summary:** The net income for unincorporated self-employed lawyers, across Canada, and in the age group of 44-56, reveals a significant gap with judicial salaries. The trend analysis suggests that this gap will remain, indicating a $107,846 net income difference in 2024.

Table 9A: Unincorporated Lawyer Net Income vs Judicial Salary for Age Group 44-56 – TOP CMAs

Year	Judicial Salary	75th Percentile (P75) Net Income	Difference between Judicial Salary and the P75 Net Income	
			$	%
2019	$329,900	$579,000	-$249,100	-43%
2020	$338,800	$652,880	-$314,080	-48%
2021	$361,100	$695,430	-$334,330	-48%
2022	$372,200	$651,475	-$279,275	-43%
2023	$383,700	$648,800	-$265,100	-41%
2024	*$396,700*	*$686,976*	*-$290,276*	*-42%*

Table 9B: Unincorporated Lawyer Net Income vs Judicial Salary (with Annuity) for Age Group 44-56 – TOP CMAs

Year	Judicial Salary (with Annuity Valuation of 28%)	75th Percentile (P75) Net Income	Difference between Judicial Salary and the P75 Net Income	
			$	%
2019	$422,272	$579,000	-$156,728	-27%
2020	$433,664	$652,880	-$219,216	-34%
2021	$462,208	$695,430	-$233,222	-34%
2022	$476,416	$651,475	-$175,059	-27%
2023	$491,136	$648,800	-$157,664	-24%
2024	*$507,776*	*$686,976*	*-$179,200*	*-26%*

Observations:

- **Judicial Salary with Annuity vs. 75th Percentile Net Income:**
  - Including the judicial annuity valuation, the judicial salary is well below the 75th percentile net income of unincorporated self-employed lawyers, with differences ranging from $156,728 to $233,222 between 2019 and 2023. For example, in 2019, the judicial salary was 73% of the 75th percentile net income for unincorporated lawyers, which was $579,000.
  - Trend analysis predicts that for 2024, the judicial salary is likely to be 74% of the 75th percentile net income, which means $179,200 below the 75th percentile net income**.**

- **Summary:** Following a similar pattern of analysis for all Canada, with larger variances and differences across years**,** the net income for unincorporated self-employed lawyers in CMA's in Canada, and in the age group of 44-56, reveals a significant gap with judicial salaries. The trend analysis suggests that this gap will remain, indicating a $179,200 income difference in 2024.

4.2 FINAL COMPARATOR FOR INCORPORATED LAWYERS

The **StatsCan data** provided includes the net income of incorporated partners from 2019 to 2022. EY has estimated the net income for incorporated lawyers in Canada nationwide and in the top Census Metropolitan Areas (CMAs) in Canada. The tables below present the estimated net income for incorporated partners at the 75th percentile for lawyers aged 44-56, which is the age group most representative of judicial appointees.

While the StatsCan partnership data is not refined by age, EY calculated an age ratio and income ratio with reference from the unincorporated self-employed CRA data, and applied these ratios to the StatsCan data to serve as a proxy for the net income of incorporated partners in the 44-56 age group.

Below we show the steps to derive the count of private sector lawyers within the age range of 44-56 and their 75th percentile net income for year 2019 in Table 10A:

1. **Determine Age Ratio:**
    - Calculate the proportion of unincorporated self-employed lawyers in the 44-56 age group (3,760) relative to the entire reported population (9,370) across Canada.
    - **Age Ratio:** (3,760 / 9,370) = 40%
2. **Determine Income Ratio:**
    - Calculate the income ratio by dividing the 75th percentile income of the 44-56 age group ($513,305) by the 75th percentile net income of the entire reported population ($420,535).
    - **Income Ratio:** ($513,305 / $420,535) = 122%
3. **Apply Ratios to Corporation Counts and Partners' 75th Percentile Net Income:**
    - Multiply the corporation counts (N) across all ages by the age ratio.
    - **Count:** 6,000 x 40% = 2,400
    - Multiply the partners' 75th percentile net income across all ages by the income ratio.
    - **75th Percentile Net Income:** $723,000 x 122% = $882,060

Additionally, a trend analysis has been conducted to predict the growth of the net income of partners practicing through professional corporations for 2023 and 2024. For this analysis, we applied a linear regression which estimates the growth of partner net income for 2023 and 2024, based on the market data from 2019 to 2022. The findings from this trend analysis offer insights into the expected income trajectory.

Table 10A: Incorporated Partners Estimated Net Income for Age Group 44-56 - ALL CANADA

Year	Judicial Salary	75th Percentile (P75) Net Income	Difference between Judicial Salary and the P75 Net Income	
			$	%
2019	$329,900	$882,060	-$552,160	-63%
2020	$338,800	$1,003,750	-$664,950	-66%
2021	$361,100	$1,095,930	-$734,830	-67%
2022	$372,200	$1,020,900	-$648,700	-64%
2023	*$383,700*	*$1,127,835*	*-$744,135*	*-66%*
2024	*$396,700*	*$1,178,705*	*-$782,005*	*-66%*

Table 10B: Incorporated Partners Estimated Net Income vs Judicial Salary (with Annuity) for Age Group 44-56 – All CANADA

Year	Judicial Salary (with Annuity Valuation of 28%)	75th Percentile (P75) Net Income	Difference between Judicial Salary and the P75 Net Income	
			$	%
2019	$422,272	$882,060	-$459,788	-52%
2020	$433,664	$1,003,750	-$570,086	-57%
2021	$462,208	$1,095,930	-$633,722	-58%
2022	$476,416	$1,020,900	-$544,484	-53%
2023	*$491,136*	*$1,127,835*	*-$636,699*	*-56%*
2024	*$507,776*	*$1,178,705*	*-$670,929*	*-57%*

Observations:

- **Judicial Salary with Annuity vs. 75th Percentile Partner Net Income:**
  - Including the judicial annuity valuation, the judicial salary is well below the 75th percentile net income of incorporated lawyers, with differences ranging from $459,788 to $633,722 between 2019 and 2022. For example, in 2019, the judicial salary was 48% of the 75th percentile net income for incorporated self-employed lawyers, which was $882,060.
  - Trend analysis predicts that for 2023 and 2024, the judicial salary would be 43% to 44% of the 75th percentile net income, indicating that the judicial salary is likely to be $636,699 below the 75th percentile net income of incorporated lawyers in 2023 and $670,929 below the 75th percentile net income in 2024.

- **Summary**: The net income for incorporated lawyers across Canada reveals a gap between judicial salaries and the incomes of incorporated partners at the 75th percentile. The trend analysis suggests that this gap will remain, growing towards a $670,929 income difference in 2024. In other words, the income of incorporated lawyers in Canada, at the relevant age and percentile, is **more than double the salary of judges**, even including the judicial annuity.

4.3 FINAL COMPARATOR FOR ALL PRIVATE PRACTICE LAWYERS

Combination of CRA Unincorporated Lawyers Data and StatsCan Incorporated Lawyers Data

The tables below present the combination of CRA and StatsCan data based on Tables 8A&B, and 10A&B. For the analysis, we focused on self-employed lawyers (both unincorporated and incorporated) across Canada and in the top Census Metropolitan Areas (CMAs), within the 44-56 age group. EY was provided with CRA data covering the years 2019-2023 and StatsCan data covering the years 2019-2022.

A detailed trend analysis was conducted to examine historical income data and make informed predictions about income growth for 2023 and 2024. For this analysis, we applied a linear regression which estimates the growth of net income, for incorporated (2023 and 2024) and unincorporated lawyers (2024 only), based on the market data from prior years. The findings from this trend analysis offer insights into the expected income trajectory.

We have also adopted the methodology of weighted average when combining the two datasets. Weighted average is a calculation that assigns varying degrees of importance to the numbers in a particular data set. A weighted average can be more accurate than a simple average in which all numbers in a data set are assigned an identical weight. In a weighted average, each data point value is multiplied by the assigned weight, which is then summed and divided by the total number of data points[15].

Table 11A: Net Income for Age Group 44-56 vs Judicial Salary – Weighted Average for Unincorporated and Incorporated – ALL CANADA

Year	Judicial Salary	Count (N)	75th Percentile (P75) Net Income	Difference between Judicial Salary and the P75 Net Income	
				$	%
2019	**$329,900**	**6,160**	**$656,976**	**-$327,076**	**-50%**
2020	**$338,800**	**5,924**	**$753,538**	**-$414,738**	**-55%**
2021	**$361,100**	**6,120**	**$815,874**	**-$454,774**	**-56%**
2022	**$372,200**	**5,899**	**$774,408**	**-$402,208**	**-52%**
2023	***$383,700***	**--**	***$853,857***	***-$470,157***	***-55%***
2024	***$396,700***	**--**	***$895,321***	***-$498,621***	***-56%***

Note: As the StatsCan data only covers the years 2019 to 2022, the trend analysis for 2023 and 2024 is based on the combined data from 2019 to 2022.

[15] Taking Table 10 as an example, to calculate the weighted average of the 75th percentile value of $656,976 in 2019, EY used the 2019 75th percentile of net income of $513,305 multiplied by the incumbent count (N) of 3,760 (Table 8A: Self-Employed Lawyer Net Income vs Judicial Salary for Age Group 44-56 – ALL CANADA) and summed it with the 2019 75th percentile of net income of $882,060 multiplied by the incumbent count (N) of 2400 (Table 10A: Incorporated Partners Estimated Net Income for Age Group 44-56 (By Corporations) - ALL CANADA). This value was then divided by the sum of the two incumbent counts to determine the weighted average value.

Table 11B: Net Income for Age Group 44-56 vs Judicial Salary (with Annuity) – Weighted Average for Unincorporated and Incorporated – ALL CANADA

Year	Judicial Salary (with Annuity Valuation of 28%)	Count (N)	75th Percentile (P75) Net Income	Difference between Judicial Salary and the P75 Net Income	
				$	%
2019	**$422,272**	**6,160**	**$656,976**	**-$234,704**	**-36%**
2020	**$433,664**	**5,924**	**$753,538**	**-$319,874**	**-42%**
2021	**$462,208**	**6,120**	**$815,874**	**-$353,666**	**-43%**
2022	**$476,416**	**5,899**	**$774,408**	**-$297,992**	**-38%**
2023	***$491,136***	**--**	***$853,857***	***-$362,721***	***-42%***
2024	***$507,776***	**--**	***$895,321***	***-$387,545***	***-43%***

Note: As the StatsCan data only covers the years 2019 to 2022, the trend analysis for 2023 and 2024 is based on the combined data from 2019 to 2022.

Observations:

- **Judicial Salary with Annuity vs. 75th Percentile Net Income:**
  - Including the judicial annuity valuation, the judicial salary is well below the 75th percentile net income of self-employed lawyers, with differences ranging from $234,704 to $353,666 between 2019 and 2022. For example, in 2019, the judicial salary was 64% of the 75th percentile net income for self-employed lawyers, which was $656,976.
  - Trend analysis predicts that for 2023 and 2024, the judicial salary would be 57% to 58% of the 75th percentile net income, indicating that the judicial salary is likely to be $362,721 below the 75th percentile net income in 2023 and $387,545 below the 75th percentile net income in 2024.

- **Summary:** The net income for private practice lawyers, across Canada, and in the age group of 44-56, reveals a gap between judicial salaries and the incomes of legal professionals at the 75th percentile. The trend analysis suggests that this gap will remain, growing towards a $387,545 income difference in 2024.

5 CONCLUSION

EY completed a comprehensive review to understand the current landscape of self-employed lawyers' salaries in Canada.

Based on the data reviewed, EY has determined that there is a significant disparity between the market pay levels and the current judicial salary. The table below illustrates the gap of the current judicial salary, with and without the annuity valuation, relative to the 75th percentile net income from the combined CRA and StatsCan datasets, for all of Canada.

Table 12A: Weighted Average Net Income of Unincorporated (CRA) and Incorporated (StatsCan) Self-Employed Lawyers vs Judicial Salary for Age Group 44-56 – All CANADA 2022

Year	Judicial Salary	75th Percentile (P75) Net Income	Difference between Judicial Salary and the P75 Net Income	
			$	%
2022	$372,200	$774,408	-$402,208	-52%

Table 12B: Weighted Average Net Income of Unincorporated (CRA) and Incorporated (StatsCan) Self-Employed Lawyers vs Judicial Salary (with Annuity) for Age Group 44-56 – All CANADA 2022

Year	Judicial Salary (with Annuity Valuation of 28%)	75th Percentile (P75) Net Income	Difference between Judicial Salary and the P75 Net Income	
			$	%
2022	$476,416	$774,408	-$297,992	-38%

Referencing the combined data in Tables 11A and 11B, the analysis indicates that market compensation levels for the 75th percentile (upper quartile) for 2022 is $774,408 and the income difference from judicial salary to this data point is $402,208 and from judicial salary (including the annuity valuation) to this data point is $297,992.

The trend analysis indicates that without adjustments, the gap between judicial salaries and market pay levels will continue to widen. This widening gap could impact the attractiveness of judicial positions, making it more challenging to hire outstanding candidates.

6 APPENDICES

6.1 APPENDIX I: SUMMARY OF UNUSED DATA SOURCES

EY has conducted a thorough review of the datasets provided to determine which datasets are useful for determining the income of self-employed lawyers and which are not. Below is a list of datasets that we have decided not to use in our analysis, along with the rationale for their exclusion.

Canada Revenue Agency: Corporations with NAICS Code 541110

The CRA data on legal corporations provides insights into T2 partnership income of corporations with NAICS code 541110 (as cross-referenced with the tax form T5013). For this dataset, EY primarily focused on tables B and D. Out of the six tables, only tables B, D, and F apply the income threshold of $90,000. In section 3.1, we elaborate further on why an accurate analysis requires considering only incomes above $90,000. Among these three tables, table F specifies that it does not include matching partnerships, which is not relevant for our purposes. Our objective with this dataset was to find data that could serve as a proxy for incorporated self-employed lawyers. Therefore, EY conducted a primary analysis of table B and D below.

Relevant Data Source Files Received:

- **All Canada**: The "*QUADCOMM T2 Province NAICS Threshold Breakdown_Final" - "All Corporations with NAICS Code 541110, Net Non-Farming Income Amounts Above $90,000" (Cell AM & AR)* dataset provides corporation-level partnership income data across Canada in the "total" rows of the documents, which includes information on partner count and 75th percentile net income above $90,000 for the entire reported population (age group 35-69) from 2019 to 2022[16]. The Cell AM & AR data are more relevant compared to other columns. The key reason is that the population of PLCs is overinclusive, as shareholders of the corporations are not necessarily lawyers. This means it encompasses a broader range of entities than necessary for our analysis, as explained in more detail below. Such over inclusiveness can dilute the specificity and accuracy of the data, making it less useful for targeted insights. Therefore, the AM & AR columns of T2 Partnership are the most relevant as they specifically target partnership income.

[16] Excel file "QUADCOMM T2 Province NAICS Threshold Breakdown_Final" by Canada Revenue Agency.

Table 13A: CRA – Table B – Incorporated Partners – All CANADA

Year	Count (N)	75th Percentile (P75) Net Income
2019	3,480	$891,000
2020	3,920	$925,000
2021	4,310	$1,031,000
2022	4,300	$1,008,000
Average	4,003	$963,750

- **All Canada**: The "*QUADCOMM T2 Province NAICS Threshold Breakdown_Final" - " Corporations with NAICS Code 541110 that Have a Matching Partnership, Net Non-Farming Income Amount Above $90,000" (Cell AM & AR)* dataset also provides corporation-level net income data across Canada in the "total" rows of the document, which includes information on partner count and 75th percentile net income above $90,000 for the entire reported population (age group 35-69) from 2019 to 2022. The potential discrepancy between the data points in these two tables (B and D) may be attributed to Table D's requirement for a valid Business Number (BN) number for partnership filings. In addition, in Table D, the data for several provinces is missing, presumably for confidentiality reasons.

Table 13B: CRA – Table D – Incorporated Partners – All CANADA (Matching Partnership)

Year	Count (N)	75th Percentile (P75) Net Income
2019	3,160	$904,000
2020	3,540	$940,000
2021	3,910	$1,051,000
2022	3,920	$1,032,000
Average	3,633	$981,750

EY did not utilize the data summarized in Tables 13A and 13B above, due the following disadvantages:

Disadvantages of Using This Data Source for Incorporated Lawyer Net Income:

- The T2 dataset includes a wide range of corporations, such as legal corporations with other investments in partnership structures (which report both income amounts in the same box), legal corporations that are not part of a partnership but are picking up partnership investment income. Many of these are not relevant to our assessment of the of the private sector comparator. As we are interested only in individuals that practice through a corporation, as opposed to various corporate structures that have the 541110 NAICS code, the T2 dataset is overinclusive and contains many irrelevant corporations. It therefore does not constitute a suitable dataset for our purposes (unless the data is cross-referenced with other information).

- Regarding the dataset itself, there are inconsistencies that further compromise its reliability. As shown above, there is a discrepancy in the T2 partnership data between the two tables, even though both tables have the same criteria for net non-farming income and the $90,000 cut-off,

and both targeted columns refer to partnerships. However, the count in Table 13A is **3,480** and in Table 13B is **3,160** for 2019**.** The inconsistency here raises concerns. In Table 13A, the partnership data is problematic because the Partnership Income from Schedule 1 on the T2 does not require detailed information about the partnership itself, only the number. This means we cannot be certain that the income is derived from professional legal activities. On the other hand, Table 13B may not capture all partnership data, as it requires a valid BN number for inclusion. This discrepancy highlights the potential noise, errors, or biases in CRA data, which could create confusion and undermine the accuracy of the analysis. Due to the inconsistencies reported above, we have concluded that this would not be a reliable source to reference.

Statistics Canada: Unincorporated Partners of Legal Partnerships:

The StatsCan data provides partnership (T5013) information under the NAICS code 541110 (Offices of Lawyers), which includes the net partnership income share of unincorporated self-employed lawyers across Canada and the CMAs[17].

Relevant Data Source File Received:

- **All Canada**: *The "partners_cma_2018_2022_NEW" - "individual_canada_90k_ni"* dataset provides individual-level net income for unincorporated lawyers receiving partnership income. Data is provided across Canada and includes information on partner count and 75th percentile net income above $90,000 for the entire reported population from 2019 to 2022.

Table 14A: StatsCan – Unincorporated Partner Net Income – All CANADA

Year	Count (N)	75th Percentile (P75) Net Income
2019	8,760	$467,000
2020	8,590	$512,000
2021	8,520	$558,000
2022	8,300	$516,000
Average	8,543	$513,250

We did not utilize this data in our analysis, due the following disadvantages:

Disadvantages of Using This Data Source for Unincorporated Lawyer Net Income

- StatsCan data for unincorporated self-employed lawyers includes only partner income data. This means that the data is underinclusive compared to the traditional dataset from the CRA on self-employed lawyers used by prior Commissions, which includes all unincorporated self-employed lawyers, whether they are partners at a firm or not. In light of this, we have opted to use the broader CRA dataset on unincorporated self-employed lawyers.

- In addition, the StatsCan data on partner income could undervalue total compensation, as it does not capture the full spectrum of income sources for unincorporated lawyers, such as consulting fee of freelance legal work that is not earned through practicing in a partnership.

- The CMA data was mostly suppressed for confidentiality reasons.

[17] Word document "DoJ Quad 2024 notes" by Economic Analysis Division, Statistics Canada, June 2024.

Statistics Canada: Legal Corporations with NAICS Code 541110

The StatsCan dataset provides data on legal corporations' (T2) with the NAICS code 541110 (Offices of Lawyers), including net income with a low income threshold of $90,000 across Canada and in the top 10 Census Metropolitan Areas[18].

Relevant Data Source File Received:

- **All Canada:** The *"plc_owners_Canada_90k_2018_2021"* - "*age_35_69_above90k_ni*" and *"age_44_56_above90_Canada_ni"* datasets provide corporation-level net income data, including corporations' count and 75th percentile net income above $90,000 for the population aged 35-69 and 44-56 based on PLC owners' age from 2019 to 2021 across Canada.

- **Top CMAs:** The *"plc_owners_cma_90k_2018_2021"* - "*age_35_69_above90k_ni*" and *"age_44_56_above90_Canada_ni"* datasets provide corporation-level net income data, including corporations' count and 75th percentile net income above $90,000 for the population aged 35-69 and 44-56 based on PLC owners' age from 2019 to 2021, in the top 10 Census Metropolitan Areas.

Disadvantages of Using This Data Source for Incorporated Self-Employed Lawyer Income

- This dataset is overinclusive because it includes all corporations with NAICS code 541110, even those where some of the shareholders are potentially not lawyers, thereby diluting the specificity and relevance of the data for our assessment. It is also overinclusive because it includes entire law firms that operate as corporations (rather than LLPs), instead of only incorporated self-employed lawyers.

- This dataset does not contain the key data point that would allow us to determine the total compensation of incorporated self-employed lawyers, as it only contains the *net* income of the corporation, not the *gross* income. When considering a single incorporated lawyer, the net income of the PLC is not representative of total compensation for that lawyer, as the lawyer will in most cases pay themself a portion of the income as salary, thereby reducing the net income declared on the corporations' T2. For an incorporated partner of a law firm, the determination of compensation requires insight into earnings flowing into the corporation, that is, the PLC's *gross* income.

  For a law firm with multiple owners operating as a corporation, the total net income of the entire firm does not provide insight into the compensation of individual lawyers.

  In both cases, the dataset does not allow us to isolate the total income of an incorporated self-employed lawyer.

- The dataset does not include data for the year 2022.

[18] Word document "DoJ Quad 2024 notes" by Economic Analysis Division, Statistics Canada, June 2024.

6.2 APPENDIX II: TERMS AND DEFINITIONS

Terms	Definitions
Number of Incumbents	The total count of individuals currently holding a specific position or job title.
Base Salary	The fixed amount of money that an employee receives from their employer as compensation for their work, excluding any additional bonuses, benefits, or other forms of compensation.
Target Short-term Incentive (STI)	The predetermined amount or percentage of an employee's compensation that is set aside as a bonus or incentive for achieving specific short-term performance goals.
Target Total Compensation	The total amount of compensation that an employee is targeted to receive, including base salary, bonuses, incentives, and any other forms of compensation.
Net Income	The amount of money that remains after all expenses, taxes, and costs have been subtracted from total revenue. It represents the profit of a company or individual after all financial obligations have been met.
The 75th Percentile (P75)	A statistical measure that indicates the value below which 75% of the data points in a data set fall.
As a % of the P75	This metric represents a given value (such as a salary or income) as a percentage of the 75th percentile value within a specific dataset. It is calculated by dividing the given value by the 75th percentile value and multiplying the result by 100.
Variance	The degree of variation or fluctuation in compensation levels for a specific job or position within the market, indicating how much salaries can differ from the market P75.

6.3 APPENDIX III: REFERENCES

The following Resources were referenced by EY to support the analysis:

1. "Compensation Review of Federally Appointed Judges – Department of Justice regarding the 2020 Judicial Compensation and Benefits Commission" by JDM Actuarial Expert Services Inc., 26 March 2021.
2. Tables derived from Appointment Demographics provided by the Commissioner for Federal Judicial Affairs.
3. "Statistics Reports" by Federation of Law Societies of Canada.
4. "Labour Force Survey" by Statistics Canada.
5. "Consumer Price Index (CPI)" by Statistics Canada. Surveys and statistical programs - Consumer Price Index (CPI).
6. "Consumer Price Index, monthly, not seasonally adjusted - Table: 18-10-0004-01" by Statistics Canada, Consumer Price Index, monthly, not seasonally adjusted.
7. "Average weekly earnings by industry, monthly, unadjusted for seasonality - Table: 14-10-0203-01" by Statistics Canada. Average weekly earnings by industry, monthly, unadjusted for seasonality.
8. Report of the Sixth Quadrennial Judicial Compensation and Benefits Commission, dated August 30, 2021 (Turcotte Commission Report).
9. Joint Submissions of the CSJA and CJC, March 29, 2021.
10. "Guide for Candidates" of the Office of the Commissioner for Federal Judicial Affairs.
11. Reports requested from the CRA by one or both parties.
12. Reports requested from the CRA on Professional Legal Corporations.
13. Reports requested from the Statistics Canada on Professional Legal Corporations.
14. Letter of Agreement with Statistics Canada, with effective date June 19, 2024.
15. "DoJ Quad 2024 notes" from Statistics Canada, June 2024.

EY | Building a better working world

EY exists to build a better working world, helping to create long-term value for clients, people and society and build trust in the capital markets.

Enabled by data and technology, diverse EY teams in over 150 countries provide trust through assurance and help clients grow, transform and operate.

Working across assurance, consulting, law,

ey.com/ca

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2018 SKQB 50**

Date: **2018 02 06**
Docket: QBG 3 of 2017
Judicial Centre: Yorkton

BETWEEN:

SANDRA BARBOUR

APPLICANT

- and -

TOWN OF ITUNA

RESPONDENT

Counsel:

C. Mervin Ozirny — for the applicant
David Kreklewich — for the respondent

JUDGMENT — ELSON J.
February 6, 2018

INTRODUCTION

[1] This is an originating application for an order, pursuant to s. 358(1)(a) of *The Municipalities Act*, SS 2005, c M-36.1 [*Act*], quashing Resolution 163/2016 passed by the council of the Town of Ituna [Town]. The primary grounds for the application assert that the Town acted contrary to ss. 137(1) and 140 of the *Act*. The alternative grounds are that the Town acted contrary to the terms of its own resolution in the manner that it issued the call for tenders.

[2] For the reasons that follow, I have decided to allow the application. That said, and as reflected in my reasons, this decision is based on an analysis that differs from that presented by the applicant's counsel. In my view, the unlawfulness of the Town's conduct does not pertain to s. 137(1) of the *Act*. Rather it is founded on its failure to submit a resolution to the electors that accorded with the petitioners' request, as directed by s. 136(1) of the *Act*. In this respect, I find the Town's failure to be more serious than counsel's submission suggested. Although the failure could arguably justify the quashing of resolutions that preceded Resolution 163/2016, I have concluded that I must limit my decision to the specific relief sought in the application.

[3] Also, before proceeding further with this decision, I must extend my apologies to counsel and both parties for the delay in completing this decision. Certain of the issues raised in this case have not been addressed directly in earlier jurisprudence. As grateful as I was for the submissions of counsel, I determined that this case required more, and somewhat different, analysis than was presented to the court. This took more time than I had anticipated.

[4] Further, and as counsel are likely aware, there have been judicial vacancies on this Court that have gone unfilled for an extended period. Coupled with the greater urgency to try criminal matters in a timely way, the judicial vacancies have resulted in the "perfect storm" of triple booked court rooms and cancellation of allotted judgment writing time. Under such circumstances, the justices of this Court are doing the best they can with the limited resources available. I thank the parties and counsel for their patience.

FACTS

[5] The court received four affidavits in this matter, including one from the applicant and one from Alvin Garchinski, who served as mayor of the Town from October 2012 to October 2016. The court also received affidavits from two other deponents. For reasons disclosed later in this judgment, I have not considered those affidavits in assessing the merits of this application. The facts referenced in this judgment are drawn from the two affidavits I have considered, as well as the appended exhibits.

[6] The relevant events surround the Town's acquisition of the former government owned liquor store at 24-1st Street N.E. in Ituna, and the potential use of that property. The Saskatchewan Liquor and Gaming Authority [SLGA] had closed the store some time before the summer of 2014. In August of that year, the SLGA asked the Town whether it would be interested in purchasing the parcel of property on where the former store stood.

[7] The Town considered the offer, including SLGA's statement that the property had an appraised value of $148,000.00. Eventually, the Town offered to purchase the property for $10,151.32 an offer that SLGA accepted. The date of the offer and acceptance were not disclosed in the evidence before me. That said, the court received minutes of the Town council meeting of March 31, 2015. At that meeting, council passed a resolution approving the purchase of the property for the price reflected in the accepted offer. The recorded vote for the resolution listed seven votes in favour of the resolution and one opposed. Mayor Garchinski was the sole dissenting vote.

[8] After the acquisition of the liquor store property, the Town council had to address the use to which it would be put. At its meeting of July 14, 2015, council considered two resolutions. The first resolution was for the Town to put the former liquor store property up for sale by tender to be advertised in local newspapers. This resolution was defeated by a recorded vote of two votes in favour and four votes opposed.

[9] Following the defeat of this resolution, and at the same meeting, the Town council passed a resolution to invite the board of the Ituna branch of the Parkland Regional Library to its workshop meeting of July 28, 2015 "to discuss the feasibility of the local Library Board turning its attention to relocation of the library and what requirements would be needed."

[10] I digress from the narrative at this point to describe the circumstances of the Ituna and District Library [Ituna Library]. The Ituna Library is a branch of the Parkland Regional Library [PRL], which is established pursuant to the provisions of *The Public Libraries Act, 1996*, SS 1996, c P-39.2. The affidavit evidence disclosed that the Ituna Library serves the residents of four municipalities: the Town; the Rural Municipality of Ituna Bon Accord, No. 246 (which surrounds the Town); the Rural Municipality of Tullymet No. 216; and the Village of Hubbard. In the summer of 2015, the branch was located in a building owned by the Town and the surrounding rural municipality.

[11] Presumably, the workshop meeting of July 28, 2015 took place. However, there are no minutes of that meeting before me, nor is there any evidence in the affidavit of matters that were discussed at the meeting.

[12] On August 11, 2015, the issue came back before the Town council. At that time, council passed Resolution 189/2015 by which it decided to contact the PRL and advise it that the Town required it to move the Ituna Library from its present location to the former liquor store property and that the move be carried out as soon as physically possible. According to Mayor Garchinski's affidavit, the board of the PRL had not initiated any contact with the Town about a possible move.

[13] The passage of Resolution 189/2015 prompted a group of electors to collect signatures for a petition to request a referendum on the matter. The petition requested that the following specific question be put to the electors in the referendum:

> Should the Ituna Town Council rescind its motion to relocate the Ituna Local Library and tender the former Ituna Liquor Store for sale?

[14] The petitioners submitted the completed petition to the Town office some time before the council's workshop meeting on September 22, 2015. Council was informed of the petition at that meeting. The minutes of this meeting, mistakenly recorded as having occurred on September 24, 2015, shows that the Town administrator advised council that the petition was sufficient. The minutes also reflect that, when reporting to the meeting, the Town administrator commented on the wording of the petition. As recorded in the minutes, the comment reads "Even Though (sic) the wording of the petition is not similar to the actual resolution the intent is there." According to the minutes, the discussion about the petition ended with a reference to the upcoming meeting of council, scheduled for October 13, 2015.

[15] As it turned out, the Town council did not formally address the petition until its regular meeting of November 17, 2015. At that meeting, council passed three resolutions providing for a referendum to be held on February 10, 2016. Resolution 284/2015 specifically set out the resolution to be submitted to the electors in the referendum. It read as follows:

> Do you want the Town of Ituna to retain ownership of the former Liquor store and move the Parkland Regional Library Ituna Branch to that location?

[16] At this point, it should be noted that there is no record in the evidence that any elector, including the applicant, objected to the wording of the submitted resolution. One of the affidavits that I have otherwise not considered referenced an unreported decision of Megaw J. in 2015. The deponent said that the application my colleague heard was "regarding the referendum question…". This evidence is misleading. I have read the decision in *Pringle v Town of Ituna*, unreported, October 30, 2015. That application, brought with the wrong procedure, was for an injunction to restrain access and relocation of the Ituna Library to the former liquor store property until after the referendum. Megaw J. did not opine on the lawfulness, or not, of the submitted resolution. In fact, the submitted resolution was not even drafted by the time this application was heard.

[17] The referendum was held, as scheduled, on February 10, 2016. The results of the referendum vote were 101 votes for the "yes" answer and 114 votes for the "no" answer. One ballot was rejected.

[18] Following the referendum, the Town council passed Resolution 84/2016 at its regular meeting of March 15, 2016. By that resolution, council

moved, without a recorded vote, to tender the former liquor store property. The resolution was carried, without a recorded vote.

[19] Although not specifically referenced in the minutes of the meeting, the applicant, who attended the meeting, described some of the debate among council members pertaining to Resolution 84/2016. Specifically, she deposed that some council members raised concerns about as to how much potential bidders might offer. Despite this, there is no evidence of any decision made by council regarding the amount it might be inclined to accept. The applicant also deposes to some discussion, among council members, about the opportunity to re-tender in the event the submitted bids were "really low."

[20] Following the March meeting, the call for tenders was advertised. According to Mayor Garchinski's affidavit, the call for tenders was advertised in the Melville Advance newspaper and publicized on both the Town's website and its Facebook page. The tender notice, which was exhibited in the material, stipulated a deadline of June 15, 2016. It further stipulated that the Town reserved the right, at its sole discretion, to accept or reject in whole or in part, any or all bid proposals. It further stipulated that the highest or any tender will not necessarily be accepted and the bidder must provide in their proposal the intent for use of the building.

[21] After the close of tenders, the Town council met at its next regular meeting on June 21, 2016. The minutes for that meeting disclose that the Town had received three bids. One bid, in the amount of $35,000.00, described a plan to purchase the building for use as a professional office building. The second bid, in the amount of $30,019.59, set out a proposal to use the building as a private liquor store. The third bid, in the amount of

$30,000.00, described a plan to move the bidder's plumbing and heating business to the location. It also contemplated the prospect of renting space for the library if the space was adequate.

[22] The applicant also attended this meeting, and described, in her affidavit, the debate among members of council. Specifically, the applicant deposes that, prior to the opening of the bids, one councillor asked what council's plans were for relocating the Ituna Library to the former liquor store. The applicant then deposed that, after the tenders were opened, the discussion among councillors suggested that the bids were too low, and that the focus of council's discussion remained centred on relocating the Ituna Library to the former liquor store property. She further deposed that one councillor stated that whichever bidder won the tender should be prepared to sign a long-term lease with the Ituna Library. Finally, the applicant deposed that there was no discussion about re-tendering the sale of the property.

[23] Following the discussion, the Town council passed Resolution 141/2016, without a recorded vote. By this resolution, council agreed that the Town should interview the bidders in order to determine "exactly what they had in mind for the liquor store building."

[24] The Town council held a special meeting on July 6, 2016. At this meeting, council dealt with two resolutions pertaining to the former liquor store property. In Resolution 163/2016, council passed a motion rejecting all tenders received for the former liquor store property. The preface for the resolution stipulated that "no suitable tenders were received". Resolution 163/2016 passed with a recorded vote of four votes in favour and two votes

against. Mayor Garchinski was one of the two council members to vote against the resolution.

[25] Despite the passage of Resolution 163/2016, the Town council then addressed Resolution 164/2016 which was to award the sale of the former liquor store property to the highest bidder on the understanding that full payment was to be made within 15 working days. This resolution was defeated, with a recorded vote of two votes in favour (including Mayor Garchinski) and four votes against.

[26] At council's regular meeting of July 19, 2016, council addressed only one resolution relating to the liquor store property. In Resolution 178/2016, council carried a resolution to instruct the Ituna Library to begin to move to the former liquor store building as soon as possible.

LAW AND ANALYSIS

Relevant Provisions of the *Act*

[27] There are a number of provisions of the *Act* that, to varying degrees, are pertinent to this application. I do not propose to recite all of them. In my view, the most relevant provisions are ss. 358, 3, 136, 137 and 140. These provisions, in the order referenced, read as follows:

> **358**(1) Subject to subsections (2) and (3), any voter of a municipality , any owner or occupant of property or a business within the municipality or the minister may apply to the court to quash a bylaw or resolution in whole or in part on the basis that:
>
> (a) the bylaw or resolution is illegal in substance or form;
>
> (b) the proceedings before the passing of the bylaw or resolution do not comply with this or any other Act; or

(c) the manner of passing the bylaw or resolution does not comply with this or any other enactment.

(2) An application pursuant to this section must be made to the court within six months after the bylaw or resolution is passed.

(3) No application may be made pursuant to this section to quash a bylaw described in section 167.

(4) A judge of the court may require an applicant to provide security for costs in an amount and manner established by the judge.

(5) A judge of the court may quash the bylaw or resolution in whole or in part and may award costs for or against the municipality and determine the scale of costs.

(6) If no application is made pursuant to subsection (1), the bylaw or resolution is binding, notwithstanding any lack of substance or form in the bylaw or resolution, in the proceedings before its passing or in the time or manner of its passing.

…

3(1) This Act recognizes that municipalities, as local governments:

(a) are a responsible and accountable level of government within their jurisdiction, being created and empowered by the Province of Saskatchewan; and

(b) are subject to provincial laws and to certain limits and restrictions in the provincial interest as set out in this and other Acts.

(2) Having regard to the principles mentioned in subsection (1), the purposes of this Act are the following:

(a) to provide the legal structure and framework within which municipalities must govern themselves and make the decisions that they consider appropriate and in the best interests of their residents;

(b) to provide municipalities with the powers, duties and functions necessary to fulfil their purposes;

(c) to provide municipalities with the flexibility to respond to the existing and future needs of their residents in creative and innovative ways;

(d) to ensure that, in achieving these objectives, municipalities are accountable to the people who elect them and are responsible for encouraging and enabling public participation in the governance process.

…

136(1) If the administrator reports to council that a petition for a referendum is sufficient, the council shall take any steps that it considers necessary to submit to the voters a bylaw or resolution in accordance with the request of the petitioners.

(2) The council shall submit the bylaw or resolution to the voters:

(a) before the end of the year in which the petition is filed, if the petition is filed with the administrator:

(i) on or before July 1 in the year in which a general election is held pursuant to section 10 of The Local Government Election Act, 2015; or

(ii) in the case of a resort village, on or before March 1 in the year in which a general election is held pursuant to section 10 of The Local Government Election Act, 2015; or

(b) within nine months after the petition is filed, if the petition is filed with the administrator at any time other than the time mentioned in clause (a).

(3) Repealed. 2011, c.9, s.67.

(4) The wording of the draft bylaw or resolution as it will appear on the ballot must be set by council at least eight weeks before the vote.

(5) A council is not required to submit a bylaw or resolution to a referendum if the council passes a bylaw or resolution that accords with the bylaw or resolution requested in the petition before the referendum would otherwise have to be conducted.

(6) If a referendum is conducted on a bylaw or resolution, the council may refuse to receive any further petition on the same or a similar subject filed within three years after the date of the vote.

137(1) If a proposed bylaw or resolution is approved by a vote at a referendum by a majority of the persons voting whose ballots are not

> rejected, the council shall pass the bylaw or resolution at the first meeting following the vote.
>
> (2) If a majority of the persons voting at a referendum do not approve the proposed resolution or bylaw, the council is not required to pass the proposed resolution or bylaw, but the council may pass the proposed resolution or bylaw if it chooses to do so.
>
> …
>
> **140**(1) Subject to subsection (3), a bylaw or resolution that a council was required to pass as a result of a vote of the voters may be amended or repealed only if:
>
> > (a) a vote of the voters is held on the proposed amendment or repeal and the majority of the persons voting whose ballots are not rejected vote in favour of the proposed amendment or repeal;
> >
> > (b) three years have passed from the date that the bylaw or resolution was passed and public notice is given of the proposed amendment or repeal; or
> >
> > (c) amendment or repeal is necessary to avert an imminent danger to the health or safety of the residents of the municipality
>
> (2) Public notice required by clause (1)(b) must be given at least 21 days before the proposed amendment or repeal.
>
> (3) A bylaw or resolution that a council was required to pass as a result of a vote of the voters may be amended if the amendment does not affect the substance of the bylaw or resolution

An Illegal Bylaw or Resolution

[28] The applicant's motion expressly engages s. 358(1)(a) of the *Act*. Under this provision, the court has the jurisdiction to quash a bylaw or resolution on the basis of it being illegal due to any lack of substance or form. The term "illegal" is not expressly defined in the *Act*. The absence of an express definition raises two questions. Firstly, what is the nature of the court's jurisdiction under s. 358(1)(a)? Secondly, in the exercise of that

jurisdiction, what is the standard of review the court must apply in assessing the legality, or not, of Resolution 163/2016?

[29] In *London (City)v RSJ Holdings Inc.*, 2007 SCC 29, [2007] 2 SCR 588 [*RSJ Holdings*], the Supreme Court of Canada addressed the question of illegality in its interpretation of a similar provision of the Ontario statute. In doing so, the court provided helpful guidance on both questions.

[30] The analysis in *RSJ Holdings* is assisted by an understanding of the background facts. The applicant in that case was a developer who had purchased residential property in London, Ontario, with the intention of demolishing the existing building and constructing four individual units in its place. In order to serve this purpose, the developer submitted a site plan to the city, along with applications for both a demolition permit and a building permit. The city eventually held closed-door meetings during which it was recommended that a land use study be undertaken and that the city council approve an interim bylaw to freeze all development in the area, which included where the developer's property was located. The interim bylaw was then passed by city council in a subsequent open session.

[31] The developer applied for an order quashing the interim bylaw on the grounds of illegality, asserting that the city had not complied with the open meeting requirements set out in the *Municipal Act, 2001*, SO 2001, c 25. At first instance, the motions court's jurisdiction to address the interim bylaw was set out in s. 273 of the same statute, which is the relative equivalent of s. 358 of the *Act* in Saskatchewan. The applicable Ontario provision, at the time in question, read as follows:

> **273.** (1) Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality.

[32] The Supreme Court of Canada, speaking through the judgment of Charron J., agreed with the developer that the city had breached the open meeting requirements of the statute. As a consequence, she concluded that the test for illegality had been met. In arriving at this conclusion, Charron J. described the discretionary nature of the court's jurisdiction at para. 39:

> **39** The power to quash a by-law for illegality contained in s. 273(1) of the *Municipal Act, 2001* is discretionary. Of course, in exercising its discretion, the court cannot act in an arbitrary manner. The discretion must be exercised judicially and in accordance with established principles of law. Hence, when there is a total absence of jurisdiction, a court acting judicially will quash the by-law. In other cases, a number of factors may inform the court's exercise of discretion including, the nature of the by-law in question, the seriousness of the illegality committed, its consequences, delay, and mootness.

[33] As for the standard of review, Charron J. rejected the city's argument that the court's review, under s. 273(1) should be guided by the principle of deference. In this respect, she said the following, at para 37:

> **37**…. Nonetheless, the City argues that the overarching principle which should govern the court on a s. 273 review of a municipal by-law is one of deference. While this approach may be appropriate on a review of the merits of a municipal decision, in my view, the City's argument is misguided here. Municipalities are creatures of statute and can only act within the powers conferred on them by the provincial legislature: *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 at p. 273. On the question of "illegality" which is central to a s. 273 review, municipalities do not possess any greater institutional expertise than the courts — "[t]he test on jurisdiction and questions of law is correctness": *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342 at para. 29.

[34] In *Hughes v Eston (Town)*, 2008 SKQB 26, 309 Sask R 167 [*Hughes*] Mills J. considered the analysis from *RSJ Holdings*, and applied it when considering the nature of this Court's jurisdiction under s. 358(1)(a). In *Hughes*, the applicant argued that the municipality had passed a resolution that was illegal in that it was based on the municipality's breach of contract and/or bias. Although Mills J. concluded that the evidence before him did not conclusively support either basis for the application, he made some helpful comments on the application of s. 358(1)(a). In his view, if there was conclusive evidence of breach of contract, it would have been open to the court to find illegality on that basis, even without evidence of bad faith in the municipality's conduct. He concluded that the term "illegality" was broad enough to include a breach of contract.

[35] Even so, Mills J. went on to say that, where illegality is found on such a basis, the analysis from *RSJ Holdings* does not necessarily lead to a quashing of the challenged resolution. Basing his comments on such a hypothetical situation, Mills J. said the following, at para. 26:

> **26** …. The court is to exercise its discretion in a judicial manner, and although a breach of contract has occurred and an illegal resolution therefore passed, the resolution need not be quashed. For example when determining the issue identified by the Supreme Court as to the seriousness of the illegal action, a resolution passed in bad faith for the purpose of eliminating contractual obligations would be more serious and more likely to be quashed than a technical breach of contract or a breach of contract occurring because of a legitimate disagreement as to its contents. In the latter cases, it is possible that the resolution may be quashed, but it is not as likely to easily flow, and the issue would have to be balanced in relation to the other matters identified by the court for consideration.

The Petition and Referendum Process

[36] At the hearing of this matter, both parties addressed the Town's decision to submit a resolution to the electors that differed from the wording of the petition's request. As earlier mentioned, no one sought judicial review of the Town's decision to frame the submitted resolution as it did. Even so, the applicant contends that the difference between the petition's request and the submitted resolution reflects badly on the Town, and illustrates its desire to proceed with its earlier agenda, irrespective of the voters' wishes. It is contended that this is a factor the court can and should consider in measuring the lack of good faith in the Town's actions.

[37] On the other hand, the Town argues that the change in wording was entirely within its discretion. Further, it contends that the resolution put to the electors was not inconsistent with the petition's request.

[38] Processes for municipalities to receive and act upon public petitions, in one form or other, have been part of the statutory fabric of municipal law in Canada for many years. In Saskatchewan, the statutory rules for the receipt of petitions and the conduct of referenda are set out in Part VI of the *Act*, pertaining to public accountability. Within Part VI, ss. 131 to 140 specifically pertain to referenda. Of these provisions, s. 131 authorizes a municipal council, on its own initiative, to submit any proposed bylaw or resolution, or alternative proposed bylaws or resolutions, to the voters in a referendum. Sections 132 to 136 specifically govern situations where voters petition for a referendum on a bylaw or resolution, subject to certain exceptions set out in s. 136(1). Sections 137 to 140 apply to all referenda, whether initiated by petition or the municipal council, itself.

[39] In my view, there are two provisions of Part VI that deserve particular attention. These provision are s. 136, particularly s. 136(1), and s. 137. In the submissions and briefs received, little attention was given to the possible interpretation of either provision. In its brief, the Town argued that s. 137(2) justified the Town's decision to act as it did, but otherwise ignored the implication of s. 137 in the interpretation of s. 136(1).

[40] Section 136 governs the responsibility of a municipality's council once a submitted petition is found to be sufficient. Specifically, s. 136(1) obliges the council to "take any steps that it considers necessary" to arrange a referendum on a bylaw or resolution "in accordance with the request of the petitioners." In the construction of s. 136(1), the question arises as to how much liberty a municipality has in the modifying a request put forward by petitioners in a valid and sufficient petition.

[41] Section 137 sets out the obligations and rights of a municipality's council when a bylaw or resolution is addressed in a referendum, whether that referendum is prompted by petition or the council's own initiative. Where the majority of electors approve the proposed bylaw or resolution, s. 137(1) obliges the council to pass the approved bylaw or resolution at the first meeting following the vote. Where the majority of electors do not approve the proposed bylaw or resolution, s. 137(2) gives council the choice either to ignore the proposed bylaw or resolution, or to pass it.

[42] As illustrated later in this judgment, the prevailing approach to the interpretation of statutes is aided by a consideration of the statute's purpose. In the present case, s. 3 of the *Act* expressly sets out the statute's principles and purposes. Of particular significance to this case is the purpose

articulated in s. 3(2)(d), which is to provide for public accountability in a municipality's decision-making. In this respect, the *Act's* purpose is twofold. First, it is to ensure that municipalities are accountable to its electors. Second, it is to ensure that municipalities "are responsible for encouraging and enabling public participation in the governance process."

[43] The accountability purpose reflected in s. 3 of the *Act* in not new. Well before its enactment in the current statute, the Supreme Court of Canada addressed the purpose of petition and plebiscite/referendum provisions in municipal governance statutes. In *Cholod v Baker*, [1976] 2 SCR 484 (WL) [*Cholod*], petitioners had presented a properly qualified petition to the council for the City of Regina. In it, the petitioners sought a plebiscite on the question as to whether a bylaw authorizing the construction of a new city hall should be repealed, and that the city proceed to renovate its existing premises. When the matter came before council, the petition was simply received and filed, with no further action taken. The applicant sought an order of *mandamus* to compel the city to proceed with a submission to the voters in accordance with the scheme, then set out in ss. 138 and 139 of *The Urban Municipality Act*, SS 1970, c 78 (rep).

[44] At first instance, and before the Saskatchewan Court of Appeal [[1975] 5 WWR 482 (Sask CA)], the request for *mandamus* was denied on the grounds that the petition and plebiscite provisions were not intended to give the electors the ability to control the lawful activities of the council. In particular, the Court of Appeal concluded that the provisions could not be used for the purpose of repealing validly enacted bylaws.

[45] The Supreme Court of Canada disagreed. The appeal was allowed and *mandamus* issued. In the view of Ritchie J, the scope of the legislation was broad enough to include petitions for the repeal of a bylaw. In describing the purpose of the statutory provisions, which I believe are thematically similar to ss. 136 and 137 of the *Act* in this case, Ritchie J. said the following at para. 16:

> **16.** I am, on the contrary, of opinion that the provisions of ss. 138 and 139 (1) are expressly designed to provide the machinery for ensuring that the voters of the city shall be afforded a controlling voice in determining whether or not a bylaw which has been made the subject of a petition under s. 138 shall be enacted or not.

[46] The purpose articulated in the *Cholod* decision has been incorporated in the interpretation of similar legislation in other cases. Included in the list are three cases from Alberta, *O'Callaghan v City of Edmonton* (1978), 6 Alta LR (2d) 307 (Alta Dist Ct); *Edmonton (City)v Ewasiuk* (1979), 23 AR 225 (Alta CA) [*Ewasiuk*]; and *Brown v Calgary (City)* (1980), 110 DLR (3d) 465 (Alta CA).

Interpretation of s. 136(1) of the *Act*

[47] I now turn to the interpretation of s. 136(1) of the *Act*. In particular, it is necessary to address the question whether the Town acted lawfully when it submitted a resolution to the electors that differed from the petitioners' request.

[48] The prevailing approach to statutory interpretation is often described as the purposive approach, formulated by Elmer Driedger in *Construction of Statutes,* 2d ed (Toronto:Butterworths,1983). This approach was described by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd*.

(Re), [1998] 1 SCR 27, and then restated, with more analysis, in *Bell ExpressVu Ltd. Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 [*Bell ExpressVu*]. In *Bell ExpressVu*, Iacobucci J. described the approach as follows:

> **26** In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > 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.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. R.*, [1984] 1 S.C.R. 536 at p. 578, *per* Estey J.; *Québec (Communauté urbaine) c. Notre-Dame de Bonsecours (Corp.)*, [1994] 3 S.C.R. 3 at p. 17; *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 25; *R. v. Araujo*, 2000 SCC 65 at para 26, [2000] 2 S.C.R. 992; *R. v. Sharpe*, 2001 SCC 2 at para 33, [2001] 1 S.C.R. 45 *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 3 at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> **27** The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 at para. 52, [2001] 2 S.C.R. 867, as "the principle of interpretation that presumes a

> harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Murphy v. Welsh*, [1993] 2 S.C.R. 1069 [a.k.a. *Stoddard v. Watson*], at p. 1079; *Pointe-Claire (Ville) c. S.E.P.B., Local 57*, [1997] 1 S.C.R. 1015 at para. 61, *per* Lamer C.J.)

[49] In keeping with the above approach, is noteworthy that s. 10 of *The Interpretation Act, 1995*, SS 1995, c I-11.2 is identical to its federal counterpart referenced by Iacobucci J.

[50] Applying the preferred approach to the interpretation of s. 136(1), the court must first consider the words of the provision in their grammatical and ordinary sense. Under s. 136(1), once a petition for a bylaw or resolution is found to be sufficient, the relevant municipal council is obliged to "take any steps that it considers necessary" to submit a bylaw or resolution that is "in accordance with the request of the petitioners." In its ordinary sense, the word "accordance" is simply a modification of the word "accord," which, either as a verb or noun, signifies a form of agreement or conformity. While the phrase "take any steps that it considers necessary" affords the council certain flexibility in the drafting of a proposed bylaw or resolution, such flexibility is limited to wording that is "in accordance" with the petition's request.

[51] The House of Lords addressed the meaning of the words "in accordance" in a decision almost 120 years ago. Although the decision is certainly dated, I think its analysis remains applicable. In *Thomas v Kelly*, [1886-90] All ER Reprint 431 (HL), the applicable statute stipulated that the bill of sale was void if it was not "in accordance" with the form prescribed by the statute. Lord Macnaghten expressed the view that the bill of sale could not differ in a manner that was characteristic of the prescribed form. In this respect, he said the following, at p. 438:

> It has been held, and I think rightly, that s. 9 does not require a bill of sale to be a verbal and literal transcript of the statutory form. The words of the Act are "in accordance with the form" not "in the form." But then comes the question: When is an instrument which purports to be a bill of sale not in accordance with the statutory form? Possibly when it departs from the statutory form in anything which is not merely a matter of verbal difference. Certainly I would say when it departs from the statutory form in anything which is a characteristic of that form.

[52] The comments of Lord FitzGerald, at p. 436, reflect a similar sentiment:

> I do not think that the legislature intended by the words "in accordance" a literal conformity with the statutable form of the bill of sale. I adopt the view of Bowen L.J., that it is sufficient if the bill of sale is substantially in accordance with and does not the part from the prescribed form in any material respect.

[53] Although not addressed in the context of the statutory use of the phrase "in accordance", the foregoing comments were favourably referenced by Lamont J. in *Rumely Co. v Registrar of Saskatoon Land Registration District* (1911), 4 Sask LR 466 (Sask CA).

[54] When interpreting s. 136(1) in the context, scheme and purpose of the *Act*, I think it is particularly important to consider the other referendum provisions of the statute. In this respect, I find it notable that, when the matter is to be submitted to the electors of a municipality, the relevant provisions described the matter as presented or submitted in the form of a "draft" (s. 136(4)) or "proposed" (s. 137) bylaw or resolution. This takes on particular significance when one notes that s. 137 addresses the consequences of a referendum's result in the context of whether or not the proposed bylaw or resolution is "approved" or not.

[55] This context is instructive. In my view, s. 136(1) obliges a municipal council to draft a bylaw or resolution that does something more than simply address the subject matter of the petition's request. Rather, the drafted bylaw or resolution must *accord* with the proposal reflected in the petition's request. In this way, voters are properly being asked whether they approve, or not, the bylaw or resolution that the petitioners propose.

[56] Although the analysis was not precisely described in this way, I think that support for the above interpretation is found in the Alberta Court of Appeal's decision in *Ewasiuk*. In that judgment, Prowse J.A., speaking for the court, suggested that the Supreme Court judgment in *Cholod* stood for the authority that the subject matter of a proposed bylaw must be set with such clarity that the council, the petitioners and the court can identify with certainty the subject matter to be dealt with in the proposed bylaw.

[57] Turning this analysis to the present case, the request presented by petitioners is a complicated matter somewhat in that it contained two proposals, one for the rescission of Resolution 189/2015, and the other for the tender of the former liquor store property. Although related, each proposal could arguably stand alone as separate resolutions. Even so, the proposal clearly reflected in the petitioners' request was that the Town rescind Resolution 189/2015, and deal with the former liquor store property in a way that differed substantially from that resolution.

[58] Despite this clear proposal, the Town submitted a resolution that differed from the petitioners' request in three respects. Firstly, it reversed the order of the two proposals contained in the petitioners' request by putting the matter of the Town's continued ownership of the former liquor store property

ahead of the decision to relocate the Ituna Library to that property. Secondly, the submitted resolution rephrased the request in such a way that those who supported the request would be obliged to vote against the submitted resolution. Thirdly, the submitted resolution did not expressly ask the voters to rescind, or not, the Town's decision to relocate the Ituna Library (Resolution 189/2015).

[59] These differences were significant. In particular, they underscore the importance of interpreting s. 136(1) in association with s. 137. By putting the submitted resolution to the electors in the manner that it did, it could be said that the Town effectively preserved the impact of Resolution 189/2015, irrespective of the referendum result. The explanation for this conclusion follows in the next paragraph.

[60] As worded, the resolution it submitted to the electors essentially called for an affirmation of the Town's decision in Resolution 189/2015. Accordingly, if the electors had voted "yes", they would simply have approved the Town's decision. Although s. 137(1) would require the Town to pass the resolution at its first meeting following the vote, such a formality would obviously not have been necessary as the decision voted on had already been made. On the other hand, with the majority of electors voting "no", as they did in this instance, it could legitimately be said that the electors did not approve the resolution presented to them. Under such circumstances, s. 137(2) would not require the Town council to do anything. As earlier mentioned, s. 137(2) stipulates that, where a proposed resolution is not approved by the electors, a council is not obliged to pass it, but can do so if it so chooses.

[61] In my view, the above scenario clearly illustrates that the Town was not at liberty, under s. 136(1), to submit a resolution to the electors that differed from the proposal that was clearly implicit in the petitioners' request. Rather, the Town was obliged to submit to the electors a resolution that called for the rescission of Resolution 189/2015 and the tender of the former liquor store property for sale. Through the passage of Resolution 284/2015, I am satisfied that the Town did not follow s. 136(1). In my view, an application to quash Resolution 284/2015, together with a related application for *mandamus*, should have been brought before the proposed resolution was submitted to the electors. Based on the above analysis, such an application would likely have been granted.

[62] Having found that the Town failed to observe the requirements of s. 136(1) when making its submission to the electors, I must now address the consequences, if any, that arise from that failure. The applicant's argument on the illegality of Resolution 163/2016 was premised on the assertion that the Town had failed to follow s. 137(1) and s. 140 of the *Act* after the electors voted as they did. For the reasons already explained, the premise behind the applicant's argument cannot stand because the electors did not approve any resolution in the 2016 referendum. Hence, s. 137(1) does not apply.

[63] Despite the faulty premise of the applicant's argument, two questions arise. The first question pertains to whether the Town's failure to follow s. 136(1) establishes the type of illegality contemplated by s. 358(1)(a). The second question, which depends on an affirmative answer to the first question, pertains to whether the so found illegality justifies a quashing of the challenged resolution.

[64] In my view, both questions must be answered in the affirmative. The Town's failure to meet its obligation under s. 136(1) was definitely unlawful. The impact of the Town's failure extended not only to Resolution 284/2015, but also to every resolution that the Town's council passed after the close of tenders, including the resolution challenged in this application.

[65] With respect to the second question, I am satisfied that the Town's failure was more than a technical breach of the law, as referenced in *Hughes*. Rather, it deprived the petitioners and the electors of the full opportunity, afforded by the *Act*, to test the proposal that was implicit in the petition's request. Instead of encouraging and enabling public participation in the governance process, the Town's actions served the exact opposite purpose.

[66] I am mindful of the applicant's comments, in her affidavit, about the attitude of certain council members following the referendum result. While obviously concerning to her, I am satisfied that there is no conclusive evidence of bad faith in the Town's decision to act as it did. That said, I am equally satisfied that a finding of bad faith is not necessary in order to conclude that the Town acted unlawfully.

[67] Given my findings in this case, I had considered the prospect of quashing more resolutions than the one challenged in this application. I have concluded that, given the form of the application before me, it would be wrong and perhaps even an error of jurisdiction for me to do so. Rather, I will confine my order to Resolution 163/2016.

Affidavits of Barbara Kuschak and Glen Kozak

[68] As for the two affidavits challenged by the applicant, I found both affidavits to be largely irrelevant. The affidavit of Barbara Kuschak almost exclusively devoted itself to her view about the desirability and suitability of the former liquor store property serving as the new location for the Ituna Library. In the context of this application, the wisdom, or not, of the Town's decision is not a relevant consideration in determining the legality of its actions. Accordingly, the entire affidavit is struck.

[69] The affidavit of Glen Kozak was not helpful, at all. There were portions of the affidavit that simply repeated the narrative from Mayor Garchinski's affidavit. More significantly, the portions of Mr. Kozak's affidavit that constituted an attack of the character of the applicant were both irrelevant and scandalous. Finally, I was very dismayed with the part of Mr. Kozak's affidavit that mischaracterized the decision of Megaw J. As Mr. Kozak's affidavit added nothing to this dispute, it must also be struck.

[70] As said by this Court many times in the past, counsel who prepare and submit affidavits in proceedings of this kind have a duty to ensure that care is taken not to present irrelevant, scandalous or misleading evidence. I am satisfied that, insofar as these two affidavits are concerned, counsel's duty was not properly observed.

CONCLUSION

[71] In the result, the application is granted. Resolution 163/2016 is quashed. Further, the affidavits of Barbara Kuschak and Glen Kozak are struck in their entirety.

[72] The applicant shall be awarded her costs in this application, for both the main application and the striking of the affidavits, fixed in the amount of $3,500.00, payable forthwith.

[73] I shall remain seized with this matter in the event there are any issues arising from either the operation or the effect of this decision, and the related order.

J.
R.W. ELSON

CITATION: Burton v. Docker, 2023 ONSC 1182
COURT FILE NO.: CV-19-00000117-0000
DATE: 2023-02-17

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Dawn-Marie Burton, Plaintiff

AND:

Vanessa Docker and James Docker, Defendants

BEFORE: Regional Senior Justice B. G. Thomas

COUNSEL: Mary-Anne C. Strong, Counsel for the Plaintiff
Catherine Costa, Counsel for the Defendants

HEARD: In writing.

ENDORSEMENT

[1] The defendants bring this motion to transfer the action from Guelph to London, claiming it is in the interests of justice. The plaintiff disputes the transfer.

Background

[2] This action arises out of a motor vehicle collision which occurred on April 27, 2017 in Guelph, Ontario. The plaintiff is 24 years of age and alleges she sustained serious and permanent injuries as a result of the negligence of the defendant, Vanessa Docker, who struck her vehicle in a rear-end collision. Her injuries have recently been labelled catastrophic by her accident benefit insurer.

[3] This action has been set down for trial in Guelph. A pre-trial conference has already occurred and notice of a trial date for the May to June, 2023 sittings has been provided by the Guelph Court. Jury selection is scheduled for April. The defendant here served the jury notice. The trial estimate is five weeks.

[4] The defendants now bring this motion for an order transferring the action from Guelph to London and to be heard together with an action between the plaintiff and her long-term disability insurer.

[5] The second action commenced in London by the plaintiff has Manulife as the defendant. It is a non-jury matter. Discoveries have just been completed. It has not been set down for trial. The plaintiff advises that issues in the London action include whether an application for benefits met the required timeframe. It will require interpretation of the contract of

insurance and whether the plaintiff is "disabled" as defined by that contract. The contract in question is a group policy of insurance.

Analysis

[6] There is no doubt that the plaintiff has the *prima facie* right to choose a venue for the hearing of his action. See, for example, *McDonald v. Dawson* (1904), 8 O.L.R. 72, [1904] O.J. No. 42 (H.C.J.); *J.G. Fitzgerald & Sons Ltd. v. Kapuskasing District High School Board*, [1968] 1 O.R. 136 (S.C.O., Senior Master); and *Paul's Hauling Ltd. v. Ontario (Minister of Transportation)*, 2011 ONSC 3970, 106 O.R. (3d) 590 (S.C.J.), at para. 13. The instant case is not one where there is some statute or rule that requires the hearing of this action to be held in a particular county, as contemplated by r. 13.1.01(1) of the *Rules of Civil Procedure*.

[7] As such, r. 13.1.01(2) applies, and the plaintiff was entitled to commence this proceeding at any court office in the Province of Ontario.

[8] To disrupt the plaintiff's choice, the defendant here needs to satisfy the Court that taking into account the factors in r. 13.1.02(2)(b)(i)-(ix), it is desirable in the interests of justice to transfer the action to London.

[9] Rule 13.1.02(2)(b) is set out below:

> (b) that a transfer is desirable in the interest of justice, having regard to,
>
> (i) where a substantial part of the events or omissions that gave rise to the claim occurred,
>
> (ii) where a substantial part of the damages were sustained,
>
> (iii) where the subject-matter of the proceeding is or was located,
>
> (iv) any local community's interest in the subject-matter of the proceeding,
>
> (v) the convenience of the parties, the witnesses and the court,
>
> (vi) whether there are counterclaims, crossclaims, or third or subsequent party claims,
>
> (vii) any advantages or disadvantages of a particular place with respect to securing the just, most expeditious and least expensive determination of the proceeding on its merits,
>
> (viii) whether judges and court facilities are available at the other county, and

(ix) any other relevant matter.

[10] The Court is to consider a holistic application of the factors outlined above, to the specific facts of the case. (*Chatterson v. M&M Meat Shops Ltd*., 2014 ONSC 1897 (Ont. Div. Ct.) para. 22.

[11] The defendants state that these actions need to be tried together. They suggest that they engage common issues and not joining them risks inconsistent verdicts. They further suggest that they will be prejudiced should the plaintiff's right to disability benefits in the London action not be determined at the same time as the trial of this action. For the reasons set out below, I reject that position and make the findings below on the basis of the material filed.

[12] The factors set out in r. 13.1.02(2)(b), (i), (ii) and (iii) do not favour the transfer. The cause of action, damages and subject matter are Guelph centric.

[13] This motor vehicle accident litigation will not attract "local community interest" as contemplated by r. 12.1.02(2)(b)(iv).

[14] The convenience of the parties and witnesses (r. 13.1.02(2) (b)(v)) do not favour a transfer:

(a) The plaintiff and her husband reside in Kitchener (closer to Guelph than London).

(b) The defendants reside in Oakville (closer to Guelph than London).

(c) While the plaintiff continues to have some treatment providers in London, the vast majority of the plaintiff's witnesses, including experts, work in the GTA. In the material filed, the plaintiff sets out 18 potential witnesses inclusive of experts. Four of those witnesses are from London.

(d) The material before me suggests that the defendant engineering expert and the defence orthopaedic surgeon are from the GTA.

(e) The plaintiff receives $310.91 per week in income replacement benefits. Her husband does not work. A five week trial in London will negatively impact the plaintiff financially.

[15] There are no counter-claims, cross-claims or third party claims to consider. (Rule 13.1.02(2)(b)(vi)).

[16] It is clear to me that to secure the most expeditious and least expensive trial of this action, it should remain in Guelph. (Rule 13.1.02(2)(b)(viii)). Transferring this five week jury trial to be tried with a non-jury trial that is not trial ready will significantly delay the trial.

[17] A transfer to London will then couple a non-jury contract dispute with a jury trial where the dynamics of the accident, liability and damages are in dispute. In all likelihood it turns a five week trial into a seven week trial.

[18] This action is on a trial list for this spring (2023) in Guelph. A seven week jury trial, even if ready for trial now, which it is not, would in all likelihood not be tried in London until 2025. As Regional Senior Justice, I am very aware of the demands on our London resources and our continuing judicial vacancies.

[19] It would not be in the interests of justice to cause such a delay.

[20] To be considered under this subsection, or perhaps r. 13.1.02(2)(b)(ix) as "any other relevant matter", I consider the terms of the *Insurance Act*. Section 267.8 allows for a credit for sums paid by Manulife in the London accident benefits action, or an assignment to the defendants here of any sums paid by Manulife after this action has been tried. (Section 267.8(12)).

[21] Any further delay in the trial of this action increases the deductible year by year for claims for non-pecuniary general damages.

[22] Finally, the plaintiff's claim for pre-trial income loss is limited to 70 percent of the loss. Any post-trial damages for lost income are compensable at 100 percent. (Section 267.5(1)).

Conclusion

[23] The advantage of a trial of these two very different actions together, although arising from the same motor vehicle accident, is far outweighed by the benefits of leaving it in Guelph.

[24] After holistically considering all the factors in the relevant rule, I am not satisfied that this action should be transferred and the defendant's motion is dismissed.

[25] I will receive written submissions regarding costs, limited to three typed pages, excluding the bill of costs as follows:

a) The plaintiff's submissions within 14 days of the release of these reasons.

b) The defendants' submissions within 7 days thereafter.

c) Any reply, 3 days after that.

[26] If no submissions are received on this schedule, there will be no order as to costs.

"Regional Senior Justice B. G. Thomas"

Regional Senior Justice B. G. Thomas

Date: February 17, 2023.

Attorney General of Canada *Appellant/ Respondent on cross-appeal*

v.

Terri Jean Bedford, Amy Lebovitch and Valerie Scott *Respondents/Appellants on cross-appeal*

- and -

Attorney General of Ontario *Appellant/ Respondent on cross-appeal*

v.

Terri Jean Bedford, Amy Lebovitch and Valerie Scott *Respondents/Appellants on cross-appeal*

and

Attorney General of Quebec, Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society, PACE Society, Secretariat of the Joint United Nations Programme on HIV/AIDS, British Columbia Civil Liberties Association, Evangelical Fellowship of Canada, Canadian HIV/AIDS Legal Network, British Columbia Centre for Excellence in HIV/AIDS, HIV & AIDS Legal Clinic Ontario, Canadian Association of Sexual Assault Centres, Native Women's Association of Canada, Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle, Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère

Procureur général du Canada *Appelant/ Intimé au pourvoi incident*

c.

Terri Jean Bedford, Amy Lebovitch et Valerie Scott *Intimées/Appelantes au pourvoi incident*

- et -

Procureur général de l'Ontario *Appelant/ Intimé au pourvoi incident*

c.

Terri Jean Bedford, Amy Lebovitch et Valerie Scott *Intimées/Appelantes au pourvoi incident*

et

Procureur général du Québec, Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society, PACE Society, Secrétariat du Programme commun des Nations Unies sur le VIH/sida, Association des libertés civiles de la Colombie-Britannique, Alliance évangélique du Canada, Réseau juridique canadien VIH/sida, British Columbia Centre for Excellence in HIV/AIDS, HIV & AIDS Legal Clinic Ontario, Association canadienne des centres contre les agressions à caractère sexuel, Association des femmes autochtones du Canada, Association canadienne des Sociétés Elizabeth Fry, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle,

sexuel, Vancouver Rape Relief Society, Christian Legal Fellowship, Catholic Civil Rights League, REAL Women of Canada, David Asper Centre for Constitutional Rights, Simone de Beauvoir Institute, AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution and Aboriginal Legal Services of Toronto Inc. *Interveners*

Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel, Vancouver Rape Relief Society, Alliance des chrétiens en droit, Ligue catholique des droits de l'homme, REAL Women of Canada, David Asper Centre for Constitutional Rights, Institut Simone de Beauvoir, AWCEP Asian Women for Equality Society, exerçant ses activités sous le nom Asian Women Coalition Ending Prostitution et Aboriginal Legal Services of Toronto Inc. *Intervenants*

Indexed as: Canada (Attorney General) *v.* Bedford

2013 SCC 72

File No.: 34788.

2013: June 13; 2013: December 20.*

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Right to security of person — Freedom of expression — Criminal law — Prostitution — Common bawdy-house — Living on avails of prostitution — Communicating in public for purposes of prostitution — Prostitutes challenging constitutionality of prohibitions on bawdy-houses, living on avails of prostitution and communicating in public for purposes of prostitution under Criminal Code — Prostitutes alleging impugned provisions violate s. 7 security of the person rights by preventing implementation of safety measures that could protect them from violent clients — Prostitutes also alleging prohibition on communicating in public for purposes of prostitution infringes freedom of expression guarantee — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 7 — Criminal Code, R.S.C. 1985, c. C-46, ss. 197(1), 210, 212(1)(j), 213(1)(c).

* A judgment was issued on January 17, 2014, amending para. 164 of both versions of the reasons. The amendments are included in these reasons.

Répertorié : Canada (Procureur général) *c.* Bedford

2013 CSC 72

N° du greffe : 34788.

2013 : 13 juin; 2013 : 20 décembre*.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Charte des droits — Droit à la sécurité de la personne — Liberté d'expression — Droit criminel — Prostitution — Maisons de débauche — Proxénétisme — Communiquer en public à des fins de prostitution — Contestation par des prostituées des dispositions du Code criminel qui interdisent les maisons de débauche, le proxénétisme et la communication en public à des fins de prostitution — Allégation selon laquelle ces dispositions portent atteinte au droit à la sécurité de la personne garanti à l'art. 7 en empêchant les prostituées de prendre des mesures susceptibles de les protéger contre la violence de certains clients — Allégation supplémentaire suivant laquelle l'interdiction de communiquer en public à des fins de prostitution porte atteinte à la liberté d'expression garantie aux prostituées — Charte canadienne des droits et libertés, art. 1, 2b), 7 — Code criminel, L.R.C. 1985, ch. C-46, art. 197(1), 210, 212(1)j), 213(1)c).

* Un jugement a été rendu le 17 janvier 2014, modifiant le par. 164 des deux versions des motifs. Les modifications ont été incorporées dans les présents motifs.

Courts — Decisions — Stare decisis — Standard of review — Prostitutes challenging constitutionality of prohibitions on bawdy-houses, living on avails of prostitution and communicating in public for purposes of prostitution under Criminal Code — Under what circumstances application judge could revisit conclusions of Supreme Court of Canada in Prostitution Reference which upheld bawdy-house and communicating prohibitions — Degree of deference owed to application judge's findings on social and legislative facts.

B, L and S, current or former prostitutes, brought an application seeking declarations that three provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, which criminalize various activities related to prostitution, infringe their rights under s. 7 of the *Charter*: s. 210 makes it an offence to keep or be in a bawdy-house; s. 212(1)(*j*) prohibits living on the avails of prostitution; and, s. 213(1)(*c*) prohibits communicating in public for the purposes of prostitution. They argued that these restrictions on prostitution put the safety and lives of prostitutes at risk, by preventing them from implementing certain safety measures — such as hiring security guards or "screening" potential clients — that could protect them from violence. B, L and S also alleged that s. 213(1)(*c*) infringes the freedom of expression guarantee under s. 2(*b*) of the *Charter*, and that none of the provisions are saved under s. 1.

The Ontario Superior Court of Justice granted the application, declaring, without suspension, that each of the impugned *Criminal Code* provisions violated the *Charter* and could not be saved by s. 1. The Ontario Court of Appeal agreed s. 210 was unconstitutional and struck the word "prostitution" from the definition of "common bawdy-house" as it applies to s. 210, however it suspended the declaration of invalidity for 12 months. The court declared that s. 212(1)(*j*) was an unjustifiable violation of s. 7, ordering the reading in of words to clarify that the prohibition on living on the avails of prostitution applies only to those who do so "in circumstances of exploitation". It further held the communicating prohibition under s. 213(1)(*c*) did not violate either s. 2(*b*) or s. 7. The Attorneys General appeal from the declaration that ss. 210 and 212(1)(*j*) of the *Code* are unconstitutional. B, L and S cross-appeal on the constitutionality of s. 213(1)(*c*) and in respect of the s. 210 remedy.

Tribunaux — Décisions — Stare decisis — Norme de contrôle — Contestation par des prostituées des dispositions du Code criminel qui interdisent les maisons de débauche, le proxénétisme et la communication en public à des fins de prostitution — À quelles conditions un juge de première instance peut-il réexaminer les conclusions de la Cour suprême du Canada dans le Renvoi sur la prostitution selon lesquelles les interdictions visant les maisons de débauche et la communication sont valides? — Degré de déférence que commandent les conclusions du juge de première instance sur des faits sociaux ou législatifs.

B, L et S — trois prostituées ou ex-prostituées — ont sollicité un jugement déclarant que trois dispositions du *Code criminel*, L.R.C. 1985, ch. C-46, qui criminalisent diverses activités liées à la prostitution, portent atteinte au droit que leur garantit l'art. 7 de la *Charte* : l'art. 210 crée l'acte criminel de tenir une maison de débauche ou de s'y trouver; l'al. 212(1)*j*) interdit de vivre des produits de la prostitution d'autrui; l'al. 213(1)*c*) interdit la communication en public à des fins de prostitution. Elles font valoir que ces restrictions apportées à la prostitution compromettent la sécurité et la vie des prostituées en ce qu'elles les empêchent de prendre certaines mesures de protection contre les actes de violence, telles l'embauche d'un garde ou l'évaluation préalable du client. Elles ajoutent que l'al. 213(1)*c*) porte atteinte à la liberté d'expression garantie à l'al. 2*b*) de la *Charte* et qu'aucune des dispositions n'est sauvegardée par l'article premier.

La Cour supérieure de justice de l'Ontario a fait droit à la demande et déclaré, sans effet suspensif, que chacune des dispositions contestées du *Code criminel* porte atteinte à un droit ou à une liberté garantis par la *Charte* et ne peut être sauvegardée par application de l'article premier. La Cour d'appel de l'Ontario a convenu de l'inconstitutionnalité de l'art. 210 et radié le mot « prostitution » de la définition de « maison de débauche » applicable à cette disposition, mais elle a suspendu l'effet de la déclaration d'invalidité pendant 12 mois. Elle a statué que l'al. 212(1)*j*) constitue une atteinte injustifiable au droit garanti à l'art. 7 et ordonné d'interpréter la disposition de manière que l'interdiction vise seulement les personnes qui vivent de la prostitution d'autrui « dans des situations d'exploitation », comme si ces mots y étaient employés. Elle a par ailleurs estimé que l'interdiction de communiquer prévue à l'al. 213(1)*c*) n'est attentatoire ni à la liberté garantie par l'al. 2*b*), ni au droit que consacre l'art. 7. Les procureurs généraux se pourvoient contre la déclaration d'inconstitutionnalité de l'art. 210 et de l'al. 212(1)*j*) du *Code*. B, L et S se pourvoient de manière incidente relativement à la constitutionnalité de l'al. 213(1)*c*) et à la mesure prise pour remédier à l'inconstitutionnalité de l'art. 210.

Held: The appeals should be dismissed and the cross-appeal allowed. Section 210, as it relates to prostitution, and ss. 212(1)(*j*) and 213(1)(*c*) of the *Criminal Code* are declared to be inconsistent with the *Charter*. The word "prostitution" is struck from the definition of "common bawdy-house" in s. 197(1) of the *Criminal Code* as it applies to s. 210 only. The declaration of invalidity should be suspended for one year.

The three impugned provisions, primarily concerned with preventing public nuisance as well as the exploitation of prostitutes, do not pass *Charter* muster: they infringe the s. 7 rights of prostitutes by depriving them of security of the person in a manner that is not in accordance with the principles of fundamental justice. It is not necessary to determine whether this Court should depart from or revisit its conclusion in the *Prostitution Reference* that s. 213(1)(*c*) does not violate s. 2(*b*) since it is possible to resolve this case entirely on s. 7 grounds.

The common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. However, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. The threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. In this case, the application judge was entitled to rule on the new legal issues of whether the laws in question violated the security of the person interests under s. 7, as the majority decision of this Court in the *Prostitution Reference* was based on the s. 7 physical liberty interest alone. Furthermore, the principles of fundamental justice considered in the *Prostitution Reference* dealt with vagueness and the permissibility of indirect criminalization. The principles raised in this case — arbitrariness, overbreadth, and gross disproportionality — have, to a large extent, developed only in the last 20 years. The application judge was not, however, entitled to decide the question of whether the communication provision is a justified limit on freedom of expression. That issue was decided in the *Prostitution Reference* and was binding on her.

The application judge's findings on social and legislative facts are entitled to deference. The standard of review for findings of fact — whether adjudicative,

Arrêt : Les pourvois sont rejetés, et le pourvoi incident est accueilli. L'article 210, en ce qui concerne la prostitution, et les al. 212(1)*j*) et 213(1)*c*) du *Code criminel* sont déclarés incompatibles avec la *Charte*. Le mot « prostitution » est supprimé de la définition de « maison de débauche » figurant au par. 197(1) du *Code criminel* pour les besoins de l'art. 210 uniquement. L'effet de la déclaration d'invalidité est suspendu pendant un an.

Les trois dispositions contestées, qui visent principalement à empêcher les nuisances publiques et l'exploitation des prostituées, ne résistent pas au contrôle constitutionnel. Elles portent atteinte au droit à la sécurité de la personne que l'art. 7 garantit aux prostituées, et ce, d'une manière non conforme aux principes de justice fondamentale. Point n'est besoin de déterminer si notre Cour devrait rompre avec la conclusion qu'elle a tirée dans le *Renvoi sur la prostitution*, à savoir que l'al. 213(1)*c*) ne porte pas atteinte à la liberté garantie à l'al. 2*b*), ou la réexaminer, puisqu'il est possible de trancher en l'espèce sur le fondement du seul art. 7.

La règle du *stare decisis* issue de la common law est subordonnée à la Constitution et ne saurait avoir pour effet d'obliger un tribunal à valider une loi inconstitutionnelle. Une juridiction inférieure ne peut toutefois pas faire abstraction d'un précédent qui fait autorité, et la barre est haute lorsqu'il s'agit d'en justifier le réexamen. Les conditions sont réunies lorsqu'une nouvelle question de droit se pose ou qu'il y a modification importante de la situation ou de la preuve. En l'espèce, la juge de première instance pouvait trancher la question nouvelle de savoir si les dispositions en cause portent atteinte ou non au droit à la sécurité de la personne garanti à l'art. 7 car, dans le *Renvoi sur la prostitution*, les juges majoritaires de la Cour statuent uniquement en fonction du droit à la liberté physique de la personne garanti par l'art. 7. Qui plus est, dans le *Renvoi sur la prostitution*, les principes de justice fondamentale sont examinés sous l'angle de l'imprécision de la criminalisation indirecte et de l'acceptabilité de celle-ci. En l'espèce, ce sont le caractère arbitraire, la portée trop grande et le caractère totalement disproportionné qui sont allégués, des notions qui ont en grande partie vu le jour au cours des 20 dernières années. La juge de première instance n'était cependant pas admise à trancher la question de savoir si la disposition sur la communication constitue une limitation justifiée de la liberté d'expression. Notre Cour s'était prononcée sur ce point dans le *Renvoi sur la prostitution*, et la juge était liée par cette décision.

Les conclusions tirées en première instance sur des faits sociaux ou législatifs commandent la déférence. La norme de contrôle applicable aux conclusions de fait —

social, or legislative — remains palpable and overriding error.

The impugned laws negatively impact security of the person rights of prostitutes and thus engage s. 7. The proper standard of causation is a flexible "sufficient causal connection" standard, as correctly adopted by the application judge. The prohibitions all heighten the risks the applicants face in prostitution — itself a legal activity. They do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks. That causal connection is not negated by the actions of third-party johns and pimps, or prostitutes' so-called choice to engage in prostitution. While some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so. Moreover, it makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence.

The applicants have also established that the deprivation of their security of the person is not in accordance with the principles of fundamental justice: principles that attempt to capture basic values underpinning our constitutional order. This case concerns the basic values against arbitrariness (where there is *no connection* between the effect and the object of the law), overbreadth (where the law goes too far and interferes with *some* conduct that bears no connection to its objective), and gross disproportionality (where the effect of the law is grossly disproportionate to the state's objective). These are three distinct principles, but overbreadth is related to arbitrariness, in that the question for both is whether there is no connection between the law's effect and its objective. All three principles compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness; they do not look to how well the law achieves its object, or to how much of the population the law benefits or is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently

qu'elles portent sur les faits en litige, des faits sociaux ou des faits législatifs — demeure celle de l'erreur manifeste et dominante.

Les dispositions contestées ont un effet préjudiciable sur la sécurité des prostituées et mettent donc en jeu le droit garanti à l'art. 7. La norme qui convient est celle du « lien de causalité suffisant », appliquée avec souplesse, celle retenue à juste titre par la juge de première instance. Les interdictions augmentent tous les risques auxquels s'exposent les demanderesses lorsqu'elles se livrent à la prostitution, une activité qui est en soi légale. Elles ne font pas qu'encadrer la pratique de la prostitution. Elles franchissent un pas supplémentaire déterminant par l'imposition de conditions *dangereuses* à la pratique de la prostitution : elles empêchent des personnes qui se livrent à une activité risquée, mais légale, de prendre des mesures pour assurer leur propre protection. Le lien de causalité n'est pas rendu inexistant par les actes de tiers (clients et proxénètes) ou le prétendu choix des intéressées de se prostituer. Bien que certaines prostituées puissent correspondre au profil de celle qui choisit librement de se livrer à l'activité économique risquée qu'est la prostitution (ou qui a un jour fait ce choix), de nombreuses prostituées n'ont pas vraiment d'autre solution que la prostitution. De plus, le fait que le comportement des proxénètes et des clients soit la source immédiate des préjudices subis par les prostituées ne change rien. La violence d'un client ne diminue en rien la responsabilité de l'État qui rend une prostituée plus vulnérable à cette violence.

Les demanderesses ont également établi que l'atteinte à leur droit à la sécurité n'est pas conforme aux principes de justice fondamentale, lesquels sont censés intégrer les valeurs fondamentales qui sous-tendent notre ordre constitutionnel. Dans la présente affaire, les valeurs fondamentales qui nous intéressent s'opposent à l'arbitraire (*absence de lien* entre l'effet de la loi et son objet), à la portée excessive (la disposition va trop loin et empiète sur *quelque* comportement sans lien avec son objectif) et à la disproportion totale (l'effet de la disposition est totalement disproportionné à l'objectif de l'État). Il s'agit de trois notions distinctes, mais la portée excessive est liée au caractère arbitraire en ce que l'absence de lien entre l'effet de la disposition et son objectif est commune aux deux. Les trois notions supposent de comparer l'atteinte aux droits qui découle de la loi avec l'objectif de la loi, et non avec son efficacité; elles ne s'intéressent pas à la réalisation de l'objectif législatif ou au pourcentage de la population qui bénéficie de l'application de la loi ou qui en pâtit. L'analyse se veut qualitative, et non quantitative. La question que commande l'art. 7 est celle de savoir si une disposition législative intrinsèquement

bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.

Applying these principles to the impugned provisions, the negative impact of the bawdy-house prohibition (s. 210) on the applicants' security of the person is grossly disproportionate to its objective of preventing public nuisance. The harms to prostitutes identified by the courts below, such as being prevented from working in safer fixed indoor locations and from resorting to safe houses, are grossly disproportionate to the deterrence of community disruption. Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes. Second, the purpose of the living on the avails of prostitution prohibition in s. 212(1)(*j*) is to target pimps and the parasitic, exploitative conduct in which they engage. The law, however, punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes and those who could increase the safety and security of prostitutes, for example, legitimate drivers, managers, or bodyguards. It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes *some* conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. The living on the avails provision is consequently overbroad. Third, the purpose of the communicating prohibition in s. 213(1)(*c*) is not to eliminate street prostitution for its own sake, but to take prostitution off the streets and out of public view in order to prevent the nuisances that street prostitution can cause. The provision's negative impact on the safety and lives of street prostitutes, who are prevented by the communicating prohibition from screening potential clients for intoxication and propensity to violence, is a grossly disproportionate response to the possibility of nuisance caused by street prostitution.

While the Attorneys General have not seriously argued that the laws, if found to infringe s. 7, can be justified under s. 1, some of their arguments under s. 7 are properly addressed at this stage of the analysis. In particular, they attempt to justify the living on the avails provision on the basis that it must be drafted broadly in order to capture all exploitative relationships. However, the law not only catches drivers and bodyguards, who may actually be pimps, but it also catches clearly non-exploitative relationships, such as receptionists or accountants who work

mauvaise prive *qui que ce soit* du droit à la vie, à la liberté ou à la sécurité de sa personne; un effet totalement disproportionné, excessif ou arbitraire sur une seule personne suffit pour établir l'atteinte au droit garanti à l'art. 7.

Si l'on applique ces notions aux dispositions contestées, l'effet préjudiciable de l'interdiction des maisons de débauche (art. 210) sur le droit à la sécurité des demanderesses est totalement disproportionné à l'objectif de prévenir les nuisances publiques. Les préjudices subis par les prostituées selon les juridictions inférieures (p. ex. le fait de ne pouvoir travailler dans un lieu fixe, sûr et situé à l'intérieur, ni avoir recours à un refuge sûr) sont totalement disproportionnés à l'objectif de réprimer le désordre public. Le législateur a le pouvoir de réprimer les nuisances, mais pas au prix de la santé, de la sécurité et de la vie des prostituées. L'interdiction faite à l'al. 212(1)*j*) de vivre des produits de la prostitution d'autrui vise à réprimer le proxénétisme, ainsi que le parasitisme et l'exploitation qui y sont associés. Or, la disposition vise toute personne qui vit des produits de la prostitution d'autrui sans établir de distinction entre celui qui exploite une prostituée et celui qui peut accroître la sécurité d'une prostituée (tel le chauffeur, le gérant ou le garde du corps véritable). La disposition vise également toute personne qui fait affaire avec une prostituée, y compris un comptable ou un réceptionniste. *Certains* actes sans aucun rapport avec l'objectif de prévenir l'exploitation des prostituées tombent ainsi sous le coup de la loi. La disposition sur le proxénétisme a donc une portée excessive. L'alinéa 213(1)*c*), qui interdit la communication, vise non pas à éliminer la prostitution dans la rue comme telle, mais bien à sortir la prostitution de la rue et à la soustraire au regard du public afin d'empêcher les nuisances susceptibles d'en découler. Son effet préjudiciable sur le droit à la sécurité et à la vie des prostituées de la rue, du fait que ces dernières sont empêchées de communiquer avec leurs clients éventuels afin de déterminer s'ils sont intoxiqués ou enclins à la violence, est totalement disproportionné au risque de nuisance causée par la prostitution de la rue.

Même si les procureurs généraux ne prétendent pas sérieusement que, si elles sont jugées contraires à l'art. 7, les dispositions en cause peuvent être justifiées en vertu de l'article premier, certaines des thèses qu'ils défendent en fonction de l'art. 7 sont reprises à juste titre à cette étape de l'analyse. En particulier, ils tentent de justifier la disposition sur le proxénétisme par la nécessité d'un libellé général afin que tombent sous le coup de son application toutes les relations empreintes d'exploitation. Or, la disposition vise non seulement

with prostitutes. The law is therefore not minimally impairing. Nor, at the final stage of the s. 1 inquiry, is the law's effect of preventing prostitutes from taking measures that would increase their safety, and possibly save their lives, outweighed by the law's positive effect of protecting prostitutes from exploitative relationships. The impugned laws are not saved by s. 1.

Concluding that each of the challenged provisions violates the *Charter* does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted, as long as it does so in a way that does not infringe the constitutional rights of prostitutes. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime. Considering all the interests at stake, the declaration of invalidity should be suspended for one year.

Cases Cited

Referred to: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458; *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *R. v. Pierce* (1982), 37 O.R. (2d) 721; *R. v. Worthington* (1972), 10 C.C.C. (2d) 311; *R. v. Downey*, [1992] 2 S.C.R. 10; *R. v. Grilo* (1991), 2 O.R. (3d) 514; *R. v. Barrow* (2001), 54 O.R. (3d) 417; *R. v. Head* (1987), 59 C.R. (3d) 80; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R.

le chauffeur ou le garde du corps, qui peut en réalité être un proxénète, mais aussi la personne qui entretient avec la prostituée des rapports manifestement dénués d'exploitation (p. ex. un réceptionniste ou un comptable). La disposition n'équivaut donc pas à une atteinte minimale. Pour les besoins du dernier volet de l'analyse fondée sur l'article premier, son effet bénéfique — protéger les prostituées contre l'exploitation — ne l'emporte pas non plus sur son effet qui empêche les prostituées de prendre des mesures pour accroître leur sécurité et, peut-être, leur sauver la vie. Les dispositions contestées ne sont pas sauvegardées par application de l'article premier.

La conclusion que les dispositions contestées portent atteinte à des droits garantis par la *Charte* ne dépouille pas le législateur du pouvoir de décider des lieux et des modalités de la prostitution, à condition qu'il exerce ce pouvoir sans porter atteinte aux droits constitutionnels des prostituées. L'encadrement de la prostitution est un sujet complexe et délicat. Il appartiendra au législateur, s'il le juge opportun, de concevoir une nouvelle approche qui intègre les différents éléments du régime actuel. Au vu de l'ensemble des intérêts en jeu, il convient de suspendre l'effet de la déclaration d'invalidité pendant un an.

Jurisprudence

Arrêts mentionnés : *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123; *Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134; *R. c. Morgentaler*, [1988] 1 R.C.S. 30; *Canada c. Craig*, 2012 CSC 43, [2012] 2 R.C.S. 489; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199; *R. c. Malmo-Levine*, 2003 CSC 74, [2003] 3 R.C.S. 571; *R. c. Spence*, 2005 CSC 71, [2005] 3 R.C.S. 458; *R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330; *H.L. c. Canada (Procureur général)*, 2005 CSC 25, [2005] 1 R.C.S. 401; *R. c. Pierce* (1982), 37 O.R. (2d) 721; *R. c. Worthington* (1972), 10 C.C.C. (2d) 311; *R. c. Downey*, [1992] 2 R.C.S. 10; *R. c. Grilo* (1991), 2 O.R. (3d) 514; *R. c. Barrow* (2001), 54 O.R. (3d) 417; *R. c. Head* (1987), 59 C.R. (3d) 80; *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307; *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3; *Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519; *Nouveau-Brunswick (Ministre de la Santé et des Services*

486; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489; *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555; *R. v. S.S.C.*, 2008 BCCA 262, 257 B.C.A.C. 57; *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735; *Rockert v. The Queen*, [1978] 2 S.C.R. 704; *R. v. Zundel*, [1992] 2 S.C.R. 731; *Shaw v. Director of Public Prosecutions*, [1962] A.C. 220; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), 7.
Criminal Code, R.S.C. 1985, c. C-46, ss. 197(1) "common bawdy-house", 210, 212(1)(*j*), 213(1)(*c*).
Criminal Code, S.C. 1953-54, c. 51, Part V, s. 182.
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 14.05(3)(g.1).

Authors Cited

Canada. House of Commons. Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights. *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws*. Ottawa: Communication Canada, 2006.
Coke, Edward. *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminal Causes*. London: Clarke, 1817 (first published 1644).
Hogg, Peter W. "The Brilliant Career of Section 7 of the Charter" (2012), 58 *S.C.L.R.* (2d) 195.
Ontario. *Inquiry into Pediatric Forensic Pathology in Ontario: Report*, vol. 3, *Policy and Recommendations*, by Stephen T. Goudge. Toronto: Ministry of the Attorney General, 2008.
Rubin, Gerald. "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law" (1960), 6 *McGill L.J.* 168.
Stewart, Hamish. *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*. Toronto: Irwin Law, 2012.

APPEALS and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Rosenberg, Feldman, MacPherson and Cronk JJ.A.), 2012 ONCA 186, 109 O.R. (3d) 1, 290 O.A.C. 236, 346 D.L.R. (4th) 385, 282 C.C.C. (3d) 1, 256 C.R.R. (2d) 143, 91 C.R. (6th) 257, [2012] O.J. No. 1296 (QL), 2012 CarswellOnt 3557, affirming in part a decision of Himel J., 2010 ONSC 4264, 102 O.R.

communautaires) c. G. (J.), [1999] 3 R.C.S. 46; *Renvoi sur la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486; *Chaoulli c. Québec (Procureur général)*, 2005 CSC 35, [2005] 1 R.C.S. 791; *R. c. Heywood*, [1994] 3 R.C.S. 761; *R. c. Demers*, 2004 CSC 46, [2004] 2 R.C.S. 489; *R. c. Khawaja*, 2012 CSC 69, [2012] 3 R.C.S. 555; *R. c. S.S.C.*, 2008 BCCA 262, 257 B.C.A.C. 57; *R. c. Clay*, 2003 CSC 75, [2003] 3 R.C.S. 735; *Rockert c. La Reine*, [1978] 2 R.C.S. 704; *R. c. Zundel*, [1992] 2 R.C.S. 731; *Shaw c. Director of Public Prosecutions*, [1962] A.C. 220; *Schachter c. Canada*, [1992] 2 R.C.S. 679.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 2*b*), 7.
Code criminel, L.R.C. 1985, ch. C-46, art. 197(1) « maison de débauche », 210, 212(1)*j*), 213(1)*c*).
Code criminel, S.C. 1953-1954, ch. 51, partie V, art. 182.
Règles de procédure civile, R.R.O. 1990, Règl. 194, règle 14.05(3)g.1).

Doctrine et autres documents cités

Canada. Chambre des communes. Sous-comité de l'examen des lois sur le racolage du Comité permanent de la justice et des droits de la personne. *Le défi du changement : Étude des lois pénales en matière de prostitution au Canada*. Ottawa : Communication Canada, 2006.
Coke, Edward. *The Third Part of the Institutes of the Laws of England : Concerning High Treason, and Other Pleas of the Crown and Criminal Causes*. London : Clarke, 1817 (first published 1644).
Hogg, Peter W. « The Brilliant Career of Section 7 of the Charter » (2012), 58 *S.C.L.R.* (2d) 195.
Ontario. *Commission d'enquête sur la médecine légale pédiatrique en Ontario : Rapport*, vol. 3, *Politique et recommandations*, par Stephen T. Goudge. Toronto : Ministère du Procureur général, 2008.
Rubin, Gerald. « The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law » (1960), 6 *R.D. McGill* 168.
Stewart, Hamish. *Fundamental Justice : Section 7 of the Canadian Charter of Rights and Freedoms*. Toronto : Irwin Law, 2012.

POURVOIS et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Ontario (les juges Doherty, Rosenberg, Feldman, MacPherson et Cronk), 2012 ONCA 186, 109 O.R. (3d) 1, 290 O.A.C. 236, 346 D.L.R. (4th) 385, 282 C.C.C. (3d) 1, 256 C.R.R. (2d) 143, 91 C.R. (6th) 257, [2012] O.J. No. 1296 (QL), 2012 CarswellOnt 3557, qui a confirmé en partie une décision de la juge Himel,

(3d) 321, 327 D.L.R. (4th) 52, 262 C.C.C. (3d) 129, 217 C.R.R. (2d) 1, 80 C.R. (6th) 256, [2010] O.J. No. 4057 (QL), 2010 CarswellOnt 7249. Appeals dismissed and cross-appeal allowed.

Michael H. Morris, *Nancy Dennison* and *Gail Sinclair*, for the appellant/respondent on cross-appeal the Attorney General of Canada.

Jamie C. Klukach, *Christine Bartlett-Hughes* and *Megan Stephens*, for the appellant/respondent on cross-appeal the Attorney General of Ontario.

Alan N. Young, *Marlys A. Edwardh* and *Daniel Sheppard*, for the respondents/appellants on cross-appeal.

Sylvain Leboeuf and *Julie Dassylva*, for the intervener the Attorney General of Quebec.

Katrina E. Pacey, *Joseph J. Arvay*, *Q.C.*, *Elin R. S. Sigurdson*, *Lisa C. Glowacki* and *M. Kathleen Kinch*, for the interveners the Pivot Legal Society, the Downtown Eastside Sex Workers United Against Violence Society and the PACE Society.

Written submissions only by *Michael A. Feder* and *Tammy Shoranick*, for the intervener the Secretariat of the Joint United Nations Programme on HIV/AIDS.

Brent B. Olthuis, *Megan Vis-Dunbar* and *Michael Sobkin*, for the intervener the British Columbia Civil Liberties Association.

Georgialee A. Lang and *Donald Hutchinson*, for the intervener the Evangelical Fellowship of Canada.

Jonathan A. Shime, *Megan Schwartzentruber* and *Renée Lang*, for the interveners the Canadian HIV/AIDS Legal Network, the British Columbia Centre for Excellence in HIV/AIDS and the HIV & AIDS Legal Clinic Ontario.

Janine Benedet and *Fay Faraday*, for the interveners the Canadian Association of Sexual Assault Centres, the Native Women's Association of

2010 ONSC 4264, 102 O.R. (3d) 321, 327 D.L.R. (4th) 52, 262 C.C.C. (3d) 129, 217 C.R.R. (2d) 1, 80 C.R. (6th) 256, [2010] O.J. No. 4057 (QL), 2010 CarswellOnt 7249. Pourvois rejetés et pourvoi incident accueilli.

Michael H. Morris, *Nancy Dennison* et *Gail Sinclair*, pour l'appelant/intimé au pourvoi incident le procureur général du Canada.

Jamie C. Klukach, *Christine Bartlett-Hughes* et *Megan Stephens*, pour l'appelant/intimé au pourvoi incident le procureur général de l'Ontario.

Alan N. Young, *Marlys A. Edwardh* et *Daniel Sheppard*, pour les intimées/appelantes au pourvoi incident.

Sylvain Leboeuf et *Julie Dassylva*, pour l'intervenant le procureur général du Québec.

Katrina E. Pacey, *Joseph J. Arvay*, *c.r.*, *Elin R. S. Sigurdson*, *Lisa C. Glowacki* et *M. Kathleen Kinch*, pour les intervenantes Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society et PACE Society.

Argumentation écrite seulement par *Michael A. Feder* et *Tammy Shoranick*, pour l'intervenant le Secrétariat du Programme commun des Nations Unies sur le VIH/sida.

Brent B. Olthuis, *Megan Vis-Dunbar* et *Michael Sobkin*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Georgialee A. Lang et *Donald Hutchinson*, pour l'intervenante l'Alliance évangélique du Canada.

Jonathan A. Shime, *Megan Schwartzentruber* et *Renée Lang*, pour les intervenants le Réseau juridique canadien VIH/sida, British Columbia Centre for Excellence in HIV/AIDS et HIV & AIDS Legal Clinic Ontario.

Janine Benedet et *Fay Faraday*, pour les intervenants l'Association canadienne des centres contre les agressions à caractère sexuel, l'Association

Canada, the Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle, Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel and the Vancouver Rape Relief Society.

Robert W. Staley, *Ranjan K. Agarwal* and *Amanda C. McLachlan*, for the interveners the Christian Legal Fellowship, the Catholic Civil Rights League and REAL Women of Canada.

Joseph J. Arvay, *Q.C.*, and *Cheryl Milne*, for the intervener the David Asper Centre for Constitutional Rights.

Walid Hijazi, for the intervener the Simone de Beauvoir Institute.

Gwendoline Allison, for the intervener the AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution.

Christa Big Canoe and *Emily R. Hill*, for the intervener Aboriginal Legal Services of Toronto Inc.

des femmes autochtones du Canada, l'Association canadienne des Sociétés Elizabeth Fry, l'Action ontarienne contre la violence faite aux femmes, la Concertation des luttes contre l'exploitation sexuelle, le Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel et Vancouver Rape Relief Society.

Robert W. Staley, *Ranjan K. Agarwal* et *Amanda C. McLachlan*, pour les intervenantes l'Alliance des chrétiens en droit, la Ligue catholique des droits de l'homme et REAL Women of Canada.

Joseph J. Arvay, *c.r.*, et *Cheryl Milne*, pour l'intervenant David Asper Centre for Constitutional Rights.

Walid Hijazi, pour l'intervenant l'Institut Simone de Beauvoir.

Gwendoline Allison, pour l'intervenante AWCEP Asian Women for Equality Society, exerçant ses activités sous le nom Asian Women Coalition Ending Prostitution.

Christa Big Canoe et *Emily R. Hill*, pour l'intervenante Aboriginal Legal Services of Toronto Inc.

Table of contents

Table des matières

she did not report to the police out of fear of police scrutiny and the possibility of criminal charges.

[12] Presently, Ms. Lebovitch primarily works independently out of her home, where she takes various safety precautions, including: making sure client telephone calls are from unblocked numbers; not taking calls from clients who sound drunk, high, or in another manner undesirable; asking for expectations upfront; taking clients' full names and verifying them using directory assistance; getting referrals from regular clients; and calling a third party — her "safe call" — when the client arrives and before he leaves. Ms. Lebovitch fears being charged and convicted under the bawdy-house provisions and the consequent possibility of forfeiture of her home. She says that the fear of criminal charges has caused her to work on the street on occasion. She is also concerned that her partner will be charged with living on the avails of prostitution. She has never been charged with a criminal offence of any kind. Ms. Lebovitch volunteers as the spokesperson for Sex Professionals of Canada ("SPOC"), and she also records information from women calling to report "bad dates" — incidents that ended in violence or theft. Ms. Lebovitch stated that she enjoys her job and does not plan to leave it in the foreseeable future.

[13] Valerie Scott was born in Moncton, New Brunswick, in 1958. She is currently the executive director of SPOC, and she no longer works as a prostitute. In the past, she worked indoors, from her home or in hotel rooms; she also worked as a prostitute on the street, in massage parlours, and she ran a small escort business. She has never been charged with a criminal offence of any kind. When Ms. Scott worked from home, she would screen new clients by meeting them in public locations. She never experienced significant harm working from home. Around 1984, as awareness about HIV/AIDS increased, Ms. Scott was compelled to work as a street prostitute, since indoor clients felt entitled not to wear condoms. On the street, she was subjected to threats of violence, as well as verbal and physical abuse. Ms. Scott described some precautions street

essentiellement attribuables à une mauvaise gestion. Elle n'a connu qu'un seul cas de violence digne de mention, qu'elle n'a toutefois pas dénoncé de crainte d'attirer l'attention de la police sur ses activités et d'être accusée au criminel.

[12] À l'heure actuelle, M^me^ Lebovitch se prostitue essentiellement chez elle, de manière autonome. Elle prend diverses précautions, dont s'assurer que le numéro de téléphone du client n'est pas masqué, refuser un client qui semble ivre, intoxiqué ou par ailleurs rebutant, s'enquérir au départ des attentes du client, lui demander son nom au complet et vérifier son identité à l'assistance annuaire, obtenir des références d'un client fiable et appeler un tiers — son « ange gardien » — à l'arrivée du client et peu avant qu'il ne parte. M^me^ Lebovitch craint d'être accusée et déclarée coupable de tenir une maison de débauche et que sa demeure soit confisquée en conséquence. Elle affirme que la peur d'être accusée au criminel l'a parfois amenée à travailler dans la rue. Elle craint également que son conjoint ne soit accusé de proxénétisme. Elle n'a jamais fait l'objet d'accusations au pénal. Elle est porte-parole bénévole de l'organisme Sex Professionals of Canada (« SPOC ») et consigne par ailleurs les incidents que lui signalent des prostituées victimes de violence ou de vol de la part de clients. M^me^ Lebovitch dit aimer son travail et n'entend pas en changer dans un avenir prévisible.

[13] Née en 1958 à Moncton, au Nouveau-Brunswick, Valerie Scott est actuellement directrice administrative de SPOC. Elle ne travaille plus comme prostituée, mais elle l'a fait, à l'intérieur, chez elle ou dans des chambres d'hôtel, dans la rue et dans des salons de massage. Elle a aussi dirigé une petite agence d'escortes. Elle n'a jamais été accusée de la moindre infraction criminelle. Lorsqu'elle travaillait chez elle, elle soumettait tout nouveau client à une évaluation préalable lors d'une rencontre dans un lieu public. Elle n'a alors jamais eu d'ennuis graves. Vers 1984, les craintes accrues suscitées par le VIH/SIDA l'ont amenée à travailler dans la rue car les clients qu'elle recevait chez elle se croyaient dispensés du port du condom. Dans la rue, elle a été l'objet de menaces de violence ainsi que d'agressions verbales et physiques. Elle fait

prostitutes took prior to the enactment of the communicating law, including working in pairs or threes and having another prostitute visibly write down the client's licence plate number, so he would know he was traceable if something was to go wrong.

[14] Ms. Scott worked as an activist and, among other things, advocated against Bill C-49 (which included the current communicating provision). Ms. Scott stated that following the enactment of the communicating law, the Canadian Organization for the Rights of Prostitutes ("CORP") began receiving calls from women working in prostitution about the increased enforcement of the laws and the prevalence of bad dates. In response, Ms. Scott was involved in setting up a drop-in and phone centre for prostitutes in Toronto; within the first year, Ms. Scott spoke to approximately 250 prostitutes whose main concerns were client violence and legal matters arising from arrest. In 2000, Ms. Scott formed SPOC to revitalize and continue the work previously done by CORP. As the executive director of this organization, she testified before a Parliamentary Subcommittee on Solicitation Laws in 2005. Over the years, Ms. Scott estimates that she has spoken with approximately 1,500 women working in prostitution. If this challenge is successful, Ms. Scott would like to operate an indoor prostitution business. While she recognizes that clients may be dangerous in both outdoor and indoor locations, she would institute safety precautions such as checking identification of clients, making sure other people are close by during appointments to intervene if needed, and hiring a bodyguard.

[15] The three applicants applied pursuant to rule 14.05(3)(g.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for an order that the provisions restricting prostitution are unconstitutional. The evidentiary record consists of over 25,000 pages of evidence in 88 volumes. The affidavit evidence was accompanied by a large volume of studies, reports, newspaper articles, legislation, Hansard and many

état de certaines précautions que les prostituées de la rue prenaient avant l'adoption des dispositions interdisant la communication, dont le travail à deux ou à trois ou la prise ostensible du numéro de plaque du client par une autre prostituée afin que ce dernier sache qu'on pouvait le retracer si les choses tournaient mal.

[14] M^me^ Scott a été militante. Elle a notamment fait campagne contre le projet de loi C-49 (dont est issue la disposition actuelle interdisant la communication). Elle dit qu'après l'interdiction de la communication, la Canadian Organization for the Rights of Prostitutes (« CORP ») a commencé à recevoir des appels de prostituées qui constataient une répression policière accrue et un plus grand nombre d'incidents avec des clients. C'est pourquoi elle a participé à la mise sur pied à Toronto d'un centre d'aide aux prostituées dont les services étaient offerts sur place et au téléphone. Dès la première année, M^me^ Scott s'est entretenue avec environ 250 prostituées dont les principaux sujets de préoccupation étaient la violence des clients et les conséquences juridiques d'une arrestation. En 2000, elle a créé SPOC afin de donner une nouvelle impulsion au travail entrepris par la CORP. C'est à titre de directrice administrative de cet organisme qu'elle a témoigné en 2005 devant le Sous-comité parlementaire de l'examen des lois sur le racolage. Au fil des ans, elle se serait entretenue avec environ 1 500 femmes qui se livrent à la prostitution. Si les appelantes ont gain de cause, M^me^ Scott aimerait se mettre à son compte et offrir des services de prostitution à l'intérieur. Elle reconnaît qu'un client peut se révéler dangereux tant à l'intérieur qu'à l'extérieur, mais elle prendrait des précautions, comme la vérification de l'identité du client, la présence d'une autre personne à proximité qui puisse intervenir au besoin lors d'un rendez-vous et l'embauche d'un garde du corps.

[15] Les trois demanderesses ont demandé, sur le fondement de l'al. 14.05(3)g.1) des *Règles de procédure civile*, R.R.O. 1990, Règl. 194, que les dispositions qui limitent la prostitution soient déclarées inconstitutionnelles. Le dossier de preuve compte plus de 25 000 pages et 88 volumes. La preuve par affidavit s'accompagne d'une foule d'études, de rapports, d'articles de journaux, d'extraits de textes

other documents. Some of the affiants were cross-examined.

II. Legislation

[16] The relevant legislation is as follows:

Canadian Charter of Rights and Freedoms

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

2. Everyone has the following fundamental freedoms:

. . .

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

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

Criminal Code

197. (1) In this Part,

. . .

"common bawdy-house" means a place that is

(*a*) kept or occupied, or

(*b*) resorted to by one or more persons

for the purpose of prostitution or the practice of acts of indecency;

210. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

de loi et des Débats de la Chambre des communes, et de nombreux autres documents. Certains déposants ont été contre-interrogés.

II. Dispositions législatives

[16] Les dispositions législatives applicables sont les suivantes :

Charte canadienne des droits et libertés

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

2. Chacun a les libertés fondamentales suivantes :

. . .

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

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Code criminel

197. (1) Les définitions qui suivent s'appliquent à la présente partie.

. . .

« maison de débauche » Local qui, selon le cas :

a) est tenu ou occupé;

b) est fréquenté par une ou plusieurs personnes,

à des fins de prostitution ou pour la pratique d'actes d'indécence.

210. (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de deux ans quiconque tient une maison de débauche.

(2) Est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque, selon le cas :

SUPREME COURT OF CANADA

CITATION: Canada (Attorney General) *v.* Power, 2024 SCC 26

APPEAL HEARD: December 7, 2023
JUDGMENT RENDERED: July 19, 2024
DOCKET: 40241

BETWEEN:

Attorney General of Canada
Appellant

and

Joseph Power
Respondent

- and -

Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Prince Edward Island, Attorney General of Saskatchewan, Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Fisher River Cree Nation, Sioux Valley Dakota Nation, Manto Sipi Cree Nation, Lake Manitoba First Nation, Quebec Native Women Inc., Speaker of the Senate, David Asper Centre for Constitutional Rights, Canadian Civil Liberties Association, Canadian Constitution Foundation, Queen's Prison Law Clinic, John Howard Society of Canada, British Columbia Civil Liberties Association, West Coast Prison Justice Society and Speaker of the House of Commons
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 119)	Wagner C.J. and Karakatsanis J. (Martin, O'Bonsawin and Moreau JJ. concurring)
REASONS DISSENTING IN PART: (paras. 120 to 253)	Jamal J. (Kasirer J. concurring)
DISSENTING REASONS: (paras. 254 to 383)	Rowe J. (Côté J. concurring)

Attorney General of Canada *Appellant*

v.

Joseph Power *Respondent*

and

Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of Nova Scotia,
Attorney General of New Brunswick,
Attorney General of Manitoba,
Attorney General of British Columbia,
Attorney General of Prince Edward Island,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Attorney General of Newfoundland and Labrador,
Fisher River Cree Nation, Sioux Valley Dakota Nation,
Manto Sipi Cree Nation, Lake Manitoba First Nation,
Quebec Native Women Inc., Speaker of the Senate,
David Asper Centre for Constitutional Rights,
Canadian Civil Liberties Association,
Canadian Constitution Foundation, Queen's Prison Law Clinic,
John Howard Society of Canada,
British Columbia Civil Liberties Association,
West Coast Prison Justice Society and
Speaker of the House of Commons *Interveners*

Indexed as: Canada (Attorney General) *v.* Power

2024 SCC 26

File No.: 40241.

2023: December 7; 2024: July 19.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Constitutional law — Charter of Rights — Remedy — Damages — Legislation enacted by Parliament later found unconstitutional — Plaintiff commencing action against Crown for damages for breach of Charter rights caused by enactment of legislation — Whether damages against Crown can ever be appropriate remedy under Charter for enactment of legislation later declared unconstitutional — Canadian Charter of Rights and Freedoms, s. 24(1).

In 1996, P was convicted of two indictable offences. He was sentenced and served his time. After his release, P applied for a record suspension but his application was denied. At the time of his conviction, persons convicted of indictable offences could apply for a record suspension five years after their release. However, the transitional provisions of legislation enacted since then by Parliament retroactively rendered him permanently ineligible for a record suspension. The transitional provisions were declared unconstitutional by courts in other matters and Canada concedes that their retrospective application violates s. 11(h) and (i) of the *Charter* in a manner that cannot be justified by s. 1. P filed a notice of action seeking, *inter alia*, damages under s. 24(1) of the *Charter* against Canada for the breach of his rights

caused by the enactment of the transitional provisions. In response to P's action, Canada brought a motion on a question of law, asking two questions:

1. Can the Crown, in its executive capacity, be held liable in damages for government officials and Ministers preparing and drafting a proposed Bill that was later enacted by Parliament, and subsequently declared invalid by a court pursuant to s. 52(1) of the *Constitution Act, 1982*?

2. Can the Crown, in its executive capacity, be held liable in damages for Parliament enacting a Bill into law, which legislation was later declared invalid by a court pursuant to s. 52(1) of the *Constitution Act, 1982*?

The motion judge answered "yes" to both questions, finding that the government was entitled to only a limited immunity from *Charter* damages for the enactment of unconstitutional legislation. The Court of Appeal dismissed Canada's appeal, agreeing with the motion judge that the government does not enjoy absolute immunity in exercising its legislative powers.

Held (Kasirer and Jamal JJ. dissenting in part and Côté and Rowe JJ. dissenting): The appeal should be dismissed.

Per **Wagner** C.J. and **Karakatsanis**, Martin, O'Bonsawin and Moreau JJ.: The questions should both be answered in the affirmative. The state is not entitled to an absolute immunity from liability for damages when it enacts unconstitutional

legislation that infringes *Charter* rights. Rather, as the Court held in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, the state may be liable for *Charter* damages if the legislation is clearly unconstitutional or was in bad faith or an abuse of power. An absolute immunity fails to properly reconcile the constitutional principles that protect legislative autonomy, such as parliamentary sovereignty and parliamentary privilege, and the principles that require the government be held accountable for infringing *Charter* rights, such as constitutionality and the rule of law. Each of these principles constitutes an essential part of Canada's constitutional law and they must all be respected to achieve an appropriate separation of powers. By shielding the government from liability in even the most egregious circumstances, absolute immunity would subvert the principles that demand government accountability.

Sections 32(1) and 24 of the *Charter*, along with s. 52(1) of the *Constitution Act, 1982*, entrench the court's role in holding the government to account for *Charter* violations. Pursuant to s. 32(1), the federal and provincial legislatures are subject to *Charter* scrutiny. A declaration of invalidity under s. 52(1), the first and most important remedy when dealing with unconstitutional legislation, allows courts to protect *Charter* rights while respecting the distinct role of the legislature in Canada's constitutional order. As for s. 24(1), it provides a personal remedy in the sense that it is specific to the violation of the applicant's rights; it is a unique public law remedy against the state that should not be assimilated to the principles of private law remedies. An award of damages as a s. 24(1) remedy against the state for exceeding its legal

powers has long been recognized as an important requirement of the rule of law. In *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, the Court set out a four-step test for determining whether damages are an appropriate and just remedy: (1) whether a *Charter* right has been breached; (2) whether damages would fulfill one or more of the related functions of compensation, vindicating the right, or deterring future breaches; (3) whether the state has demonstrated that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust; and (4) the appropriate quantum of damages.

While there is a general presumption against combining remedies under ss. 24(1) and 52(1), there is no categorical restriction. The existence of an alternative remedy is a countervailing consideration under the *Ward* test; however, provided an award of *Charter* damages is not duplicative, the potential to combine declarations and damages must remain available in situations where a declaration would fail to satisfy the functional need for compensation, vindication or to meaningfully deter future breaches. While good governance concerns may defeat an award of damages, the mere suggestion that damages will have a chilling effect on government is not sufficient to defeat an applicant's functional entitlement to *Charter* damages established at steps one and two of the *Ward* test. Damages may promote good governance by encouraging constitutional compliance and deterring *Charter* breaches. Limited immunity for the state for the enactment of legislation subsequently declared unconstitutional is consistent with and best reconciles the constitutional principles underpinning both legislative autonomy and accountability: parliamentary sovereignty, the separation of

powers, parliamentary privilege, the broad and purposive approach to rights and remedial provisions in the *Charter*, and constitutionalism and the rule of law.

First, the principle of parliamentary sovereignty must not be confused with parliamentary supremacy. Parliamentary sovereignty does not mean that Parliament is above the Constitution; rather, Parliament remains subject to the constraints and accountability mechanisms of the Constitution, including the *Charter*. The supremacy of the Constitution in relation to Parliament is well recognized in each application of s. 52 of the *Constitution Act, 1982*. Limited immunity does not impair Parliament's power to make and repeal laws within the confines of the Constitution.

Second, limited immunity is consistent with the separation of powers. The separation of powers does not mean that each branch works in isolation. The Court has never adopted a watertight system of separation but rather has always emphasized that each branch cannot exercise undue interference, which depends entirely on the circumstances and the constitutional principles engaged. Holding the legislature liable for *Charter* damages when it seriously misuses its legislative power does not constitute undue judicial interference in the legislative process. Rather, damages are an after-the-fact remedy for a *Charter* violation. However, respect for the legislative role requires a high threshold for liability for the enactment of unconstitutional legislation.

Third, courts can respect parliamentary privilege when applying the limited immunity threshold. Parliamentary privilege provides the legislature with the tools to execute its core functions. It operates by shielding some areas of legislative

activity from external review: for example, parliamentary privilege gives members of the legislature the freedom of speech necessary to carry out their law-making power without fear of liability, and protects against the compellability of certain types of evidence, such as the testimony of sitting members of Parliament. The protection of these processes is fundamental to Canada's constitutional structure and the functioning of its democracy. Parliamentary privilege cannot be subordinated or diminished by other parts of the Constitution. But *Charter* damages for the enactment of unconstitutional legislation are not claimed against any individual members involved in the legislative process. The action is directly against the state. The basis for the state's liability for damages under s. 24(1) is the breach of the claimant's *Charter* right. The state's conduct within the legislative process is not an independent basis for liability but rather informs whether damages are an appropriate and just remedy for the breach caused by the enactment of the *Charter*-infringing law. The state's liability for unconstitutional legislation does not engage members' personal immunity for parliamentary speech. Nor does it interfere with Parliament's power to control its own debates and proceedings, or dictate how the legislative function is exercised. Parliamentary privilege must not be extended beyond the scope necessary to protect the legislature's core democratic functions. However, parliamentary privilege may prevent claimants from adducing certain types of evidence relating to the legislative process and hence limit a claimant's practical ability to satisfy the threshold in a given case. But this possibility does not foreclose the availability of such a cause of action in principle.

Fourth, an absolute immunity does not accommodate the principles recognized in the jurisprudence on constitutional remedies. It leaves little room for the principles that underpin legislative accountability — including the broad and purposive approach to rights and remedial provisions in the *Charter*, as well as constitutionalism and the rule of law. An absolute immunity would protect the government from any claim for damages for any unconstitutional legislation, no matter how egregious, and allow a narrow set of constitutional interests to dominate the analysis.

A high bar for immunity, set by the Court in *Mackin*, has been good law for over two decades. It has resulted neither in chilling good governance, nor in a floodgate of claims against the state for damages. Although the Court may depart from precedent where there is a compelling reason to do so, there are no compelling reasons to overrule *Mackin*. The *Mackin* qualified immunity threshold is assessed at step three of the *Ward* framework and can be restated as follows: the good governance defence will prevail unless the law was clearly unconstitutional, in bad faith or an abuse of power. If the threshold is not met, the balance of constitutional principles tilts in favour of state immunity. In such cases, the constitutional imperative that the government be afforded the autonomy to govern effectively will defeat the claim to damages.

Per Kasirer and **Jamal** JJ. (dissenting in part): The appeal should be allowed in part and the first question answered in the negative. The Crown enjoys an absolute immunity from damages under s. 24(1) of the *Charter* when preparing and drafting primary legislation later found to be unconstitutional. Such conduct is

protected from judicial interference by established categories of parliamentary privilege, namely freedom of speech and control over parliamentary proceedings. The courts have no jurisdiction to review or assign liability for the exercise of these established categories of parliamentary privilege. The second question should be answered in the affirmative, but in a qualified manner: damages may only be available under s. 24(1) for harms flowing from "clearly unconstitutional" enactments. *Mackin* should be clarified to eliminate bad faith and abuse of power in enacting primary legislation as grounds for damages under s. 24(1) of the *Charter*, as they inevitably trench on established categories of parliamentary privilege. They would also strain the separation of powers by asking the courts to entertain non-justiciable questions. The Crown may, however, be liable in damages under s. 24(1) for harms flowing from "clearly unconstitutional" enactments. The clearly unconstitutional threshold is a nuanced standard that appropriately protects the autonomy of Parliament and the limited immunity necessary for legislators to carry out their work, while employing a purposive approach to s. 24(1) remedies to vindicate *Charter* rights.

The doctrine of parliamentary privilege refers to the sum of the privileges, powers, and immunities of the federal Houses of Parliament or provincial legislative assemblies, and of their individual members, that are necessary to their capacity to function as legislative bodies. Parliamentary privilege helps Canada's constitutional democracy maintain the fundamental separation of powers between the legislative, executive, and judicial branches of government, by shielding some areas of legislative activity from external review. Parliamentary privilege is part of the Constitution of

Canada. Since one part of the Constitution cannot be abrogated or diminished by another part of the Constitution, actions or conduct protected by parliamentary privilege are not subject to the *Charter*. Once the existence of a category of parliamentary privilege is established, conduct or activities that are themselves an exercise of that privilege are not subject to review by the courts, even when such conduct or activities are alleged to violate the *Charter*. This means that such conduct or activities cannot be the basis of a *Charter* breach and cannot give rise to a *Charter* remedy such as damages under s. 24(1).

In the instant case, three uncontroversial points regarding the questions at issue guide the analysis. First, there is no debate that the questions, which inquire as to the Crown's liability in its executive capacity, refer to the liability of the Canadian government *qua* executive, to be distinguished from the legislature. Second, there is no debate that the *Charter*, including s. 24(1), applies to Parliament and the government of Canada, pursuant to s. 32(1)(a) of the *Charter*. Third, remedies under s. 52(1) of the *Constitution Act, 1982* and s. 24(1) of the *Charter* can be combined. A remedy will be appropriate and just within the meaning of s. 24(1) when it furthers the general objectives of the *Charter* by compensating the plaintiff for any loss, vindicating rights, or deterring future breaches.

Both questions before the Court raise distinct parliamentary privilege considerations relating, in question 1, to the legislative process of preparing and drafting legislation, and in question 2, to the grounds on which legislation, once

enacted, may be reviewed. Concerning the first question, the Crown cannot be liable for preparing and drafting legislation. Government officials and Ministers involved in preparing and drafting legislation enjoy the parliamentary privilege of freedom of speech for words or conduct connected to their legislative work. Whether the privilege applies is not determined by the nature of the relevant individual, but by the activities in which they are engaged and the necessity of those activities to core legislative functions. Robust legislative debate, which falls within the privilege over freedom of speech, is the lifeblood of Parliament's day-to-day business. Exposing the Crown, in its executive capacity, to liability in damages for the conduct of government officials and Ministers in preparing and drafting legislation would inevitably intrude upon this category of privilege.

As with the free speech privilege, exposing the Crown to liability for the words or conduct of government officials and Ministers in preparing and drafting legislation would unavoidably trench on the established privilege over the proceedings of Parliament. This privilege is broad: it includes everything said or done by a Member in the exercise of their functions as a Member in committees of either House, as well as everything said or done in either House in the transaction of parliamentary business. It also extends to matters taking place outside the houses of Parliament. The words and conduct of Members who are occupied in something closely and necessarily related to a proceeding in Parliament are accorded absolute privilege. It cannot reasonably be suggested that preparing and drafting legislation is not closely and necessarily related to proceedings in Parliament.

Parliamentary privilege is a threshold jurisdictional issue under the *Ward* framework regarding *Charter* damages under s. 24(1). If the existence of a recognized category of parliamentary privilege is proved, there can be no judicial review of the exercise of the privilege, even on *Charter* grounds. This conclusion is a direct consequence of the constitutional nature of parliamentary privilege and its status as a rule of curial jurisdiction. The privilege cannot be the subject of a judicial balancing as to whether countervailing good governance concerns at step three of *Ward* defeat the functional considerations that support a damages award and render damages inappropriate or unjust. Instead, the existence of the privilege means that the courts lack jurisdiction to undertake any further inquiry. In addition, the Crown in its executive capacity cannot be held liable for the work of Ministers and other government officials in preparing and drafting legislation because, in doing so, they act in a legislative rather than an executive capacity. Such conduct is not Crown conduct that can be attributed to the executive for which the Crown can be liable in an action brought under s. 23(1) of the *Crown Liability and Proceedings Act*.

With respect to the second question, if it is interpreted as relating to whether an enactment that violates the *Charter* can ever give rise to *Charter* damages under s. 24(1) after a bill has become law and the legislative process is complete, the answer is a qualified "yes". The limited immunity rule in *Mackin* should be modified to clarify that the Crown can be liable in damages for the breach of *Charter* rights caused by legislation only when the legislation is shown to have been "clearly unconstitutional" at the time it was enacted. There are compelling reasons to revisit

Mackin. None of the authorities cited in *Mackin* support awarding *Charter* damages against the Crown for harms caused by unconstitutional primary legislation. The test enunciated in *Mackin* also conflicts with the doctrine of parliamentary privilege, as well as the separation of powers and principles of justiciability. None of these points was argued in *Mackin*, and the Court did not consider them in its reasons.

The bad faith and abuse of power thresholds in *Mackin* are inappropriate thresholds in respect of damages under s. 24(1) of the *Charter* for unconstitutional primary legislation because they conflict with the doctrine of parliamentary privilege and principles of justiciability, and strain the separation of powers. The doctrine of parliamentary privilege prevents courts from passing judgment on the process of enacting legislation. Scrutinizing legislation for evidence of bad faith or abuse of power, even once the law has already been enacted, would inevitably pull courts into judging the legislative process, which is beyond their jurisdiction. The courts cannot put Parliament "on trial".

In addition, inquiring into whether primary legislation was in bad faith and an abuse of power as standards for awarding *Charter* damages would threaten the separation of powers by requiring the courts to consider questions that are not justiciable. Justiciability refers to a set of judge-made rules, norms, and principles delineating the scope of judicial intervention in social, political, and economic life. A court may decline to answer a question on the ground of justiciability when doing so would take it beyond its proper constitutional role, or if the court cannot provide an

answer within its area of expertise. Once legislation has been found to be unconstitutional, there is no legal yardstick to measure whether the legislation was in bad faith or involved an abuse of power. Asking whether the legislation is in bad faith or constitutes an abuse of power requires the court to pass judgment on the content of the legislation on grounds other than its constitutionality, which strays into evaluating the wisdom or policy of the law and is not the proper role of the courts. The appropriate use of Hansard as proof of historical context or purpose in statutory interpretation must be distinguished from its inappropriate use to prove that legislation is in bad faith. The former does not impugn the freedom of speech or the integrity of parliamentary proceedings; the latter does.

In the context of legislative enactments, absolute immunity overshoots what is required to protect parliamentary privilege and the separation of powers. These constitutional imperatives can be respected by a test that focuses on whether the enactment itself clearly violated established constitutional norms at the time it was enacted. A qualified or limited immunity preserves the courts' power under s. 24(1) to craft remedies that meaningfully vindicate *Charter* rights, while ensuring that effective government is not jeopardized by overbroad state liability that trenches on parliamentary privilege. To overcome the good governance concerns at step three of the *Ward* framework, a claimant must show that the legislation was clearly unconstitutional in the sense that the unconstitutionality was readily or obviously demonstrable at the time the legislation was enacted and could not be subject to any serious debate. Such a standard focuses on legislative outputs rather than legislative

inputs, and on how the impugned legislation must be significantly wide of the constitutional mark before damages will be an appropriate and just remedy under s. 24(1) of the *Charter*. The clearly unconstitutional standard allows courts to consider whether legislation has an unconstitutional purpose as a factor in a damages assessment, and it is an appropriately high but not insurmountable bar for claimants to meet. If an enactment was clearly unconstitutional at the time of enactment, this should be readily or obviously demonstrable.

Per Côté and **Rowe** JJ. (dissenting): The appeal should be allowed and both questions answered in the negative. The preparation, drafting, and enactment of legislation necessarily implicates parliamentary privilege, which is fundamentally at odds with awarding damages against the Crown in the manner sought. Both parliamentary privilege and the *Charter* constitute components of the Constitution of Canada. Neither one subordinates the other. The *Charter* must, as a matter of constitutional law, be given effect in a manner that is compatible with parliamentary privilege. Parliamentary privilege is rooted in the earliest chapters of Canada's constitutional history, and reflects an inherited legacy of struggle between the Crown and Parliament in the United Kingdom, one that reaches back to Parliament's origins. The Court has a responsibility to preserve the inheritance of Canada's constitutional order. It should not be discarded, and parliamentary privilege should not be subordinated to s. 24(1) of the *Charter*. To do so would be to depart from precedent and to do so unwisely.

Canada's constitutional arrangements (aside from Aboriginal and treaty rights) consist of four written and unwritten components: the *Constitution Acts* of 1867 and 1982, constitutional conventions, Crown prerogative and parliamentary privilege. The unwritten components, including parliamentary privilege, fulfill a necessary role in Canada's constitutional order — they are no less part of the Constitution than are the two *Constitution Acts*. In addition, there are underlying (unwritten) principles that contribute to giving effect to Canada's constitutional arrangements. These principles are not themselves components of the Constitution; rather, they assist in interpreting the Constitution and arriving at answers to questions not otherwise provided for in the Constitution. They do not have a substantive policy content and cannot be the basis to challenge the validity of legislation. Norms expressed in the underlying/unwritten principles of constitutionalism and the rule of law do not constitute a basis to override parliamentary privilege, any more than they can constitute a basis to invalidate legislation. Parliamentary sovereignty and the separation of powers (plus constitutionalism and the rule of law) are underlying/unwritten principles that inform interpretation of the constituent components of the Constitution, but parliamentary privilege is different in that it is itself part of the Constitution. This distinction is fundamental.

The *Constitution Act, 1867* established that parliamentary privilege, which was essential to the operation of the largely unwritten constitution of the United Kingdom, would also be part of Canada's Constitution; the preamble states that Canada will have a Constitution similar in principle to that of the United Kingdom.

Parliamentary privilege was also specifically dealt with in s. 18 of the *Constitution Act, 1867*, which provides that the privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada. Thus, parliamentary privilege was from the outset a component of Canada's Constitution and continues to be so today. Unwritten components of the Constitution — including parliamentary privilege — have continued to be given faithful effect because they continue to play a crucial role in Canada's constitutional order.

Chief among the functions of parliamentary privilege is that it ensures that Parliament and provincial legislatures are able to carry out their work effectively. The purpose of privilege is to recognize Parliament's exclusive jurisdiction to deal with complaints within its privileged sphere of activity. A two-step process applies when courts are confronted with a privilege claim. First, the court must assess whether the existence and scope of the claimed privilege have been authoritatively established. If so, then the court's inquiry stops. The second step, which is not relevant in the instant case given the established nature of the privileges in question, requires the court to assess the necessity of the privilege asserted.

Parliamentary privilege ensures that the legislature is safeguarded from interference by the other two branches of the state, the executive and the judiciary. Intervention by the executive or by the courts in the working of legislatures would

inevitably create delays, disruption, uncertainties and costs which would hold up the nation's business and on that account would be unacceptable.

Parliamentary privilege also structures the dialogue between the courts and the legislature. By delineating the scope of what is open to review, this privilege ensures that legislatures are able to respond to decisions in which courts give meaning to the Constitution, and where necessary, invalidate legislation. The dialogical nature of constitutional development in Canada is reflected in the "second look" cases in which the Court has wrestled with what weight to afford Parliament's attempt to reformulate legislation in response to a decision under s. 52(1). Consistent in these cases is the principle that Parliament should not be discouraged from trying again to reformulate legislation so that it is consistent with the *Charter*.

Respect for the separation of powers — which has been repeatedly affirmed as a constitutional principle — precludes judicial scrutiny of the legislative process. Subordinating parliamentary privilege in order to impose s. 24(1) damages for the preparation, drafting, and enactment of legislation risks drawing the courts into a supervisory role over the legislative process.

In the instant case, the privileges invoked are the House's exclusive control over its proceedings, and the privilege related to freedom of speech. They are both well established, and are rooted in art. 9 of the *Bill of Rights* of 1689, which established that the freedom of speech and debates, or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament. It has long been

accepted that these privileges must be held absolutely and constitutionally if they are to be effective; the legislative branch of government must enjoy a certain autonomy which even the Crown and the courts cannot touch. Judicial consideration of these privileges shows that the broad shelter afforded by the operation of parliamentary privilege is agnostic towards the content of what is protected. It matters not what was said or what the impugned conduct involved — what matters is whether the conduct in question relates to the assembly's ability to fulfill its constitutional functions.

Parliamentary privilege attaches to the entire process through which legislation is developed and adopted. It extends to the range of Parliamentary actors who are involved in the legislative process. When ministers develop legislation, they act in a parliamentary capacity. Despite an inevitable overlap between executive and legislative functions inherent in their work in developing legislation, because they are engaged in the law-making process when they develop legislation, the process is generally protected from judicial oversight.

While the existence and limits of parliamentary privilege are justiciable, their operation is not. Once a court finds that a privilege exists and describes its extent, the court's role ends. It is for the legislature itself to determine whether the exercise of the privilege was proper; such matters are not reviewable by the courts. The wide berth given to parliamentary privilege has been reflected in the manner in which the Court has approached apparent conflicts between parliamentary privilege and other components of the Constitution. The solution, when a conflict emerges between

parliamentary privilege and another component of the Constitution, is not to read down the protections afforded by parliamentary privilege — the solution is to read the relevant constitutional components in a compatible way. It is not open to the courts to intrude upon the *bona fides* of parliamentary debates and proceedings. The courts have long recognized the defining significance of Parliament's work and the need for parliamentarians to debate and develop legislation freely. Parliamentary privileges are vital to the separation of powers as they enable parliamentarians — both individually and collectively — to freely express themselves and to act on matters of importance to Canadians, including controversial public policy issues, without fear of interference from the Crown or the courts.

The *Charter* did not negate the fundamental constitutional tenets upon which British parliamentary democracy rested or mark a "clean break" with existing constitutional structures that came before the passage of the *Constitution Act, 1982*. Instead, the passage of the *Charter* must be understood within the broader context of Canada's constitutional development. Many consider the *Charter* to be the paramount constitutional instrument. This is incorrect. All parts of the Constitution must be read together, and no one can be subordinated to the others. That said, the *Charter* was accompanied by a revolutionary transformation of sorts, in the nature and extent of demands by litigants for courts to use their authority to advance goals that those litigants had not achieved through the electoral process. But it is not for the courts to pass upon the policy or wisdom of legislative will or question the wisdom of enactments which are within the competence of the Legislatures. Temperance and

moderation in the face of such invitations remain fundamental to the appreciation by the judiciary of its own position in the constitutional scheme.

The theory of liability endorsed by the courts below in the instant case elides the distinction between "the Crown" in its executive and legislative capacities. Canada's Constitution incorporates the Westminster system of government, which was varied for a federal structure rather than a unitary state. Subsequent developments in the Constitution have built on this. In the contemporary constitutional order, the Crown acts in multiple distinct capacities, federal and provincial, as well as executive and legislative. The Crown in its executive capacity and the Crown in its legislative capacity are distinct. The Crown in its executive capacity consists of the King (through the Governor General) exercising the executive government and authority of and over Canada, as continued in the *Constitution Act, 1867*, s. 9. Those executive powers are, by constitutional convention, exercised by the Prime Minister, Cabinet, and public authorities in furtherance of statutory delegation of authority. The Crown-in-Parliament consists of the monarch (Governor General) acting in their legislative capacity. The Crown-in-Parliament embraces three determinative acts that are part of Parliament's core functions as a legislative body: royal recommendation, royal consent and royal assent.

The Crown, thus, is at the heart of both the executive and legislative branches of government, but plays different roles in each. While Canada's constitutional order envisages some overlap as to the Crown in its various capacities,

the law does not recognize executive control of the legislative branch. This is consistent with the scope of parliamentary privilege and its application across the various steps in the legislative process. The preparation of legislation is a complex process involving multiple actors across government. The courts are ill-equipped to deal with the procedural complexities of the legislative process. The distinctive roles played by the Crown reflects the separation of powers between the different branches of government, and the balance between them. This is part of the explanation as to why absolute immunity is needed for the preparation, drafting, and enactment of legislation, but not for determination of the validity of legislation once it is enacted or the legality of acts taken pursuant to the legislation.

Mackin does not resolve the question as to how parliamentary privilege operates where someone seeks s. 24(1) damages for the preparation, drafting, and enactment of legislation. The Court in *Mackin* did not turn its attention to this question nor has *Mackin* been applied in this way. The Court cannot rely on a passing reference in *Mackin* as the basis to depart from a substantial body of jurisprudence on parliamentary privilege and to abandon the fundamental principle that components of the Constitution do not negate one another. *Mackin* cannot be the basis for deciding that s. 24(1) damages can apply against the Crown in its executive capacity for the preparation, drafting, and enactment of legislation. Parliamentary privilege was never mentioned, much less discussed. To the extent, if any, that *Mackin*'s brief reference to damages for the mere enactment of a law represents a holding of the Court, it should

be treated as weak precedent at most. Accordingly, the matter being considered in the instant case must be seen as novel for the Court's consideration.

To remain faithful to the Court's jurisprudence, the Court's role must be limited to establishing the existence of the privileges in question, rather than inquiring into their operation. Parliamentary privilege stands without exception. Moreover, the Crown in its executive capacity cannot be liable for the preparation, drafting, or enactment of legislation, as it is not part of the legislative process. Rather it is the Crown-in-Parliament which is so; legislation is approved by the Commons and the Senate, followed by royal assent. Seeking damages from the Crown in its executive capacity for the preparation, drafting, and enactment of legislation is conceptually incoherent. The Attorney General of Canada is not the legal representative of Parliament and cannot represent Parliament in legal proceedings.

Absolute immunity is necessary. Parliamentary privilege is like an eggshell; one cannot break it just a little. In order for the Crown in its executive capacity to be held liable for the preparation, drafting, and enactment of legislation, courts will need to inquire into the motivations and knowledge of those engaged in the legislative process. The inquiry into "bad faith or abuse of power" can manifest itself in any variety of ways, many that cannot now be contemplated. Legislatures will have to ask themselves whether a court, sitting in judgment of their actions with the benefit of hindsight, will deem theirs to be "an improper purpose". Furthermore, a "clearly

unconstitutional" standard will necessarily depend on the eye of the beholder, and what is known to the court sitting in judgment of the legislature's actions *ex post facto*.

Enabling s. 24(1) damages would upset the dialogical balance between legislatures and the courts. Courts will be thrust into a position of overseeing the work of Parliament, and inquiring into the motives and knowledge of parliamentarians and others involved in the legislative process. Extending s. 24(1) damages to the preparation, drafting, and enactment of legislation would deprive Parliament of its ability to meaningfully respond to decisions in which the judiciary has determined the validity of laws or the legality of actions taken pursuant to those laws. Further, given the number of parliamentary actors and the vagaries of the legislative process, it is unclear whose alleged actions would be at issue in any claim seeking *Charter* damages for the drafting and enactment of any one statute. Absolute immunities are required for certain institutions to function. This is exemplified by the fact that the judiciary enjoys an absolute immunity in the exercise of its adjudicative function.

Remedies under s. 24(1) are available following the enactment of legislation, in relation to executive action pursuant to legislation. P is not without recourse to a remedy, nor would others be. P could have applied for judicial review on *Charter* grounds of the decision to deny his application for a criminal record suspension. That remedy accords fully with Canada's constitutional arrangements and would in no way detract from parliamentary privilege.

Cases Cited

By Wagner C.J. and Karakatsanis J.

Discussed: *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; **distinguished:** *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765; **considered:** *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678; *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3; **referred to:** *Chu v. Canada (Attorney General)*, 2017 BCSC 630, 347 C.C.C. (3d) 449; *Charron v. The Queen*, Ont. S.C.J., No. 16-67821, June 14, 2017; *Rajab v. The Queen*, Ont. S.C.J., No. 16-67822, June 14, 2017; *P.H. v. Canada (Attorney General)*, 2020 FC 393, [2020] 2 F.C.R. 461; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629; *R. v. Albashir*, 2021 SCC 48; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Brazeau v.*

Canada (Attorney General), 2020 ONCA 184, 149 O.R. (3d) 705; *R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2019] 4 All E.R. 299; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455; *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, [2020] 2 S.C.R. 506; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *R. v. Sullivan*, 2022 SCC 19; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *Dunlea v. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136; *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)*, [1979] A.C. 385; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485; *R. v. Sharma*, 2022 SCC 39; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857; *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17; *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *R. v. Kirkpatrick*, 2022 SCC 33; *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347; *Finney v.*

Barreau du Québec, 2004 SCC 36, [2004] 2 S.C.R. 17; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621; *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 S.C.R. 304.

By Jamal J. (dissenting in part)

Mackin v. New Brunswick (Minister of Finance), 2002 SCC 13, [2002] 1 S.C.R. 405; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *Chu v. Canada (Attorney General)*, 2017 BCSC 630, 347 C.C.C. (3d) 449; *P.H. v. Canada (Attorney General)*, 2020 FC 393, [2020] 2 F.C.R. 461; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687; *Kielley v. Carson* (1842), 4 Moo. 63, 13 E.R. 225; *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, [2020] 2 S.C.R. 506; *Duffy v. Canada (Senate)*, 2020 ONCA 536, 151 O.R. (3d) 489; *Stockdale v. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112; *R. v. Chaytor*, [2010] UKSC 52, [2011] All E.R. 805; *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Harvey v. New Brunswick*, [1996] 2 S.C.R. 876; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069; *Canada (Auditor General) v. Canada (Minister of*

Energy, Mines and Resources), [1989] 2 S.C.R. 49; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295; *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629; *R. v. Albashir*, 2021 SCC 48; *Ontario v. Rothmans Inc.*, 2014 ONSC 3382, 120 O.R. (3d) 467; *Lavigne v. Ontario (Attorney General)* (2008), 91 O.R. (3d) 728; *Gagliano v. Canada (Attorney General)*, 2005 FC 576, [2005] 3 F.C.R. 555, aff'd 2006 FCA 86, 268 D.L.R. (4th) 190; *Canada (Deputy Commissioner, Royal Canadian Mounted Police) v. Canada (Commissioner, Royal Canadian Mounted Police)*, 2007 FC 564, [2008] 1 F.C.R. 752; *Prebble v. Television of New Zealand Ltd.*, [1995] 1 A.C. 321; *Canada (Board of Internal Economy) v. Boulerice*, 2019 FCA 33, [2019] 3 F.C.R. 145; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214; *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3; *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, [2019] 4 S.C.R. 335; *Rice v. New Brunswick* (1999), 235 N.B.R. (2d) 1; *R. v. McGregor*, 2023 SCC 4; *Plourde v. Wal-Mart Canada Corp.*, 2009 SCC 54, [2009] 3 S.C.R. 465; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R.

609; *R. v. Kirkpatrick*, 2022 SCC 33; *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42; *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347; *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3; *Janssen-Ortho Inc. v. Amgen Canada Inc.* (2005), 256 D.L.R. (4th) 407; *Club Pro Adult Entertainment v. Ontario* (2006), 150 C.R.R. (2d) 1, rev'd in part 2008 ONCA 158, 42 B.L.R. (4th) 47; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750; *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607; *La Rose v. Canada*, 2023 FCA 241, 488 D.L.R. (4th) 340; *Turner v. Canada*, [1992] 3 F.C. 458; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735; *R. v. Sharma*, 2022 SCC 39; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, [2020] 2 S.C.R. 283; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Pepper (Inspector of Taxes) v. Hart*, [1993] A.C. 593; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *Francis v. Ontario*, 2021 ONCA 197, 154 O.R. (3d) 498.

By Rowe J. (dissenting)

New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, [2021] 2 S.C.R. 845; *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753; *Alford v. Canada (Attorney General)*, 2024 ONCA 306; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *Duffy v. Canada (Senate)*, 2020 ONCA 536, 151 O.R. (3d) 489; *Janssen-Ortho Inc. v. Amgen Canada Inc.* (2005), 256 D.L.R. (4th) 407; *R. v. Mills*, [1999] 3 S.C.R. 668; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *R. (on the application of SC and others) v. Secretary of State for Work and Pensions*, [2021] UKSC 26, [2022] 3 All E.R. 95; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] 1 S.C.R. 175; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765; *Stockdale v. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112; *Ontario v. Rothmans Inc.*, 2014 ONSC 3382, 120 O.R. (3d) 467; *Janssen-Ortho Inc. v. Amgen Canada Inc.*, 2004 CanLII 8595; *Club Pro Adult Entertainment Inc. v. Ontario* (2006), 150 C.R.R. (2d) 1, rev'd in part on other grounds 2008 ONCA 158, 42 B.L.R.

(4th) 47; *Canada (Board of Internal Economy) v. Boulerice*, 2019 FCA 33, [2019] 3 F.C.R. 145; *Prebble v. Television New Zealand Ltd.*, [1994] 3 All E.R. 407; *Gagliano v. Canada (Attorney General)*, 2005 FC 576, [2005] 3 F.C.R. 555; *Canada (Deputy Commissioner, Royal Canadian Mounted Police) v. Canada (Commissioner, Royal Canadian Mounted Police)*, 2007 FC 564, [2008] 1 F.C.R. 752; *Guergis v. Novak*, 2022 ONSC 3829; *Galati v. Canada (Governor General)*, 2015 FC 91, [2015] 4 F.C.R. 3; *Fielding v. Thomas*, [1896] A.C. 600; *Roman Corp. Ltd. v. Hudson's Bay Oil & Gas Co. Ltd.*, [1971] 2 O.R. 418, aff'd [1972] 1 O.R. 444; *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214; *Mohr v. National Hockey League*, 2022 FCA 145, [2021] 4 F.C.R. 465; *R. v. Sharma*, 2022 SCC 39; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180; *Pepper v. Hart*, [1993] A.C. 593; *Ontario (Attorney General) v. Clark*, 2021 SCC 18, [2021] 1 S.C.R. 607; *Morier v. Rivard*, [1985] 2 S.C.R. 716; *Ernst v. Alberta Energy Regulator*,

2017 SCC 1, [2017] 1 S.C.R. 3; *P.H. v. Canada (Attorney General)*, 2020 FC 393, [2020] 2 F.C.R. 461.

Statutes and Regulations Cited

Act to restrict and regulate Chinese immigration into Canada, S.C. 1885, c. 71, s. 4.

Bill of Rights (Eng.), 1 Will. & Mar. Sess. 2, c. 2, art. 9.

Canadian Charter of Rights and Freedoms, ss. 1, 11(h), (i), 24, 32(1), 33.

Constitution Act, 1867, preamble, ss. 9, 17, 18, 55, 91.

Constitution Act, 1982, s. 52.

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 23(1).

Federal Courts Act, R.S.C. 1985, c. F-7, ss. 2(1), 17.

Limiting Pardons for Serious Crimes Act, S.C. 2010, c. 5, s. 10.

Parliament of Canada Act, R.S.C. 1985, c. P-1, ss. 4, 5.

Safe Streets and Communities Act, S.C. 2012, c. 1, s. 161.

Authors Cited

Black's Law Dictionary, 11th ed., by Bryan A. Garner. St. Paul, Minn.: Thomson Reuters, 2019, "*obiter dictum*", "*ratio decidendi*".

Blackstone, William. *Commentaries on the Laws of England*, Book I, 17th ed. London: Richard Taylor, 1830.

Brun, Henri, Guy Tremblay and Eugénie Brouillet. *Droit constitutionnel*, 6th ed. Cowansville, Que.: Yvon Blais, 2014.

Charles, W. H. *Understanding Charter Damages: The Judicial Evolution of a Charter Remedy*. Toronto: Irwin Law, 2016.

Chevrette, François, and Herbert Marx. *Droit constitutionnel: Principes fondamentaux: Notes et jurisprudence*, 2nd ed. rev. by Han-Ru Zhou. Montréal: Les Éditions Thémis, 2021.

Cooper-Stephenson, Ken. *Charter Damages Claims*. Toronto: Carswell, 1990.

Cromwell, Thomas *A. Locus Standi: A Commentary on the Law of Standing in Canada*. Toronto: Carswell, 1986.

Dussault, René, and Louis Borgeat. *Administrative Law: A Treatise*, 2nd ed., vol. 5. Toronto: Carswell, 1990.

Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament, 25th ed. by David Natzler and Mark Hutton, eds. London: LexisNexis, 2019.

Hogg, Peter W., and Wade K. Wright. *Constitutional Law of Canada*, 5th ed. Supp. Toronto: Thomson Reuters, 2023 (updated 2023, release 1).

Hogg, Peter W., Patrick J. Monahan and Wade K. Wright. *Liability of the Crown*, 4th ed. Toronto: Carswell, 2011.

Jackson, Vicki C., and Mark Tushnet. *Comparative Constitutional Law*. New York: Foundation Press, 1999.

Laskin, Bora. "Case and Comment" (1955), 33 *Can. Bar Rev.* 215.

Law Society of Upper Canada. *Special Lectures of the Law Society of Upper Canada 1979 — The Abuse of Power and the Role of an Independent Judicial System in Its Regulation and Control*. Toronto: Richard De Boo, 1979.

Maingot, J. P. Joseph. *Parliamentary Immunity in Canada*. Toronto: LexisNexis, 2016.

Maingot, J. P. Joseph. *Parliamentary Privilege in Canada*, 2nd ed. Montréal: McGill-Queen's University Press, 1997.

Marcotte, Alexandre. "Structural Analysis, Unwritten Principles and Constitutional Remedies: *Charter* Damages for the Enactment of Legislation by Parliament" (2024), 18 *J.P.P.L.* 69.

Mathen, Carissima, and Patrick Macklem, eds. *Canadian Constitutional Law*, 6th ed. Toronto: Emond, 2022.

Newman, Warren J. "Parliamentary Privilege, the Canadian Constitution and the Courts" (2008), 39 *Ottawa L. Rev.* 573.

Newman, Warren J. "The Crown, the Queen, and the Structure of the Constitution", in D. Michael Jackson and Christopher McCreery, eds., *A Resilient Crown: Canada's Monarchy at the Platinum Jubilee*. Toronto: Dundurn Press, 2022, 13.

Pilkington, Marilyn L. “Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms” (1984), 62 *Can. Bar Rev.* 517.

Roach, Kent. *Constitutional Remedies in Canada*, 2nd ed. Toronto: Canada Law Book, 2013 (loose-leaf updated October 2023, release 2).

Roach, Kent. “The Separation and Interconnection of Powers in Canada: The Role of Courts, the Executive and the Legislature in Crafting Constitutional Remedies” (2018), 5 *J.I.C.L.* 315.

Rosenfeld, Michel. “Constitutional Identity”, in Michel Rosenfeld and András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law*. Toronto: Oxford University Press, 2012, 756.

Rowe, Malcolm. “The Virtue of Judicial Restraint, or Who Guards the Guardians?” (2022), 55 *U.B.C. L. Rev.* 311.

Rowe, Malcolm, Chris Puskas and Allyse Cruise. “The Separation of Powers in Canada” (2024), 1 *S.C.L.R.* (3d) 323.

Rowe, Malcolm, and Leanna Katz. “A Practical Guide to *Stare Decisis*” (2020), 41 *Windsor Rev. Legal Soc. Issues* 1.

Rowe, Malcolm, and Manish Oza. “Structural Analysis and the Canadian Constitution” (2023), 101 *Can. Bar Rev.* 205.

Rowe, Malcolm, and Michael Collins. “The Constitution of Canada” (2017-18), 49 *Ottawa L. Rev.* 93.

Rowe, Malcolm, and Nicolas Déplanche. “Canada’s Unwritten Constitutional Order: Conventions and Structural Analysis” (2020), 98 *Can. Bar Rev.* 430.

Roy, Marc-André. “Le Parlement, les tribunaux et la *Charte canadienne des droits et libertés*: vers un modèle de privilège parlementaire adapté au XXI^{e} siècle” (2014), 55 *C. de D.* 489.

Sharpe, Robert J. *Good Judgment: Making Judicial Decisions*. Toronto: University of Toronto Press, 2018.

Sharpe, Robert J., and Kent Roach. *The Charter of Rights and Freedoms*, 7th ed. Toronto: Irwin Law, 2021.

Sossin, Lorne M. *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. Toronto: Carswell, 2012.

Sossin, Lorne M., and Gerard Kennedy. *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 3rd ed. Toronto: Thomson Reuters, 2024.

Strayer, Barry L. *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 3rd ed. Toronto: Butterworths, 1988.

Sullivan, Ruth. *The Construction of Statutes*, 7th ed. Toronto: LexisNexis, 2022.

Trueman, John. *Britain: The Growth of Freedom*. Toronto: J. M. Dent & Sons (Canada) Ltd., 1960.

Weinrib, Lorraine E. "Canada's *Charter of Rights*: Paradigm Lost?" (2002), 6 *Rev. Const. Stud.* 119.

Weinrib, Lorraine Eisenstat. "Of diligence and dice: Reconstituting Canada's Constitution" (1992), 42 *U.T.L.J.* 207.

APPEAL from a judgment of the New Brunswick Court of Appeal (Richard C.J. and LaVigne and LeBlond JJ.A.), 2022 NBCA 14, 471 D.L.R. (4th) 68, 508 C.R.R. (2d) 115, [2022] N.B.J. No. 80 (Lexis), 2022 CarswellNB 161 (WL), affirming a decision of Dysart J., 2021 NBQB 107, [2021] N.B.J. No. 172 (Lexis), 2021 CarswellNB 336 (WL). Appeal dismissed, Kasirer and Jamal JJ. dissenting in part and Côté and Rowe JJ. dissenting.

Sharlene Telles-Langdon and *Sarah Drodge*, for the appellant.

Louis-Alexandre Hébert Gosselin and *Lex Gill*, for the respondent.

Ravi Amarnath and *S. Zachary Green*, for the intervener the Attorney General of Ontario.

François Hénault, for the intervener the Attorney General of Quebec.

Samantha Parris and *Edward A. Gores, K.C.*, for the intervener the Attorney General of Nova Scotia.

Rose Campbell and *Isabel Lavoie Daigle, K.C.*, for the intervener the Attorney General of New Brunswick.

Charles Murray and *Julie Winter*, for the intervener the Attorney General of Manitoba.

Nicholas Isaac, Emily Lapper and *Steven Davis*, for the intervener the Attorney General of British Columbia.

Written submissions only by *Meaghan Hughes* and *Nicole Sylvester*, for the intervener the Attorney General of Prince Edward Island.

Theodore J. C. Litowski, for the intervener the Attorney General of Saskatchewan.

David Kamal, for the intervener the Attorney General of Alberta.

Written submissions only by *Justin S. C. Mellor, Mark P. Sheppard* and *Eugene H. Chao*, for the intervener the Attorney General of Newfoundland and Labrador.

Mohsen Seddigh, *Adil Abdulla* and *Alyssa Cloutier*, for the interveners the Fisher River Cree Nation, the Sioux Valley Dakota Nation, the Manto Sipi Cree Nation, and the Lake Manitoba First Nation.

David Schulze and *Sara Andrade*, for the intervener Quebec Native Women Inc.

Marc-André Roy, *Anne Burgess* and *Maxime Faille*, for the intervener the Speaker of the Senate.

Neil Abraham and *Megan Stephens*, for the intervener the David Asper Centre for Constitutional Rights.

Andrew Lokan and *Mariam Moktar*, for the intervener the Canadian Civil Liberties Association.

George Avraam, *Jennifer Bernardo* and *Rono Khan*, for the intervener the Canadian Constitution Foundation.

Written submissions only by *James Sayce*, *Vlad Calina* and *Caitlin Leach*, for the intervener the Queen's Prison Law Clinic.

Connor Bildfell and *Simon Bouthillier*, for the intervener the John Howard Society of Canada.

Brodie Noga, *Emily MacKinnon* and *Emily Wang*, for the intervener the British Columbia Civil Liberties Association.

Written submissions only by *Alexa Biscaro* and *Sarah Ivany*, for the intervener the West Coast Prison Justice Society.

Alyssa Tomkins and *John J. Wilson*, for the intervener the Speaker of the House of Commons.

The judgment of Wagner C.J. and Karakatsanis, Martin, O'Bonsawin and Moreau JJ. was delivered by

THE CHIEF JUSTICE AND KARAKATSANIS J. —

I. Overview

[1] It is a fundamental principle of our constitutional order that courts have a duty to protect the rights guaranteed by the *Canadian Charter of Rights and Freedoms* from infringement by the state. However, other foundational constitutional principles require that the state be afforded the legislative autonomy to govern effectively. At the heart of this appeal is a question about how to reconcile these principles in the context of s. 24(1) of the *Charter*, which authorizes courts to grant such remedies to individuals for the infringement of their *Charter* rights as is considered appropriate and just in the circumstances.

S.C.R. 485, at para. 31; *R. v. Sharma*, 2022 SCC 39, at paras. 88-90). Indeed, this Court has in other contexts assessed whether the legislature acted in good faith in enacting a law (see, e.g., *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 63; *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857, at paras. 3 and 38), or whether the state had actual or constructive knowledge of the unconstitutional effects of a law (*Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17, at para. 114). Granted, the purpose of the review may be different in a claim for *Charter* damages. But these examples reveal that the judicial assessment of the nature of legislation and Parliament's purpose or objective in enacting it can be accomplished without violating parliamentary privilege.

[93] Fourth, an absolute immunity does not accommodate the principles recognized in this Court's jurisprudence on constitutional remedies. It leaves little room for the principles that underpin legislative accountability — including the broad and purposive approach to rights and remedial provisions in the *Charter*, as well as constitutionalism and the rule of law. All these principles militate against absolute immunity. We agree in this respect with Mr. Power, who submits that "[a]n absolute immunity is . . . incompatible with the remedial discretion of the courts — 'a fundamental feature of the *Charter*' — and with the idea that 'flexibility is necessary to arrive at appropriate remedies involving legislation'" (R.F., at para. 81, citing *G*, at paras. 101 and 146).

[94] As discussed above, the *Charter* effected a "revolutionary transformation of the Canadian polity" under which courts were "mandated to bring the entire legal system into conformity with a complex new structure of rights-protection" (L. E. Weinrib, "Canada's *Charter of Rights*: Paradigm Lost?" (2002), 6 *Rev. Const. Stud.* 119, at p. 120). Even before the *Charter*, the court's role in holding the legislature accountable was recognized as part of the fabric of Canada's constitutional order. As Dickson J. (as he then was) explained in *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, at p. 590:

> A state, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the constitution in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the Legislatures, but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power. [Emphasis added.]
>
> (See also *Manitoba Language Rights*, at p. 745.)

[95] The *Charter* demands that legislative power be constrained by constitutional rights. Courts are constitutionally obliged to hold the government accountable when it breaches such rights, including by providing meaningful remedies in the face of their violation. An absolute immunity would undermine the purpose and text of s. 24(1), which asks courts to look at the specific context of a given violation to determine whether a remedy is appropriate and just. The *Charter* requires courts to enforce constitutional rights. Enforcement means ensuring that remedies are

commensurate with the extent of the violation (*Corbiere*, at para. 46). In this way, the separation of powers also protects the judiciary's independence to carry out its constitutional duties: "Nothing less [is] required to maintain the normative ordering of the Canadian legal system" (*Doucet-Boudreau*, at para. 109).

[96] An absolute immunity would protect the government from any claim for damages for *any* unconstitutional legislation, no matter how egregious. We accept Mr. Power's assertion that an absolute immunity allows a narrow set of constitutional interests to dominate the analysis (R.F., at para. 81).

[97] In setting a high bar for immunity, *Mackin* has stood the test of time. It has been good law for over two decades. It has resulted neither in chilling good governance, nor in a floodgate of claims against the state for damages. The state will continue to benefit from immunity unless the high threshold is satisfied. This exacting threshold functions to limit the scope of causes of action for damages. And, as always, the state can apply for a s. 24(1) claim to be dismissed summarily if the claimant fails to plead circumstances which could, if accepted, satisfy the *Mackin* threshold for liability (*Henry* (2015), at para. 43).

[98] This Court may depart from precedent where there is a compelling reason to do so, including if the precedent was inconsistent with a binding authority or statute, it has proven unworkable, or its rationale has been eroded by significant social or legal change (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44; *R. v. Kirkpatrick*,

Conférence des juges de paix magistrats du Québec, Christine Auger, Jacques Barbès, Réjean Bédard, Dominique Benoît, Georges Benoît, Michel Boissonneault, Suzanne Bousquet, Sylvie Desmeules, Julie Dionne, Marie-Chantal Doucet, Louis Duguay, Gaby Dumas, Nathalie Duperron Roy, Réna Émond, Pierre Fortin, Louise Gallant, Marie-Josée Hénault, François Kouri, Jean-Georges Laliberté, Robert Lanctôt, Luc Marchildon, Sylvie Marcotte, Nicole Martin, Danielle Michaud, Gilles Michaud, Lucie Morissette, Monique Perron, Jean-Gilles Racicot, Gaétan Ratté, Marc Renaud, Rosaire Vallières, Pierre Verrette, Johanne White, Gilles Pigeon, Léopold Goulet, Yannick Couture, Marie-Claude Bélanger and Patricia Compagnone *Appellants*

v.

Attorney General of Quebec and Minister of Justice of Quebec *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Conférence des juges de la Cour du Québec

and

Association of Justices of the Peace of Ontario *Interveners*

Indexed as: Conférence des juges de paix magistrats du Québec *v.* Quebec (Attorney General)

2016 SCC 39

File No.: 36165.

2016: January 18; 2016: October 14.

Conférence des juges de paix magistrats du Québec, Christine Auger, Jacques Barbès, Réjean Bédard, Dominique Benoît, Georges Benoît, Michel Boissonneault, Suzanne Bousquet, Sylvie Desmeules, Julie Dionne, Marie-Chantal Doucet, Louis Duguay, Gaby Dumas, Nathalie Duperron Roy, Réna Émond, Pierre Fortin, Louise Gallant, Marie-Josée Hénault, François Kouri, Jean-Georges Laliberté, Robert Lanctôt, Luc Marchildon, Sylvie Marcotte, Nicole Martin, Danielle Michaud, Gilles Michaud, Lucie Morissette, Monique Perron, Jean-Gilles Racicot, Gaétan Ratté, Marc Renaud, Rosaire Vallières, Pierre Verrette, Johanne White, Gilles Pigeon, Léopold Goulet, Yannick Couture, Marie-Claude Bélanger et Patricia Compagnone *Appelants*

c.

Procureure générale du Québec et Ministre de la justice du Québec *Intimées*

et

Procureur général du Canada, procureur général de l'Ontario, Conférence des juges de la Cour du Québec

et

Association des juges de paix de l'Ontario *Intervenants*

Répertorié : Conférence des juges de paix magistrats du Québec *c.* Québec (Procureure générale)

2016 CSC 39

N° du greffe : 36165.

2016 : 18 janvier; 2016 : 14 octobre.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

Présents : La juge en chef McLachlin et les juges Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté et Brown.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Constitutional law — Judicial independence — Financial security — Justices of peace — Judicial reform — Provincial legislation amending status of justices of peace, including employment conditions, remuneration and pension plan — Whether new judicial office created — Whether committee review of remuneration and pension plan necessary and if so, when should review occur — Whether legislation infringes constitutional guarantee of judicial independence — If so, whether infringement justifiable — Constitution Act, 1867, preamble — Canadian Charter of Rights and Freedoms, ss. 1, 11(d) — Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace, S.Q. 2004, c. 12, ss. 27, 30 and 32 — Décret 932-2008, (2008) 140 G.O. 2, 5681.

Droit constitutionnel — Indépendance judiciaire — Sécurité financière — Juges de paix — Réforme judiciaire — Statut des juges de paix, dont les conditions d'emploi, la rémunération et le régime de retraite, modifié par législation provinciale — Y a-t-il eu création d'une nouvelle charge judiciaire? — Un examen de la rémunération et du régime de retraite par un comité est-il nécessaire et, dans l'affirmative, à quel moment l'examen doit-il intervenir? — La loi porte-t-elle atteinte à la garantie constitutionnelle d'indépendance judiciaire? — Dans l'affirmative, l'atteinte se justifie-t-elle? — Loi constitutionnelle de 1867, préambule — Charte canadienne des droits et libertés, art. 1, 11d) — Loi modifiant la Loi sur les tribunaux judiciaires et d'autres dispositions législatives eu égard au statut des juges de paix, L.Q. 2004, c. 12, art. 27, 30 et 32 — Décret 932-2008, (2008) 140 G.O. 2, 5681.

Constitutional law — Judicial independence — Financial security — Pensions — Justices of peace — Judicial reform — Section 178 of Courts of Justice Act, CQLR, c. T-16, mandates participation of justices of peace in public service pension plan — Whether pension plan, as part of overall remuneration, meets minimum constitutional threshold required for judicial office.

Droit constitutionnel — Indépendance judiciaire — Sécurité financière — Régime de retraite — Juges de paix — Réforme judiciaire — Participation des juges de paix au régime de retraite de la fonction publique imposée par l'art. 178 de la Loi sur les tribunaux judiciaires, RLRQ, c. T-16 — Le régime de retraite, qui s'inscrit dans la rémunération globale, satisfait-il au seuil constitutionnel minimal qu'exige une charge judiciaire?

In 2004, the Quebec government reformed its justices of the peace regime in response to a Court of Appeal judgment declaring that the existing regime violated the tenure security guarantee of judicial independence. Six sitting justices of the peace were transitioned to the new regime, with the same remuneration as before; however, justices newly appointed to that office received a lower remuneration. None of the legislative provisions affecting remuneration were put to a reviewing committee before 2007, which then made recommendations only on a forward-looking basis. The government followed up on these recommendations by making executive Order 932-2008. In 2008, the Conférence des juges de paix magistrats du Québec and its individual members (presiding justices of the peace ("PJPs")) challenged ss. 27, 30 and 32 of the *Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace* (the "amending Act") and executive Order 932-2008, as infringing the financial security guarantee of judicial independence. In addition, the PJPs argued that s. 178 of

En 2004, le gouvernement du Québec a procédé à une réforme du régime applicable aux juges de paix en réponse au jugement de la Cour d'appel déclarant que ce régime ne respectait pas la garantie d'inamovibilité qu'exige l'indépendance judiciaire. Six juges de paix ont été transférés au nouveau régime tout en conservant leur rémunération; toutefois les juges de paix nouvellement nommés touchaient un traitement moins élevé. Aucune des dispositions législatives touchant à la rémunération n'a été soumise à l'examen d'un comité de la rémunération avant 2007; le comité n'a alors fait que des recommandations pour l'avenir. Le gouvernement a adopté le Décret 932-2008 pour donner suite aux recommandations. En 2008, la Conférence des juges de paix magistrats du Québec et ses membres (les juges de paix magistrats (« JPM ») ont contesté les art. 27, 30 et 32 de la *Loi modifiant la Loi sur les tribunaux judiciaires et d'autres dispositions législatives eu égard au statut des juges de paix* (la « Loi modificatrice ») et le Décret 932-2008 au motif qu'ils ne respectaient pas la garantie de

the *Courts of Justice Act* ("*CJA*"), which mandates their participation in the public service Pension Plan of Management Personnel, also infringes the financial security guarantee. Both the Superior Court and the Court of Appeal, in turn, found no violation of judicial independence because the provisions were part of a reform resulting in the creation of a new judicial office.

Held: The appeal should be allowed in part. Sections 27, 30 and 32 of the *Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace* are unconstitutional.

A judicial reform may raise questions of judicial independence both for judges occupying offices that are reformed or abolished, and for judges appointed to newly created positions. Any measure that affects remuneration will automatically trigger the institutional dimension of financial security. The initial remuneration for the new office must meet the constitutional minimum required to ensure judicial integrity. Without committee review of the initial remuneration, there is no guarantee that the constitutional minimum is met. A review is also required where the new judges were transferred from an old judicial office. The government should not be able to replace one office with another, adjust the jurisdiction, transfer the judges and change the remuneration, without any safeguards. Because sitting judges are in an existing relationship with the government, their relationship is more susceptible to the risk of manipulation. This warrants additional protection for sitting judges. Thus, while the government retains the discretion to set the remuneration of newly appointed judges, it cannot change the remuneration of sitting judges until after committee review.

To protect judicial independence when a new judicial office is created, all remuneration must be reviewed within a reasonable time. A reasonable time refers to the time required to implement a judicial reform, to establish the appropriate review committee and to ensure proper participation by the new judges. It will generally be measured in months, and not in years.

In the context of a judicial reform, the same reasons that justify deferring committee review of the remuneration for newly appointed judges apply equally to sitting judges who are transferred to a new office. Requiring prior review for sitting judges would create delays for

sécurité financière qu'exige l'indépendance judiciaire. En outre, les JPM soutenaient que l'art. 178 de la *Loi sur les tribunaux judiciaires* (« *LTJ* »), en les obligeant à participer au régime de retraite du personnel d'encadrement de la fonction publique, ne respectait pas non plus la garantie de sécurité financière. La Cour supérieure et la Cour d'appel ont conclu que les dispositions ne menaçaient pas l'indépendance judiciaire, car elles s'inscrivaient dans le cadre d'une réforme ayant abouti à la création d'une nouvelle charge judiciaire.

Arrêt : L'appel est accueilli en partie. Les articles 27, 30 et 32 de la *Loi modifiant la Loi sur les tribunaux judiciaires et d'autres dispositions législatives eu égard au statut des juges de paix* sont inconstitutionnels.

Il se peut qu'une réforme judiciaire suscite des interrogations concernant l'indépendance judiciaire à l'égard non seulement des juges dont la charge a été modifiée ou abolie, mais aussi de ceux qui sont nommés à une charge nouvellement créée. Toute mesure ayant une incidence sur la rémunération des juges mettra automatiquement en jeu la dimension institutionnelle de la sécurité financière. La rémunération initiale de la nouvelle charge doit satisfaire au minimum constitutionnel requis pour assurer l'intégrité judiciaire. À défaut d'examen de la rémunération initiale par un comité, il n'existe aucune garantie que le minimum constitutionnel est respecté. Un examen s'impose également lorsque les nouveaux juges sont transférés d'une ancienne charge judiciaire. Le gouvernement ne saurait simplement remplacer une charge par une autre, en modifier la juridiction, transférer les juges et réduire leur rémunération, sans garantie. Comme les juges en exercice entretiennent déjà des rapports avec le gouvernement, le risque de manipulation est aggravé, ce qui justifie une protection supplémentaire dans leur cas. Ainsi, bien que le gouvernement puisse, en vertu de son pouvoir discrétionnaire, fixer la rémunération des nouveaux juges, il ne peut modifier le traitement des juges en exercice tant que le comité n'a pas procédé à l'examen.

Pour protéger l'indépendance judiciaire lorsqu'il y a création d'une charge judiciaire, toute rémunération doit être examinée dans un délai raisonnable. Un délai raisonnable s'entend du temps qu'il faut pour effectuer une réforme judiciaire, mettre sur pied le comité d'examen et assurer une participation adéquate des nouveaux juges. Il se calcule de façon générale en mois et non en années.

Dans le contexte d'une réforme judiciaire, les raisons qui justifient que soit reportée la tenue d'un comité d'examen de la rémunération dans le cas des juges nouvellement nommés s'appliquent tout autant aux juges en exercice qui sont transférés à une nouvelle charge.

judicial reforms that are in the public interest, potentially prolong an unconstitutional judicial regime, undermine judicial independence and negatively impact public perception. The principle of judicial independence exists for the benefit of the public, not for the judge. Viewed from the perspective of the public, a review within a reasonable time for all judges is an effective safeguard for financial security, even if some judges were previously serving in another judicial office.

In determining whether a judicial office has merely been changed, or a new judicial office has been created, the judicial function and the conditions of employment, including tenure, financial security, selection and administrative independence, are relevant considerations. In this case, the 2004 reform created a new judicial office. The PJPs have a different jurisdiction than under the previous regime: they do not have jurisdiction to preside over bail hearings and do not hear summary prosecutions under Part XXVII of the *Criminal Code*. In addition, the PJPs now benefit from greater judicial independence guarantees: they enjoy tenure until the age of 70; their remuneration and other benefits are subject to periodic committee review; their selection criteria are set out in the *CJA*; and finally, they are integrated into the Court of Québec and are thus subject to the authority of its Chief Judge.

Because the reform created a new judicial office, the remuneration of all the judges appointed to it (whether they were appointed for the first time or transferred from another office) needed to be reviewed retroactively, within a reasonable time after their appointment. Section 32 of the amending Act prohibits any review of the remuneration before 2007, although the judicial office was established in 2004. This contravenes the constitutional requirement that the initial remuneration of judges occupying a new office be reviewed by a committee within a reasonable time after their appointment. There were no compelling reasons why a review could not proceed before 2007. Three years is not a reasonable time. As such, s. 32 of the amending Act infringes the financial security guarantee of judicial independence. In addition, as ss. 27 and 30 provide for a freeze in the remuneration of the sitting judges and the establishment of the remuneration of the newly appointed judges, respectively, without referencing the need to retroactively submit the remuneration to a committee, these sections also infringe judicial independence. Finally, s. 27 infringes judicial independence

Exiger un examen préalable dans le cas de juges en exercice retarderait la mise en œuvre des réformes judiciaires fondées sur l'intérêt public et risquerait de prolonger un régime judiciaire inconstitutionnel, de porter atteinte à l'indépendance judiciaire et de miner la perception du public. Le principe de l'indépendance judiciaire existe au profit du public et non du juge. Pour le public, la tenue dans un délai raisonnable d'un examen portant sur la situation de tous les juges protège efficacement la sécurité financière, même si certains juges occupaient antérieurement une autre charge judiciaire.

Lorsqu'il s'agit de déterminer si une charge a simplement été modifiée ou si une nouvelle charge a été créée, les fonctions de la charge judiciaire et les conditions d'emploi, dont l'inamovibilité, la sécurité financière, la sélection et l'indépendance administrative, constituent des considérations pertinentes. En l'espèce, la réforme de 2004 a créé une nouvelle charge judiciaire. La juridiction des JPM se distingue de celle que prévoyait l'ancien régime : les JPM n'ont pas compétence pour présider les enquêtes sur mise en liberté sous caution et ne peuvent instruire les poursuites sommaires intentées en vertu de la partie XXVII du *Code criminel*. En outre, dorénavant, les JPM bénéficient de garanties d'indépendance judiciaire plus étendues : ils peuvent siéger jusqu'à l'âge de 70 ans, leur traitement et les autres avantages sont soumis périodiquement à l'examen d'un comité, leurs critères de sélection sont énoncés dans la *LTJ* et, enfin, ils relèvent de la Cour du Québec et sont donc soumis à l'autorité du juge en chef de ce tribunal.

Comme la réforme a créé une nouvelle charge judiciaire, le traitement initial de tous les juges nommés à cette charge (pour la première fois ou après un transfert d'une autre charge) devait être examiné rétroactivement, dans un délai raisonnable après leur nomination. L'article 32 de la Loi modificatrice interdit tout examen de la rémunération avant 2007, bien que la charge judiciaire ait été créée en 2004. Il s'agit là d'un manquement à l'exigence constitutionnelle selon laquelle la rémunération initiale des juges occupant une nouvelle charge est examinée par un comité dans un délai raisonnable après leur nomination. Aucune raison valable n'explique pourquoi l'examen ne pouvait être tenu avant 2007. Un délai de trois ans ne constitue pas un délai raisonnable. En conséquence, l'art. 32 de la Loi modificatrice porte atteinte à la garantie de sécurité financière qu'exige l'indépendance judiciaire. En outre, étant donné que les art. 27 et 30 prévoient respectivement un gel de la rémunération des juges transférés et l'établissement de la rémunération des juges nouvellement nommés, mais n'exigent pas l'examen rétroactif de la rémunération par un comité, ces dispositions

because it freezes the remuneration of sitting judges before a committee has reviewed this remuneration, contrary to the financial security guarantee. As for the salary gap between the sitting judges and those newly appointed, the gap, by itself, did not infringe the financial security guarantee.

As ss. 27, 30 and 32 of the amending Act did not provide for retroactive committee review within a reasonable time, these sections infringe the institutional financial security guarantee of judicial independence, and are thus contrary to s. 11(*d*) of the *Charter* and the preamble to the *Constitution Act, 1867*. This infringement of judicial independence is not justified under s. 1 of the *Charter*, because there is no evidence of a dire and exceptional financial emergency. Therefore, ss. 27, 30 and 32 are unconstitutional. Because the infringement arises from the lack of committee review between 2004 and 2007, a review for this period is required for all PJPs as a remedy. The committee must consider all factors bearing on remuneration, including the remuneration of the previous judicial office. While the guarantee of judicial independence was compromised between 2004 and 2007, however, the judicial decisions rendered by the PJPs throughout that period are valid.

Since the government complied with its constitutional obligation to periodically submit PJPs remuneration to a committee from 2007 onwards, public confidence in judicial independence was in no way undermined for that later period. As such, there was no violation of judicial independence after 2007 and no defect in the executive Order 932-2008. Moreover, any impact that the lack of committee review from 2004 to 2007 may have had on PJPs remuneration after 2007 cannot be said to have raised constitutional concerns.

Finally, s. 178 of the *CJA* is valid. While the Pension Plan of Management Personnel may not be as beneficial as that of the judges of the Court of Québec, as part of overall remuneration, it meets the minimum constitutional threshold required for the office of a judge such that the PJPs are not perceived as susceptible to political pressure through economic manipulation.

portent également atteinte à l'indépendance judiciaire. Enfin, l'art. 27 porte atteinte à l'indépendance judiciaire en ce sens qu'il a pour effet de geler la rémunération de juges en exercice avant qu'un comité n'examine la question, ce qui est contraire aux exigences de la garantie de sécurité financière. En ce qui concerne l'écart salarial entre les juges transférés et les juges nouvellement nommés, en soi, cet écart salarial n'a pas porté atteinte à la garantie de sécurité financière.

Étant donné que les art. 27, 30 et 32 de la Loi modificatrice n'exigent pas l'examen rétroactif de la rémunération par un comité dans un délai raisonnable, ces dispositions portent atteinte à la garantie de sécurité financière institutionnelle qu'exige l'indépendance judiciaire et ne respectent pas l'al. 11*d*) de la *Charte* ainsi que le préambule de la *Loi constitutionnelle de 1867*. Cette atteinte à l'indépendance judiciaire n'est pas justifiée au regard de l'article premier de la *Charte* en l'absence de preuve d'une crise financière exceptionnellement grave. En conséquence, les art. 27, 30 et 32 sont inconstitutionnels. Comme l'atteinte découle de l'absence d'examen par un comité entre 2004 et 2007, un examen de la rémunération de tous les JPM par un comité est ordonné pour cette période, à titre de réparation. Le comité doit tenir compte de tous les facteurs ayant une incidence sur la rémunération, y compris la rémunération associée à la charge judiciaire antérieure. Même si la garantie d'indépendance judiciaire a été compromise entre 2004 et 2007, les décisions judiciaires rendues par les JPM durant cette période sont valides.

Comme le gouvernement s'est conformé dès 2007 à son obligation constitutionnelle de soumettre périodiquement à l'examen d'un comité la rémunération des JPM, la confiance du public à l'égard de l'indépendance judiciaire n'a en aucun cas été minée depuis. Il n'y a donc pas eu d'atteinte à l'indépendance judiciaire après 2007, et le Décret 932-2008 n'est entaché d'aucun vice. De surcroît, si tant est que l'absence d'examen, entre 2004 et 2007, ait eu sur la rémunération des JPM après 2007 une incidence, on ne peut dire que cette dernière ait soulevé des préoccupations d'ordre constitutionnel.

Enfin, l'art. 178 de la *LTJ* est valide. Bien que le régime de retraite du personnel d'encadrement ne soit pas aussi avantageux que celui des juges de la Cour du Québec, considéré dans le cadre de la rémunération globale, il respecte le seuil minimal constitutionnel requis pour une charge judiciaire de sorte que les JPM ne soient pas perçus comme étant vulnérables aux pressions politiques exercées par le biais de la manipulation financière.

Cases Cited

Referred to: *Pomerleau v. The Queen*, 2003 CanLII 33471; *Conférence des juges du Québec v. Québec (Procureur général)*, 2007 QCCS 2672, [2007] R.J.Q. 1556; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, 2005 SCC 44, [2005] 2 S.C.R. 286; *R. v. Généreux*, [1992] 1 S.C.R. 259; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Masters' Association of Ontario v. Ontario*, 2011 ONCA 243, 105 O.R. (3d) 196; *Ontario Deputy Judges Assn. v. Ontario* (2006), 80 O.R. (3d) 481; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3.

Statutes and Regulations Cited

Act respecting the Pension Plan of Management Personnel, CQLR, c. R-12.1.
Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace, S.Q. 2004, c. 12, ss. 1, 26, 27, 30, 32, 35.
Canadian Charter of Rights and Freedoms, ss. 1, 11(*d*).
Constitution Act, 1867, preamble, ss. 92(14), 96, 101.
Courts of Justice Act, CQLR, c. T-16, Part III.1, ss. 161, 162, 163, 165, 166, 169, 173, 175, 176, 178, 246.29, 246.42, Sch. V.
Criminal Code, R.S.C. 1985, c. C-46, Part XXVII.
Décret 689-2004, (2004) 136 G.O. 2, 3531.
Décret 932-2008, (2008) 140 G.O. 2, 5681.

Authors Cited

Quebec. Assemblée nationale. *Journal des débats*, vol. 38, nº 75, 1re sess., 37e lég., 20 mai 2004, p. 4543.
Quebec. Assemblée nationale. *Journal des débats de la Commission permanente des institutions*, vol. 38, nº 54, 1re sess., 37e lég., 28 mai 2004, p. 18.
Quebec. Comité de la rémunération des juges. *Rapport du Comité de la rémunération des juges*, présidé par Alban D'Amours, 23 décembre 2010 (en ligne: http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/remjuges2011.pdf).
Quebec. Comité de la rémunération des juges. *Rapport du comité de la rémunération des juges*, présidé par

Jurisprudence

Arrêts mentionnés : *Pomerleau c. La Reine*, [2004] R.J.Q. 83; *Conférence des juges du Québec c. Québec (Procureur général)*, 2007 QCCS 2672, [2007] R.J.Q. 1556; *Beauregard c. Canada*, [1986] 2 R.C.S. 56; *Valente c. La Reine*, [1985] 2 R.C.S. 673; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3; *Ell c. Alberta*, 2003 CSC 35, [2003] 1 R.C.S. 857; *Mackin c. Nouveau-Brunswick (Ministre des Finances)*, 2002 CSC 13, [2002] 1 R.C.S. 405; *Assoc. des juges de la Cour provinciale du Nouveau-Brunswick c. Nouveau-Brunswick (Ministre de la Justice)*, 2005 CSC 44, [2005] 2 R.C.S. 286; *R. c. Généreux*, [1992] 1 R.C.S. 259; *MacMillan Bloedel Ltd. c. Simpson*, [1995] 4 R.C.S. 725; *Masters' Association of Ontario c. Ontario*, 2011 ONCA 243, 105 O.R. (3d) 196; *Ontario Deputy Judges Assn. c. Ontario* (2006), 80 O.R. (3d) 481; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1998] 1 R.C.S. 3.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 11*d*).
Code criminel, L.R.C. 1985, c. C-46, partie XXVII.
Décret 689-2004, (2004) 136 G.O. 2, 3531.
Décret 932-2008, (2008) 140 G.O. 2, 5681.
Loi constitutionnelle de 1867, préambule, art. 92(14), 96, 101.
Loi modifiant la Loi sur les tribunaux judiciaires et d'autres dispositions législatives eu égard au statut des juges de paix, L.Q. 2004, c. 12, art. 1, 26, 27, 30, 32, 35.
Loi sur le régime de retraite du personnel d'encadrement, RLRQ, c. R-12.1.
Loi sur les tribunaux judiciaires, RLRQ, c. T-16, partie III.1, art. 161, 162, 163, 165, 166, 169, 173, 175, 176, 178, 246.29, 246.42, ann. V.

Doctrine et autres documents cités

Québec. Assemblée nationale. *Journal des débats*, vol. 38, nº 75, 1re sess., 37e lég., 20 mai 2004, p. 4543.
Québec. Assemblée nationale. *Journal des débats de la Commission permanente des institutions*, vol. 38, nº 54, 1re sess., 37e lég., 28 mai 2004, p. 18.
Québec. Comité de la rémunération des juges. *Rapport du Comité de la rémunération des juges*, présidé par Alban D'Amours, 23 décembre 2010 (en ligne : http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/remjuges2011.pdf).
Québec. Comité de la rémunération des juges. *Rapport du comité de la rémunération des juges*, présidé par

Daniel Johnson, avril 2008 (en ligne: http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/rem-juge3.pdf).

Quebec. Comité de la rémunération des juges. *Rapport du Comité de la rémunération des juges*, présidé par Michel Clair, 30 septembre 2013 (en ligne: http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/remjuges2013.pdf).

APPEAL from a judgment of the Quebec Court of Appeal (Dalphond, Bouchard and Vauclair JJ.A.), 2014 QCCA 1654, [2014] AZ-51107397, [2014] Q.J. No. 9733 (QL), 2014 CarswellQue 14611 (WL Can.), affirming a decision of Mongeon J., 2012 QCCS 1021, [2012] R.J.Q. 729, [2012] AZ-50840226, [2012] J.Q. nº 2260 (QL), 2012 CarswellQue 2373 (WL Can.). Appeal allowed in part.

Raymond Doray and *Loïc Berdnikoff*, for the appellants.

Sébastien Rochette and *Brigitte Bussières*, for the respondents.

François Joyal and *Catherine Lawrence*, for the intervener the Attorney General of Canada.

Sarah Kraicer and *Josh Hunter*, for the intervener the Attorney General of Ontario.

Joël Mercier and *Christine Baudouin*, for the intervener Conférence des juges de la Cour du Québec.

J. Thomas Curry and *Paul-Erik Veel*, for the intervener the Association of Justices of the Peace of Ontario.

The judgment of the Court was delivered by

KARAKATSANIS, WAGNER AND CÔTÉ JJ. —

I. Introduction

[1] Legislatures have the constitutional power over the creation, transformation and abolition of judicial offices. However, legislatures must exercise this

Daniel Johnson, avril 2008 (en ligne : http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/rem-juge3.pdf).

Québec. Comité de la rémunération des juges. *Rapport du Comité de la rémunération des juges*, présidé par Michel Clair, 30 septembre 2013 (en ligne : http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/remjuges2013.pdf).

POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Dalphond, Bouchard et Vauclair), 2014 QCCA 1654, [2014] AZ-51107397, [2014] J.Q. nº 9733 (QL), 2014 CarswellQue 9133 (WL Can.), qui a confirmé une décision du juge Mongeon, 2012 QCCS 1021, [2012] R.J.Q. 729, [2012] AZ-50840226, [2012] J.Q. nº 2260 (QL), 2012 CarswellQue 2373 (WL Can.). Pourvoi accueilli en partie.

Raymond Doray et *Loïc Berdnikoff*, pour les appelants.

Sébastien Rochette et *Brigitte Bussières*, pour les intimées.

François Joyal et *Catherine Lawrence*, pour l'intervenant le procureur général du Canada.

Sarah Kraicer et *Josh Hunter*, pour l'intervenant le procureur général de l'Ontario.

Joël Mercier et *Christine Baudouin*, pour l'intervenante la Conférence des juges de la Cour du Québec.

J. Thomas Curry et *Paul-Erik Veel*, pour l'intervenante l'Association des juges de paix de l'Ontario.

Version française du jugement de la Cour rendu par

LES JUGES KARAKATSANIS, WAGNER ET CÔTÉ —

I. Introduction

[1] Les législatures disposent du pouvoir constitutionnel de créer des charges judiciaires, de les modifier et de les abolir. Cependant, elles doivent exercer

power in a way that complies with the constitutional principle of judicial independence.

[2] In 2004, the government of Quebec reformed its regime of justices of the peace in response to a Court of Appeal judgment declaring that the existing regime violated the tenure security guarantee of judicial independence. The new regime created two categories of justices of the peace. Six sitting justices were transitioned to the new tenured category, maintaining their remuneration. However, the government set the starting remuneration of the new category well below the previous levels; therefore, judges newly appointed into that office received a significantly lower remuneration than their sitting counterparts. None of the provisions affecting remuneration were put to a remuneration committee (or commission) before 2007; the committee made recommendations only on a forward-looking basis.

[3] In 2008, the appellants — the Conférence des juges de paix magistrats du Québec and its individual members — made an application in the Superior Court. They argued that the transitional provisions relating to the setting and review of remuneration, specifically ss. 27, 30 and 32 of the *Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace*, S.Q. 2004, c. 12 ("Act"), and executive Order 932-2008, (2008) 140 G.O. 2, 5681, violate the financial security guarantee of judicial independence. They also argued that their participation in the public service Pension Plan of Management Personnel mandated by s. 178 of the *Courts of Justice Act*, CQLR, c. T-16 ("*CJA*"), violates the financial security guarantee.

[4] The courts below found no violation of judicial independence because the provisions were part of a reform resulting in the creation of a new judicial office.

ce pouvoir conformément au principe constitutionnel d'indépendance judiciaire.

[2] En 2004, le gouvernement du Québec a procédé à une réforme du régime applicable aux juges de paix en réponse au jugement de la Cour d'appel déclarant que ce régime ne respectait pas la garantie d'inamovibilité qu'exige l'indépendance judiciaire. Le nouveau régime créait deux catégories de juges de paix. Six juges de paix ayant été nommés sous l'ancien régime sont passés à l'une des nouvelles catégories, une charge inamovible, tout en conservant leur traitement. Or, le gouvernement avait fixé le traitement initial de cette nouvelle catégorie bien en deçà de la rémunération de la charge précédente; les juges de paix nouvellement nommés touchaient donc un traitement beaucoup moins élevé que leurs homologues en exercice. Aucune des dispositions touchant à la rémunération n'a été soumise à l'examen d'un comité — ou commission — de la rémunération avant 2007; le comité n'a alors fait que des recommandations pour l'avenir.

[3] En 2008, les appelants — la Conférence des juges de paix magistrats du Québec et ses membres — se sont adressés à la Cour supérieure. Ils soutenaient que les dispositions transitoires relatives à la détermination de leur traitement et à l'examen de ce dernier, à savoir les art. 27, 30 et 32 de la *Loi modifiant la Loi sur les tribunaux judiciaires et d'autres dispositions législatives eu égard au statut des juges de paix*, L.Q. 2004, c. 12 (« Loi »), et le Décret 932-2008, (2008) 140 G.O. 2, 5681, ne respectaient pas la garantie de sécurité financière qu'exige l'indépendance judiciaire. Ils soutenaient également que leur participation au régime de retraite du personnel d'encadrement imposée par l'art. 178 de la *Loi sur les tribunaux judiciaires*, RLRQ, c. T-16 (« *LTJ* »), ne respectait pas la garantie de sécurité financière.

[4] Les juridictions inférieures ont conclu que les dispositions contestées ne menaçaient pas l'indépendance judiciaire, car elles s'inscrivaient dans le cadre d'une réforme ayant abouti à la création d'une nouvelle charge judiciaire.

[5] For the reasons that follow, we would allow the appeal in part. In our view, committee review of remuneration is required for any new judicial office, although it can be done retroactively within a reasonable time after the appointments. This is so even where those appointed to the new judicial office were transferred from a previous judicial office. Because ss. 27, 30 and 32 of the Act did not provide for retroactive committee review within a reasonable time after the appointments, these sections violate the financial security guarantee of judicial independence. The constitutional questions and our answers to them are set out in the Appendix to the reasons.

II. Facts

[6] Before 2004, Quebec's justice of the peace system comprised two categories of justices: justices of the peace with limited powers, who were public servants, and justices of the peace with expanded powers ("JPEPs"), who were authorized to exercise a wide array of judicial functions.

[7] In *Pomerleau v. The Queen*, 2003 CanLII 33471, the Quebec Court of Appeal held that the existing system was unconstitutional because it did not guarantee the independence of justices of the peace. Since justices of the peace with limited powers were subject to removal, the court declared that they did not have the required minimum guarantees of independence. The Court of Appeal refused to suspend the effects of that declaration.

[8] Six months after *Pomerleau*, the National Assembly adopted the Act, which replaced Part III.1 of the *CJA*, entitled "Justices of the Peace", with a new part. The new part created the offices of "presiding justice of the peace" ("PJP") and "administrative justice of the peace". The key provisions of the Act are set out in the Appendix.

[9] Administrative justices of the peace exercise functions that do not require judicial independence. They are not at issue in this appeal.

[5] Pour les motifs qui suivent, nous sommes d'avis d'accueillir en partie le pourvoi. Selon nous, il est nécessaire qu'un comité se penche sur la rémunération liée à toute nouvelle charge judiciaire, bien que cet examen puisse être fait rétroactivement dans un délai raisonnable après les nominations. Il en est ainsi même si les personnes nommées à la nouvelle charge judiciaire occupaient une ancienne charge. Comme les art. 27, 30 et 32 de la Loi ne prévoyaient pas l'examen rétroactif par un comité dans un délai raisonnable après les nominations, ces dispositions ne respectent pas la garantie de sécurité financière qu'exige l'indépendance judiciaire. Les questions constitutionnelles et nos réponses se trouvent en annexe aux présents motifs.

II. Les faits

[6] Avant 2004, le système des juges de paix en place au Québec comprenait deux catégories de juges. Il y avait les juges de paix à pouvoirs restreints, qui étaient fonctionnaires, et les juges de paix à pouvoirs étendus (« JPPE »), autorisés à poser de nombreux actes de nature judiciaire.

[7] Dans l'arrêt *Pomerleau c. La Reine*, [2004] R.J.Q. 83, la Cour d'appel du Québec a conclu que le système en place était inconstitutionnel puisqu'il ne garantissait pas l'indépendance des juges de paix. Comme les juges de paix à pouvoirs restreints étaient amovibles, la cour a déclaré que ces juges ne jouissaient pas des garanties minimales d'indépendance. La Cour d'appel a refusé de suspendre l'effet de cette déclaration.

[8] Six mois après l'arrêt *Pomerleau*, l'Assemblée nationale a adopté la Loi. Cette loi venait remplacer la partie III.1 de la *LTJ*, « des juges de paix », par une nouvelle partie, qui créait les postes de « juge de paix magistrat » (« JPM ») et de « juge de paix fonctionnaire ». Les dispositions importantes de la Loi se trouvent à l'annexe.

[9] Les juges de paix fonctionnaires exercent des fonctions qui ne requièrent pas l'indépendance judiciaire. Ils ne sont pas visés par ce pourvoi.

[10] The functions of the PJP are similar to those of the JPEP. Unlike the JPEP, however, a PJP cannot preside over bail hearings or hear summary conviction proceedings under Part XXVII of the *Criminal Code*, R.S.C. 1985, c. C-46 (*CJA*, s. 173 and Schedule V). The Act also included changes to the qualifications for PJPs and to the selection and appointment processes (*CJA*, ss. 161, 162 and 163). PJPs are now integrated into the Court of Québec (s. 169). Moreover, they have security of tenure until the age of 70 (ss. 165 to 166). Their salary and benefits are fixed by the government after receipt of the recommendations of a committee on the remuneration of judges and justices of the peace (ss. 175 and 176). PJPs participate in the pension plan established by the *Act respecting the Pension Plan of Management Personnel*, CQLR, c. R-12.1 (*CJA*, s. 178). Changes to this plan can be made only after a committee on the remuneration of judges and justices of the peace has reviewed them (s. 178 para. 2; s. 246.29).

[11] The Act also set out rules that governed the transition from the old system to the new. Section 26 of the Act provided that JPEPs who had been appointed before 2004 and were still in office in 2004 were to become PJPs. Section 27 provided that they were to retain the salary they had been receiving before then "until that salary is equal to the salary to be determined by the Government", thus creating a higher level of remuneration. Further, in 2007, as a result of a Superior Court judgment regarding judges' salaries for the period from 2001 to 2007, the former JPEPs were awarded a retroactive increase, raising their salary as of June 30, 2004, to $137,280 (see *Conférence des juges du Québec v. Québec (Procureur général)*, 2007 QCCS 2672, [2007] R.J.Q. 1556).

[12] Moreover, s. 30 of the Act gave the government the power to unilaterally determine the salary of PJPs appointed on or after June 30, 2004. Under that section, the government made an order — Order 689-2004, (2004) 136 G.O. 2, 3531, of June 30, 2004 — in which it fixed the annual salary of PJPs at $90,000. Section 32 of the Act provided that the

[10] Les attributions des JPM sont similaires à celles des JPPE. Cependant, contrairement aux JPPE, les JPM ne peuvent présider des enquêtes pour mise en liberté et présider des audiences sur des poursuites sommaires en vertu de la partie XXVII du *Code criminel*, L.R.C. 1985, c. C-46 (*LTJ*, art. 173 et annexe V). La Loi comprenait également des changements portant sur les conditions d'admissibilité des JPM et sur le processus de sélection et de nomination (*LTJ*, art. 161, 162 et 163). Les JPM sont désormais intégrés à la Cour du Québec (art. 169). De plus, ils sont inamovibles jusqu'à l'âge de 70 ans (art. 165 à 166). Le traitement ainsi que les autres avantages sont déterminés par le gouvernement après réception des recommandations d'un comité de la rémunération des juges (art. 175 et 176). Les JPM participent au régime de retraite établi par la *Loi sur le régime de retraite du personnel d'encadrement*, RLRQ, c. R-12.1 (*LTJ*, art. 178). Ce régime ne peut être modifié qu'après l'intervention d'un comité de la rémunération des juges (art. 178 al. 2, art. 246.29).

[11] La Loi prévoit aussi les règles applicables au passage de l'ancien au nouveau régime. L'article 26 de la Loi prévoit que les JPPE nommés avant 2004 et en fonction en 2004 deviennent JPM. Selon l'article 27, ils conservent le traitement qu'ils recevaient antérieurement, « jusqu'à ce que ce traitement soit égal à celui qui sera établi par le gouvernement », ce qui a pour effet d'établir un palier supérieur de rémunération. En outre, en 2007, à la suite d'un jugement de la Cour supérieure relatif au traitement des juges pour la période de 2001 à 2007, les anciens JPPE reçoivent une augmentation rétroactive qui porte leur salaire au 30 juin 2004 à 137 280 $ (voir *Conférence des juges du Québec c. Québec (Procureur général)*, 2007 QCCS 2672, [2007] R.J.Q. 1556).

[12] De plus, l'art. 30 de la Loi confère au gouvernement le pouvoir de fixer unilatéralement le traitement des JPM nommés à compter du 30 juin 2004. En vertu de cet article, le 30 juin 2004, par le Décret 689-2004, (2004) 136 G.O. 2, 3531, le gouvernement fixe le salaire annuel des JPM à 90 000 $. L'article 32 de la Loi énonce pour sa part

committee on the remuneration of judges and justices of the peace was not to begin exercising its functions with regard to PJPs until 2007.

[13] The first new PJPs were appointed in May 2005. The Conférence des juges de paix magistrats was created in December of that year.

[14] In 2008, a committee on the remuneration of judges and justices of the peace chaired by Daniel Johnson (the "Johnson Committee") tabled its report on, among other subjects, the remuneration of PJPs. It concluded that it lacked the authority to retroactively review remuneration for the period from 2004 to 2007 (*Rapport du comité de la rémunération des juges* (2008) (online), at p. IV-17). The Johnson Committee recommended that the annual salary of PJPs be raised to $110,000 for the period from 2007 to 2010 (p. IV-26). It recommended that the salary of the former JPEPs, then frozen at $137,280, be maintained. The government adopted these recommendations by way of Order 932-2008.

[15] In November 2008, the 33 PJPs and the Conférence des juges de paix magistrats commenced proceedings in the Superior Court.

[16] In 2010, a committee on the remuneration of judges and justices of the peace chaired by Alban D'Amours (the "D'Amours Committee") recommended that the salary of PJPs be raised to $119,000 (*Rapport du Comité de la rémunération des juges* (2010) (online), at pp. IV-19 to IV-20), and that the salary of PJPs appointed before June 30, 2004, remain unchanged. The government adopted these recommendations. In 2013, a committee on the remuneration of judges and justices of the peace chaired by Michel Clair (the "Clair Committee") reviewed the remuneration of PJPs once again. (See *Rapport du Comité de la rémunération des juges* (2013) (online).)

[17] Since 2013, the salary of PJPs appointed after 2004 has been identical to that of the former JPEPs. The existence of two tiers of remuneration has thus been eliminated.

que le Comité de la rémunération des juges n'exerce ses attributions concernant les JPM qu'à compter de 2007.

[13] Les premiers nouveaux JPM sont nommés en mai 2005. En décembre 2005, la Conférence des juges de paix magistrats est constituée.

[14] En 2008, un comité de la rémunération des juges présidé par Daniel Johnson (le « Comité Johnson ») dépose son rapport portant, entre autres, sur la rémunération des JPM. Le comité estime qu'il est sans pouvoir pour examiner rétroactivement la rémunération pour la période de 2004 à 2007 (*Rapport du comité de la rémunération des juges* (2008) (en ligne), p. IV-17). Le Comité Johnson recommande d'augmenter le traitement annuel des JPM pour le porter à 110 000 $ pour la période de 2007 à 2010 (p. IV-26). Il recommande de maintenir le traitement des anciens JPPE, alors gelé à 137 280 $. Le gouvernement adopte ces recommandations par le Décret 932-2008.

[15] En novembre 2008, les 33 JPM, ainsi que la Conférence des juges de paix magistrats, intentent un recours en Cour supérieure.

[16] En 2010, un comité de la rémunération des juges présidé par Alban D'Amours (le « Comité D'Amours ») recommande une augmentation du traitement des JPM qui le porterait à 119 000 $ (*Rapport du Comité de la rémunération des juges* (2010) (en ligne), p. IV-19 à IV-20), et le maintien du statu quo concernant le traitement des JPM nommés avant le 30 juin 2004. Le gouvernement adopte ces recommandations. En 2013, un comité de la rémunération des juges et juges de paix présidé par Michel Clair (le « Comité Clair ») examine à nouveau la rémunération des JPM. (Voir le *Rapport du Comité de la rémunération des juges* (2013) (en ligne).)

[17] Depuis 2013, le traitement des JPM nommés après 2004 est identique à celui des anciens JPPE. En conséquence, les deux paliers de rémunération sont disparus.

III. Judgments of the Courts Below

A. *Superior Court, 2012 QCCS 1021, [2012] R.J.Q. 729*

[18] The Conférence des juges de paix magistrats challenged the constitutionality of ss. 27, 30 and 32 of the Act, as well as of s. 178 of the *CJA* and Order 932-2008, on the basis that they compromised the judicial independence — and more specifically, the financial security — of PJPs. The judge dismissed the application.

[19] On the issue of the constitutionality of s. 27 of the Act, the application judge found that it suffices, when the government freezes judges' salaries, that it submit the decision to a committee on the remuneration of judges and justices of the peace within a reasonable time. In this case, the decision to freeze the remuneration of the former JPEPs who had become PJPs was submitted to and accepted by the Johnson and D'Amours committees. The time at issue was reasonable in the circumstances, as the government, although it could have acted more quickly, submitted the question of the freeze to a committee on the remuneration of judges and justices of the peace within three years.

[20] Turning to s. 30 of the Act, the application judge stressed that it was not until after the order establishing the remuneration of PJPs had been issued that candidates applied for the office and that they did so with full knowledge of the situation. This was therefore not a case of economic manipulation.

[21] The application judge further stated that, although the Johnson Committee had lacked the authority to intervene retroactively in order to assess the remuneration of PJPs for the period from 2004 to 2007, it had effectively validated the government's decision after the fact.

[22] The application judge added that the prerogative for fixing the starting remuneration of judges lies with the government and that there is no authority to the effect that, when creating a new category of judges, the government is first required to

III. Décisions des juridictions inférieures

A. *Cour supérieure, 2012 QCCS 1021, [2012] R.J.Q. 729*

[18] La Conférence des juges de paix magistrats attaque la constitutionnalité des art. 27, 30 et 32 de la Loi, ainsi que l'art. 178 de la *LTJ* et le Décret 932-2008, au motif qu'ils portent atteinte à l'indépendance judiciaire — et plus spécifiquement, à la sécurité financière — des JPM. Le juge de la Cour supérieure du Québec rejette la requête.

[19] Au sujet de la constitutionnalité de l'art. 27 de la Loi, le juge saisi de la requête conclut qu'il est suffisant, lorsque le gouvernement procède à un gel du traitement des juges, qu'il soumette la décision à un comité de la rémunération des juges dans un délai raisonnable. En l'espèce, la décision de geler la rémunération des anciens JPPE devenus JPM a été soumise et entérinée par les Comités Johnson et D'Amours. Ce délai était raisonnable dans les circonstances, même si le gouvernement aurait pu agir plus rapidement, et ce, dans la mesure où ce dernier a soumis la question du gel à un comité de la rémunération des juges dans un délai de trois ans.

[20] À propos de l'art. 30 de la Loi, le juge saisi de la requête insiste sur le fait que ce n'est qu'après la promulgation du décret établissant la rémunération des JPM et, en pleine connaissance de cause, que les candidats au poste de JPM ont soumis leur candidature. Il ne peut donc être question de manipulation financière.

[21] Par ailleurs, selon le juge saisi de la requête, même si le Comité Johnson n'avait pas le pouvoir d'intervenir rétroactivement pour évaluer la rémunération des JPM pour la période allant de 2004 à 2007, il a, dans les faits, validé la décision du gouvernement a posteriori.

[22] Le juge saisi de la requête ajoute que la prérogative de fixation de la rémunération initiale des juges appartient au gouvernement, et rien dans la jurisprudence n'indique que le gouvernement qui crée une nouvelle catégorie de juges doit au préalable

submit their employment conditions to an independent committee. He concluded that s. 32 of the Act was valid.

[23] Finally, addressing the issue of the applicable pension plan, the application judge recognized that the plan for management personnel was less advantageous and more onerous than the one for judges of the Court of Québec. That said, two independent committees had considered the plan to be adequate.

[24] As a result, the application judge dismissed the applicants' motion in its entirety, without costs.

B. *Court of Appeal, 2014 QCCA 1654*

[25] The Court of Appeal dismissed the appeal. It found, first, that even though it may have been beneficial to obtain a recommendation from a committee on the remuneration of judges and justices of the peace before fixing the remuneration for the new office of PJP, the government was under no constitutional obligation to do so. In the court's opinion, such an obligation arises only where judges' employment conditions are modified by increasing, reducing or freezing their salary.

[26] The Court of Appeal noted that the Act had had the effect of creating two new offices (those of the PJP and the administrative justice of the peace), which had replaced the two existing categories of justices of the peace. Therefore, no salaries were increased, reduced or frozen; rather, a level of remuneration was fixed for a new office.

[27] Thus, the government's sole obligation was to order a salary level above the minimum threshold that would be required to ensure public confidence in the new judicial office. In this case, it is clear that the Court of Appeal considered the level of remuneration that was fixed to be high enough to guarantee the independence of the new PJPs.

[28] The Court of Appeal added that even if it had found that a prior recommendation from a

soumettre leurs conditions de travail à un comité indépendant. Il conclut que l'art. 32 de la Loi est valide.

[23] Finalement, abordant la question du régime de retraite applicable, le juge saisi de la requête reconnaît que le régime du personnel d'encadrement est moins avantageux et plus onéreux que le régime de retraite des juges de la Cour du Québec. Cela étant, deux comités indépendants ont estimé que ce régime était adéquat.

[24] Partant, le juge rejette la requête des requérants dans son entièreté, et ce, sans dépens.

B. *Cour d'appel, 2014 QCCA 1654*

[25] La Cour d'appel rejette le pourvoi. Tout d'abord, la cour estime que, quand bien même il aurait été bénéfique de le faire, le gouvernement n'avait pas l'obligation constitutionnelle d'obtenir une recommandation d'un comité de la rémunération des juges avant de fixer la rémunération rattachée à la nouvelle charge de JPM. Selon la Cour d'appel, une telle obligation existe seulement lorsque les conditions de travail des juges sont modifiées par augmentation, réduction ou gel de leur traitement.

[26] La Cour d'appel a constaté que la Loi a eu pour effet de créer deux nouvelles charges (celle de JPM et celle de juge de paix fonctionnaire), lesquelles ont remplacé les deux catégories existantes de juges de paix. Donc, il ne s'agissait pas d'une augmentation, d'une réduction ou d'un gel de traitement, mais de la fixation de la rémunération d'une nouvelle charge.

[27] Ainsi, la seule obligation qui revenait au gouvernement était de décréter un niveau de traitement supérieur au seuil minimum requis pour assurer la confiance du public dans la nouvelle instance judiciaire. Or, en l'espèce, il est clair que pour la Cour d'appel le niveau de rémunération fixé était suffisamment élevé pour garantir l'indépendance des nouveaux JPM.

[28] La Cour d'appel ajoute que même si elle avait conclu qu'une recommandation préalable d'un

committee on the remuneration of judges and justices of the peace was required, the remedy being sought would not have been granted, given the level of remuneration that had been ordered and the fact that there was no evidence of an attempt at economic manipulation. In the court's opinion, to make it a systemic obligation to proceed by means of a committee on the remuneration of judges and justices of the peace regardless of the circumstances would be to allow form to prevail over substance. Moreover, the Court of Appeal found that there was nothing unlawful *per se* in the existence of two tiers of remuneration, as the Constitution does not require uniformity in judges' salaries and benefits.

[29] On the issue of the establishment of the employment conditions of the former JPEPs, the Court of Appeal held that a reasonable and well-informed person would find that the Act, as a whole, had the effect of reinforcing the independence of those justices, who now benefit from broader guarantees of independence.

[30] Finally, regarding the pension plan established by s. 178 of the *CJA*, as amended by s. 1 of the Act, the Court of Appeal found that it was not unconstitutional, stating that [TRANSLATION] "the Constitution does not require the implementation of pension plans intended solely for and controlled by judges, but merely that judges benefit from a pension plan that takes into account the specificities of their duties" (para. 111 (CanLII)). Nor does the Constitution require a uniform pension plan for all PJPs. Given that three remuneration committees had concluded that the new pension plan was adequate, the Court of Appeal was of the opinion that the submissions in this regard should be rejected on the basis that a reasonable and well-informed person would conclude that the requisite minimum threshold was met and that the plan did not expose PJPs to attempts at economic manipulation.

IV. Principles

A. *Judicial Independence: General Principles*

[31] Judicial independence has its basis in the preamble to the *Constitution Act, 1867*, which

comité de la rémunération des juges s'imposait, la réparation demandée n'aurait pas été accordée de toute façon, vu le niveau de rémunération décrété et l'absence de preuve de tentative de manipulation financière. De l'avis de la cour, faire de l'étape du comité de la rémunération des juges une obligation systémique, quelles que soient les circonstances, équivaudrait à faire prévaloir la forme sur le fond. De plus, la Cour d'appel est d'avis que l'existence de deux paliers de traitement n'a rien d'illégal en soi, la Constitution n'exigeant pas l'uniformité de la rémunération et des autres avantages conférés aux juges.

[29] Sur la question de la fixation des conditions de travail des anciens JPPE, la Cour d'appel estime qu'une personne raisonnable et bien informée conclurait que la Loi, dans son ensemble, a eu pour effet de renforcer l'indépendance des anciens JPPE, lesquels bénéficient désormais de garanties d'indépendance plus étendues.

[30] Enfin, concernant le régime de retraite établi par l'art. 178 de la *LTJ*, et modifié par l'art. 1 de la Loi, la Cour d'appel estime que celui-ci n'est pas inconstitutionnel. En effet, « la Constitution n'exige pas la mise sur pied de régimes de retraite réservés aux juges et contrôlés par eux, mais uniquement qu'ils bénéficient d'un régime qui tient compte des particularités de leurs fonctions » (par. 111 (CanLII)). La Constitution n'exige pas non plus un régime de retraite uniforme pour tous les JPM. Trois comités de la rémunération ayant conclu que le nouveau régime de retraite est adéquat, la Cour d'appel est d'avis de rejeter l'argument sur le régime de retraite, et ce, dans la mesure où une personne raisonnable et bien informée conclurait que le seuil minimal requis est respecté et que le régime n'expose pas les JPM à des tentatives de manipulation financière.

IV. Principes

A. *Indépendance judiciaire : généralités*

[31] Le principe de l'indépendance judiciaire est issu du préambule de la *Loi constitutionnelle*

states that the Constitution of Canada is "similar in Principle to that of the United Kingdom" (see *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 72). It is also based on s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, which guarantees an accused the right to a fair trial before an impartial tribunal (*Valente v. The Queen*, [1985] 2 S.C.R. 673, at pp. 685-89). This Court has recognized judicial independence as an unwritten constitutional principle (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*1997 Reference*"), at paras. 83-109). Judicial independence is important both for public confidence in the proper administration of justice and for the constitutional separation of powers (*1997 Reference*; *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857, at paras. 22-23; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, at paras. 37-38).

[32] The principle of judicial independence applies to all courts (*1997 Reference*, at para. 106). In *Ell*, this Court found that the principle extended to Alberta's justices of the peace because these justices performed numerous judicial functions — most notably presiding at bail hearings and issuing search warrants — that significantly affected the rights and liberties of individuals (paras. 20-26). There is no dispute in this case that judicial independence applies to Quebec's PJPs.

[33] Judicial independence entails three objective guarantees: security of tenure, financial security, and administrative independence (*1997 Reference*, at para. 115; *Valente*, at pp. 697-712). Each of these guarantees has both an individual and an institutional dimension (*1997 Reference*, at para. 118). The manner in which each of these guarantees may be satisfied varies with the context (*Ell*, at paras. 30-32). The ultimate question is whether a reasonable and informed person would perceive that the tribunal enjoys the objective guarantees (*Valente*, at p. 689, cited in *Ell*, at para. 32; see also *1997 Reference*, at para. 112). As such, judicial independence belongs not to judges, but to the public.

de 1867, qui prévoit que la Constitution du Canada repose sur « les mêmes principes que celle du Royaume-Uni » (voir *Beauregard c. Canada*, [1986] 2 R.C.S. 56, p. 72). Il est également issu de l'al. 11*d*) de la *Charte canadienne des droits et libertés*, qui garantit à l'accusé le droit à un procès équitable devant un tribunal impartial (*Valente c. La Reine*, [1985] 2 R.C.S. 673, p. 685-689). Notre Cour a reconnu l'indépendance judiciaire comme principe constitutionnel non écrit (*Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3 (« *Renvoi de 1997* »), par. 83-109). L'indépendance judiciaire est importante à la fois pour la confiance du public dans l'administration de la justice et pour la séparation constitutionnelle des pouvoirs (*Renvoi de 1997*; *Ell c. Alberta*, 2003 CSC 35, [2003] 1 R.C.S. 857, par. 22-23; *Mackin c. Nouveau-Brunswick (Ministre des Finances)*, 2002 CSC 13, [2002] 1 R.C.S. 405, par. 37-38).

[32] Le principe de l'indépendance judiciaire s'applique à tous les tribunaux judiciaires (*Renvoi de 1997*, par. 106). Dans l'arrêt *Ell*, la Cour reconnaît l'application de ce principe aux juges de paix de l'Alberta, ces derniers exerçant de nombreuses fonctions judiciaires — notamment présider des enquêtes sur mise en liberté sous caution et décerner des mandats de perquisition — susceptibles de restreindre de manière importante les droits et libertés d'individus (par. 20-26). Il ne fait aucun doute en l'espèce que l'indépendance judiciaire s'applique aux JPM du Québec.

[33] L'indépendance judiciaire exige trois garanties objectives : l'inamovibilité, la sécurité financière et l'indépendance administrative (*Renvoi de 1997*, par. 115; *Valente*, p. 697-712). Chacune de ces garanties possède une dimension individuelle et une dimension institutionnelle (*Renvoi de 1997*, par. 118). La manière de respecter ces garanties varie selon le contexte (*Ell*, par. 30-32). Il s'agit en définitive de déterminer si une personne raisonnable et renseignée conclurait que le tribunal bénéficie de ces garanties objectives (*Valente*, p. 689, cité dans *Ell*, par. 32; voir aussi le *Renvoi de 1997*, par. 112). Ainsi, l'indépendance judiciaire existe au profit, non pas des juges, mais du public. Les

The guarantees are not intended to be a means for judges to improve their working conditions (*1997 Reference*, at para. 9; *Ell*, at para. 29).

[34] This Court has examined the institutional dimension of the financial security guarantee on a number of occasions. This guarantee has three elements: first, remuneration cannot be changed without recourse to an independent committee (or commission); second, there are to be no negotiations between the judiciary and the executive or legislature regarding remuneration; and third, any reduction to remuneration cannot take it below a basic minimum level of remuneration required for the office of a judge (*1997 Reference*, at paras. 133-35; *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, 2005 SCC 44, [2005] 2 S.C.R. 286 ("*Bodner*"), at paras. 8-11). The purpose of these elements is to ensure that the process of setting judicial remuneration remains, to the extent possible, consistent with the depoliticized relationship between the judiciary and the other branches of government (*1997 Reference*, at paras. 138-46; *Mackin*, at paras. 53-54; *Bodner*, at paras. 8-11 and 14-21). A minimum level of remuneration protects the integrity of the judicial office.

[35] The role of remuneration committees has been detailed elsewhere (see, in particular, *1997 Reference*, at paras. 147-85, and *Bodner*, at paras. 13-21). Only a few points bear repeating here. The committee must review all proposed changes to remuneration: remuneration cannot be "reduced, increased, or frozen" without prior recourse to a committee (*1997 Reference*, at para. 133; see also para. 174; *Mackin*, at paras. 57 and 69). Further, the committee reviews overall remuneration: salary, pensions, and other benefits are considered together as part of overall remuneration (*Valente*, at p. 704). Finally, the committee's recommendations are not binding (*Bodner*, at paras. 19-20). The government may depart from the committee's recommendations provided it gives "rational reasons" (para. 21).

garanties ne sont pas là pour permettre aux juges d'améliorer leurs conditions de travail (*Renvoi de 1997*, par. 9; *Ell*, par. 29).

[34] La Cour s'est penchée sur la dimension institutionnelle de la garantie de sécurité financière à quelques reprises. Cette garantie comporte trois éléments : premièrement, la rémunération ne saurait être modifiée sans l'aval d'un comité indépendant — ou commission; deuxièmement, elle ne saurait faire l'objet de négociations entre le pouvoir judiciaire et le pouvoir exécutif ou la législature; troisièmement, elle ne saurait être abaissée sous le seuil minimum requis par la charge de juge (*Renvoi de 1997*, par. 133-135; *Assoc. des juges de la Cour provinciale du Nouveau-Brunswick c. Nouveau-Brunswick (Ministre de la Justice)*, 2005 CSC 44, [2005] 2 R.C.S. 286 (« *Bodner* »), par. 8-11). L'objectif de ces éléments est d'assurer que le processus de fixation de la rémunération des juges respecte, dans la mesure du possible, le principe de dépolitisation des rapports entre le pouvoir judiciaire et les autres pouvoirs de l'État (*Renvoi de 1997*, par. 138-146; *Mackin*, par. 53-54; *Bodner*, par. 8-11 et 14-21). Un seuil minimal de rémunération protège l'intégrité de la magistrature.

[35] Le rôle des comités de la rémunération des juges a déjà été expliqué en détail dans d'autres affaires (voir, plus particulièrement, le *Renvoi de 1997*, par. 147-185, et *Bodner*, par. 13-21). Seuls quelques points méritent d'être répétés ici. Le comité doit examiner toutes les modifications proposées à la rémunération : les traitements ne peuvent être « réduits, haussés ou bloqués » sans recours préalable à un comité (*Renvoi de 1997*, par. 133; voir aussi par. 174; *Mackin*, par. 57 et 69). Par ailleurs, le comité examine la rémunération de façon globale : le traitement, le régime de retraite et les autres avantages sont considérés dans la rémunération globale (*Valente*, p. 704). Enfin, les recommandations du comité ne sont pas exécutoires (*Bodner*, par. 19-20). Le gouvernement peut s'en écarter à condition de justifier sa décision par des « motifs rationnels » (par. 21).

B. *Judicial Independence in the Context of Judicial Reform*

[36] The seminal cases in the judicial independence jurisprudence do not address the issue of the financial security guarantee in the context of broad court reforms. In *Valente*, the question was whether or not the Ontario Provincial Court was an independent tribunal. In *Beauregard*, a Quebec Superior Court judge challenged the constitutional validity of a newly enacted provision providing that Superior Court judges would be required to contribute to the cost of their pension plan. *R. v. Généreux*, [1992] 1 S.C.R. 259, for its part, concerned the remuneration of existing members of military tribunals. The *1997 Reference* involved numerous changes made by legislatures to the remuneration of provincial court judges as a result of provincial governments' efforts to balance their budget. In *Mackin*, the violation of judicial independence was the result of the abolition of the status of supernumerary judge and the creation of the position of per diem judge. While the Court found that tenure security was not infringed since there was no removal from office, it nevertheless found that financial security was violated. The absence of an independent remuneration committee was fatal. Finally, *Bodner* concerned the nature of judicial remuneration committees and the obligation of governments to respond to these recommendations.

[37] In *Ell*, the issue was whether a reform to the Alberta justices of the peace regime infringed the tenure security of existing justices who lost their position as a result of this reform. This Court found that since their removal was not arbitrary, it did not violate the security of tenure guarantee (paras. 37-41). However, *Ell* concerned the tenure guarantee, and did not raise any issue regarding financial security.

[38] Thus, while the principles in these cases assist in our analysis, the application of the financial security guarantee in the context of broad judicial reform is an issue of first impression before this Court.

B. *L'indépendance judiciaire dans le contexte d'une réforme judiciaire*

[36] Les arrêts de principe concernant l'indépendance judiciaire n'abordent pas la question de la garantie de sécurité financière dans le contexte d'une réforme judiciaire générale. Dans l'affaire *Valente*, il s'agissait de déterminer si la Cour provinciale de l'Ontario était un tribunal indépendant. Dans l'affaire *Beauregard*, un juge de la Cour supérieure du Québec contestait la constitutionnalité d'une nouvelle disposition obligeant les juges de ce tribunal à cotiser à leur régime de pension. Pour sa part, l'arrêt *R. c. Généreux*, [1992] 1 R.C.S. 259, portait sur la rémunération des membres en exercice des tribunaux militaires. Le *Renvoi de 1997* portait sur les nombreuses modifications apportées par les législatures à la rémunération des juges des cours provinciales dans la foulée des efforts déployés par les gouvernements provinciaux pour atteindre l'équilibre budgétaire. Dans l'affaire *Mackin*, il avait été reconnu que l'abolition des fonctions de juge surnuméraire et la création de la charge de juge rémunéré sur une base journalière avaient porté atteinte au principe de l'indépendance judiciaire. La Cour a conclu que si l'inamovibilité n'avait pas été touchée, puisqu'il n'y avait pas eu révocation de charge, il n'en allait pas de même de la sécurité financière. L'absence d'un comité indépendant était fatale. Enfin, l'arrêt *Bodner* portait sur la nature des comités et l'obligation des gouvernements de donner suite à leurs recommandations.

[37] Dans l'affaire *Ell*, la Cour devait décider si la garantie d'inamovibilité avait été respectée par une réforme albertaine ayant éliminé des postes de juges de paix. La Cour a conclu que les destitutions n'étaient pas arbitraires et que la réforme ne portait donc pas atteinte à la garantie d'inamovibilité (par. 37-41). Toutefois, l'arrêt *Ell* concernait l'inamovibilité et ne portait aucunement sur la sécurité financière.

[38] En conséquence, bien que les principes qui se dégagent de ces affaires puissent servir à notre analyse, c'est la première fois que la Cour se penche sur l'application de la garantie de sécurité financière dans le contexte d'une réforme judiciaire générale.

[39] Legislatures have the power and responsibility to legislate in relation to the administration of justice (*Constitution Act, 1867*, ss. 92(14), 96 and 101). This includes the power to create, transform and abolish judicial offices. Provincial legislatures also have power over the jurisdiction of the courts they create (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 10-12). Reforms can contribute to public confidence in the administration of justice. Indeed, by implementing reforms to the justice system, governments and legislatures often play an active role in ensuring and enhancing public confidence in the judiciary. Reforms can be driven by a number of reasons: improving the independence and qualifications of judicial officers, adapting to new realities, and increasing access to justice. However, all reforms must respect the constitutional requirements for judicial independence (paras. 36-37) and the core jurisdiction of the courts established under s. 96 of the *Constitution Act, 1867*.

[40] A judicial reform may raise questions of judicial independence both for judges occupying offices that are reformed or abolished, and for judges appointed into newly created positions. Where a reform affects the conditions of sitting judges, the reform may engage all three objective guarantees of judicial independence (security of tenure, financial security, and administrative independence). However, any measure that affects remuneration will automatically trigger the institutional dimension of financial security (*Mackin*, at para. 61).

[41] In this case, the impact of the reform on the other guarantees of judicial independence — such as tenure security — is not at issue. The appeal raises issues relating to the financial security guarantee in the context of a judicial reform. Thus, the question is whether the requirement for prior committee review of the remuneration of a *new* judicial office is necessary to satisfy a reasonable and informed person that the court enjoys the objective guarantee of financial security.

[39] Les législatures ont le pouvoir et la responsabilité de légiférer en matière d'administration de la justice (*Loi constitutionnelle de 1867*, par. 92(14), art. 96 et 101) et notamment de créer, de transformer et d'abolir des charges judiciaires. Les législatures provinciales ont également compétence sur les tribunaux qu'elles créent (*MacMillan Bloedel Ltd. c. Simpson*, [1995] 4 R.C.S. 725, par. 10-12). Les réformes sont susceptibles d'améliorer la confiance du public dans l'administration de la justice. En effet, en réformant le système de justice, les gouvernements et les législatures contribuent activement à assurer et à renforcer la confiance du public envers le pouvoir judiciaire. Divers besoins dictent ces changements : accroissement de l'indépendance des officiers de justice et rehaussement de leurs compétences, adaptation aux nouvelles réalités et amélioration de l'accès à la justice. Cependant, les exigences constitutionnelles relatives à l'indépendance judiciaire (par. 36-37) et la juridiction fondamentale des tribunaux constitués en vertu de l'art. 96 de la *Loi constitutionnelle de 1867* doivent être respectées.

[40] Il se peut qu'une réforme judiciaire suscite des interrogations concernant l'indépendance judiciaire à l'égard non seulement des juges dont la charge a été modifiée ou abolie, mais aussi de ceux qui sont nommés à une charge nouvellement créée. Une réforme qui modifie les conditions de travail des juges en exercice est susceptible de toucher les trois garanties objectives d'indépendance judiciaire (inamovibilité, sécurité financière et indépendance administrative). Toutefois, toute mesure ayant une incidence sur la rémunération des juges mettra automatiquement en jeu la dimension institutionnelle de la sécurité financière (*Mackin*, par. 61).

[41] Dans la présente affaire, l'incidence de la réforme sur les autres garanties d'indépendance judiciaire — l'inamovibilité, à titre d'exemple — n'est pas en litige. Le pourvoi soulève des questions liées à la garantie de sécurité financière dans le contexte d'une réforme judiciaire. La Cour doit donc décider s'il faut absolument que la rémunération associée à une *nouvelle* charge judiciaire soit soumise à l'examen préalable d'un comité de la rémunération des juges pour convaincre la personne raisonnable et renseignée que la cour bénéficie de la garantie objective de sécurité financière.

V. Issues

[42] The specific issues in this case are as follows:

(1) Is a committee review necessary when a new judicial office is created?

(2) If committee review is necessary when a new judicial office is created, when should that review take place?

(3) Should sitting judges "transferred" to a new office be treated differently?

(4) What qualifies as a "new judicial office"?

(5) Were these requirements satisfied in the case at bar?

VI. Analysis

(1) *Is a Committee Review Necessary When a New Judicial Office Is Created?*

[43] The Court of Appeal found that because the amendments created a new judicial office, no committee review of the initial remuneration was required. The court found that the requirement for prior committee review applied only when judges' remuneration is increased, reduced or frozen, because in these contexts, committee review guards against any government attempt to financially manipulate judges. Similarly, the respondent the Attorney General of Quebec argues that the safeguarding function of the remuneration committee — namely to avoid negotiations and maintain a depoliticized relationship between the judiciary and the other branches — is not required when a legislature creates a new office, because there is no risk of the government exerting political pressure on judges who have not yet been appointed.

[44] We disagree. Such an approach may have the unintended effect of permitting the legislature to

V. Questions en litige

[42] Le présent pourvoi soulève les questions suivantes :

(1) Une nouvelle charge judiciaire doit-elle être examinée par un comité de la rémunération des juges?

(2) Si une nouvelle charge judiciaire doit être examinée par un comité de la rémunération des juges, quand cet examen devrait-il avoir lieu?

(3) Les juges en exercice qui « sont transférés » à une nouvelle charge doivent-ils être traités différemment?

(4) Qu'est-ce qui caractérise une « nouvelle charge judiciaire »?

(5) Ces conditions ont-elles été respectées en l'espèce?

VI. Analyse

(1) *Une nouvelle charge judiciaire doit-elle être examinée par un comité de la rémunération des juges?*

[43] Selon la Cour d'appel, comme les modifications en cause créaient une nouvelle charge judiciaire, il n'était pas nécessaire de soumettre à l'examen d'un comité la rémunération initiale. Selon elle, l'exigence d'un examen préalable par un comité ne s'applique que si la rémunération des juges est augmentée, réduite ou gelée; l'examen sert alors à parer aux possibilités de manipulation financière des juges par le gouvernement. De même, la procureure générale du Québec soutient que le rôle protecteur du comité — qui consiste notamment à éviter les négociations et à maintenir des rapports dépolitisés entre le pouvoir judiciaire et les autres pouvoirs — n'est d'aucune utilité lorsqu'une législature crée une nouvelle charge, parce que le gouvernement est incapable d'exercer des pressions politiques sur des juges n'ayant pas encore été nommés.

[44] Nous ne partageons pas cet avis. Un tel raisonnement peut entraîner un résultat non souhaitable :

use the creation of judicial offices to circumvent the requirements set out in the *1997 Reference*: a legislature could effectively change or freeze judicial remuneration without recourse to a remuneration committee by simply creating a new office and wiping the slate clean.

[45] As noted above, it is a clearly established principle that any changes or freezes in judicial remuneration require prior recourse to a committee to avoid the possibility or appearance of political interference through economic manipulation (*1997 Reference*, at para. 133). This obligation arises whether or not the judicial offices are filled at the time of the proposed change. Although the concern regarding economic manipulation is not as strong when the government establishes the initial remuneration of a new office as it is when it increases, decreases or freezes remuneration in an office with sitting judges, the concern remains real. For example, the government should not be able to simply replace one court with another, adjust the jurisdiction, transfer the judges and reduce the remuneration, without any safeguards. This is especially true where the core jurisdiction remains. Such a scenario would raise the perception of a serious risk of financial manipulation. Personal financial considerations should never be seen as playing any role in judicial decision-making. The public needs assurance that changes to a judicial office that could result in financial consequences for judges cannot by-pass the constitutional assurance of review by an arm's-length committee.

[46] In addition, public confidence in the judiciary may be undermined if the new remuneration does not meet the constitutional minimum required to ensure the integrity of the new office (*1997 Reference*, at para. 193). A certain minimum level of remuneration also promotes a well-qualified judiciary. But without committee review of the initial remuneration, there is no guarantee — or public assurance — that the constitutional minimum is met.

la législature pourrait utiliser son pouvoir de créer des charges judiciaires pour contourner les exigences établies dans le *Renvoi de 1997*; elle pourrait modifier ou geler la rémunération des juges sans constituer de comité, et ce, en créant simplement une nouvelle charge et en faisant table rase.

[45] Comme nous l'avons mentionné, un principe clairement établi veut que toute modification ou tout gel de la rémunération des juges soit préalablement soumis à l'examen d'un comité afin d'éviter toute possibilité ou apparence d'ingérence politique par le biais de la manipulation financière (*Renvoi de 1997*, par. 133). Cette obligation existe, que la charge judiciaire soit pourvue ou non au moment de la modification proposée. Bien que la crainte d'une manipulation financière soit moins élevée lorsque le gouvernement fixe la rémunération associée à une nouvelle charge que lorsqu'il augmente, diminue ou gèle celle de juges en exercice, cette crainte est toujours réelle. À titre d'exemple, le gouvernement ne saurait simplement remplacer un tribunal par un autre, en modifier la juridiction, transférer les juges et réduire leur rémunération, sans garantie, tout particulièrement si la juridiction principale du tribunal en question est maintenue. Un tel scénario pourrait être perçu comme présentant un risque grave de manipulation financière. Il ne faut jamais que les considérations financières personnelles paraissent avoir joué un rôle dans les décisions des juges. Le public doit avoir l'assurance que les modifications à une charge judiciaire susceptibles d'entraîner des conséquences financières pour ses titulaires ne peuvent être soustraites au crible constitutionnel que représente l'examen par un comité indépendant.

[46] De plus, il y a un risque de miner la confiance du public envers le pouvoir judiciaire si la nouvelle rémunération ne satisfait pas au minimum constitutionnel requis pour assurer l'intégrité de la nouvelle charge (*Renvoi de 1997*, par. 193). Un certain seuil minimum de rémunération promeut également une magistrature compétente. Or, à défaut d'examen de la rémunération initiale par un comité, il n'existe aucune garantie — ni assurance pour le public — que le minimum constitutionnel est respecté.

[47] As a result, we are of the view that in order to adequately protect judicial independence in such circumstances, whenever a new judicial office is created, an independent review of the initial remuneration of judges appointed to the new office is always necessary. This ensures that all judicial remuneration is reviewed, regardless of whether the remuneration of an existing office is changed or a new office is created.

(2) *If Committee Review Is Necessary When a New Judicial Office Is Created, When Should That Review Take Place?*

[48] The application judge raised the possibility of review within a reasonable delay after the new office was implemented, albeit in a different context. For its part, the Attorney General of Quebec argues that while retroactive review may be beneficial, if prior review is not required, neither is retroactive review.

[49] In our view, when the government sets the initial remuneration of a newly created judicial office, review by a remuneration committee may take place within a reasonable time *after* the appointment of the new judges. There are both principled and practical reasons for this.

[50] The manner in which the conditions of judicial independence may be satisfied varies with the context (*Ell*, at para. 30). While committee review is always required for the implementation of judicial remuneration, in our view, the manner in which this requirement may be satisfied is different in the context of a new judicial office. There are two relevant contextual considerations: first, the legislature has the constitutional power to reform courts; and second, as previously noted, the risk of political pressure or economic manipulation is not as strong in the context of a reform that creates a new judicial office. In this context, requiring that the initial remuneration of the new office be subject to a retroactive review by a committee within a reasonable time is a sufficient safeguard for the financial security guarantee. It ensures that remuneration will be reviewed in a timely enough fashion to correct any

[47] C'est pourquoi nous sommes d'avis que, pour protéger adéquatement l'indépendance judiciaire dans de telles circonstances, dès lors qu'il y a création d'une charge judiciaire, un examen indépendant de la rémunération initiale des juges nommés à la nouvelle charge doit avoir lieu. Ainsi, la rémunération de tous les juges est examinée, qu'il y ait modification de la rémunération associée à une charge existante ou création d'une nouvelle charge.

(2) *Si une nouvelle charge judiciaire doit être examinée par un comité de la rémunération des juges, quand cet examen devrait-il avoir lieu?*

[48] Le juge saisi de la requête a évoqué la possibilité, dans un autre contexte, d'un examen dans un délai raisonnable après la création de la nouvelle charge. Pour sa part, la procureure générale du Québec soutient que, si un examen préalable n'est pas nécessaire, il en va de même d'un examen rétroactif, même si ce dernier pourrait se révéler utile.

[49] À notre avis, lorsque le gouvernement fixe la rémunération associée à une nouvelle charge judiciaire, l'examen par un comité peut avoir lieu dans un délai raisonnable *après* la nomination des nouveaux juges. Des raisons de principe et des raisons pratiques le justifient.

[50] La manière de satisfaire aux conditions de l'indépendance judiciaire varie selon le contexte (*Ell*, par. 30). À notre avis, bien qu'il soit toujours nécessaire de soumettre la rémunération des juges à un comité, la manière avec laquelle cette exigence est satisfaite diffère dans le cas de la création d'une nouvelle charge. Il existe deux facteurs contextuels pertinents : premièrement, la législature dispose du pouvoir constitutionnel de réformer les tribunaux; et deuxièmement, comme nous l'avons souligné, le risque de pression politique ou de manipulation économique est plus faible dans le cas d'une réforme se soldant par la création d'une nouvelle charge judiciaire. Dans ce contexte, exiger l'examen rétroactif de la nouvelle charge par un comité, dans un délai raisonnable, protège suffisamment la garantie de sécurité financière. Ainsi, la rémunération est examinée dans un délai assez court pour en

deficiency if it is found to be below the constitutional minimum. At the same time, it enables legislatures to fulfill their constitutional role effectively.

[51] Such a requirement provides governments with flexibility, while not imposing unwarranted barriers to the effective implementation of court reform initiatives.

[52] Moreover, it is simply more efficient to consider the new office-holders all together. In fact, requiring retroactive review rather than prior review may actually serve to *increase* the protection of financial security. As the Court explained in *Bodner*, at para. 17, a remuneration committee "must objectively consider the submissions of all parties" (emphasis added). But if a committee were required to review remuneration prior to the establishment of a new judicial office and before any judges had been appointed into the new office, there would be no office-holders to make submissions before the committee. Therefore, the proper functioning of the committee would likely be hindered. But where the review takes place within a reasonable time after the appointment of the judges to the new office, this allows the cohort of newly appointed judges to fully participate in the committee process.

[53] In addition, requiring prior recourse to a remuneration committee before setting the initial remuneration of a new judicial office would necessarily create delays. Establishing a remuneration committee takes time. As the intervener the Attorney General of Ontario points out, in establishing a committee for a new judicial office, "there are many issues, and many options on those issues, that the government will have to consider before establishing an independent, effective and objective special process for setting the remuneration" of that new office (*Masters' Association of Ontario v. Ontario*, 2011 ONCA 243, 105 O.R. (3d) 196, at para. 70, quoted in I.F., at para. 29). These issues may include the question of whether the appropriate forum is an existing or a new committee, its size, structure, powers and membership and what objective criteria the committee is mandated to consider. While the committee process is a constitutional requirement, it

permettre la révision si elle est jugée inférieure au minimum constitutionnel. En même temps, les législatures peuvent ainsi s'acquitter efficacement de leur rôle constitutionnel.

[51] Une telle exigence donne de la latitude aux gouvernements tout en n'entravant pas indûment la mise en œuvre efficace des initiatives de réforme judiciaire.

[52] En réalité, l'exercice est simplement plus efficace une fois tous les nouveaux titulaires de charge nommés. En fait, il se peut qu'exiger un examen rétroactif plutôt qu'un examen préalable *accroisse* effectivement la protection de la sécurité financière. Comme la Cour l'explique, au par. 17 de l'arrêt *Bodner*, le comité de rémunération « doit examiner objectivement les arguments de toutes les parties » (nous soulignons). Or, si un comité devait se pencher sur la rémunération avant la création de la nouvelle charge judiciaire, et avant la nomination des juges, aucun titulaire de charge ne serait en mesure de lui présenter des observations. Le bon fonctionnement du comité s'en trouverait donc probablement gêné. Cependant, si l'examen a lieu dans un délai raisonnable après la nomination des juges à la nouvelle charge, ces juges auraient l'occasion de participer pleinement au processus d'examen.

[53] De surcroît, exiger la tenue d'un comité avant que ne soit fixée la rémunération rattachée à la nouvelle charge entraînerait nécessairement des retards. Mettre sur pied un comité prend du temps. Comme le souligne le procureur général de l'Ontario, intervenant en l'espèce, lorsqu'il s'agit de constituer un comité appelé à examiner une nouvelle charge judiciaire, [TRADUCTION] « il y a de nombreuses questions et de nombreuses solutions, et le gouvernement doit en tenir compte avant d'établir un mécanisme extraordinaire qui soit indépendant, efficace et objectif pour la détermination de la rémunération » associée à cette nouvelle charge (*Masters' Association of Ontario c. Ontario*, 2011 ONCA 243, 105 O.R. (3d) 196, par. 70, cité dans le m.i., par. 29). À titre d'exemple, parmi les questions, il pourrait y avoir celle de savoir si la tribune appropriée serait un comité existant ou un nouveau comité, de même que d'autres portant sur sa taille, sa structure, ses

should not cause unnecessary delays in rolling out reforms.

[54] The imposition of structural barriers to reforms aimed at improving the independence and qualifications of judges would undermine the public's confidence in the administration of justice rather than increasing it. Taking into account that "the conditions of independence are intended to protect the interests of the public", and that they are a "means to safeguard our constitutional order and to maintain public confidence in the administration of justice", such barriers should be avoided (*Ell*, at para. 29). Therefore, in our view, when a new office is created, a committee must review the initial remuneration, but this review can take place within a reasonable time after the appointment of judges into the new office.

[55] Governments have a variety of options for structuring a judicial remuneration committee so long as it is "[i]ndependent, [e]ffective and [o]bjective" (*1997 Reference*, at paras. 166-74). For example, the government could decide to conduct a simplified process for the first committee review, without "formal hearings, the calling of evidence, commission counsel, intervenors . . . or any of the other accoutrements common to public or judicial commissions" (*Ontario Deputy Judges Assn. v. Ontario* (2006), 80 O.R. (3d) 481 (C.A.), at para. 36).

[56] A "reasonable time" refers to the time it takes to set up a committee process as soon as some judges have been appointed into the new office. Because the minimum adequate remuneration ensures judicial integrity, the retroactive review should be conducted within a reasonable time after the appointment of judges into the new office. In establishing this "reasonable time" requirement, we are not here referring to the three- to five-year period described in the *1997 Reference*. Indeed, that time period serves a different purpose; namely to "guard against the possibility that government inaction could be used as a means of economic manipulation by allowing

pouvoirs et sa formation ainsi que les critères objectifs dont il devrait tenir compte. Bien que l'établissement d'un comité réponde à une exigence constitutionnelle, cela ne devrait pas entraîner de retard inutile dans la mise en œuvre d'une réforme.

[54] En imposant des obstacles structurels à des réformes destinées à renforcer l'indépendance et à améliorer les compétences des juges, on minerait la confiance du public dans l'administration de la justice au lieu de l'accroître. Vu que « les conditions d'indépendance sont censées protéger les intérêts du public » et que l'indépendance judiciaire est un « moyen de préserver notre ordre constitutionnel et de maintenir la confiance du public dans l'administration de la justice », il faut éviter d'imposer de tels obstacles (*Ell*, par. 29). En conséquence, nous sommes d'avis que, lorsqu'une nouvelle charge est créée, la rémunération initiale qui y est rattachée doit être soumise à un comité, mais que cet examen peut avoir lieu dans un délai raisonnable après la nomination des juges à cette nouvelle charge.

[55] Les gouvernements peuvent structurer de diverses façons les commissions, pourvu qu'elles soient « indépendantes, efficaces et objectives » (*Renvoi de 1997*, par. 166-174). À titre d'exemple, le gouvernement pourrait opter pour un processus simplifié pour le premier examen, sans [TRADUCTION] « audience formelle, production de preuve, avocats de la commission, intervenants [. . .] et tout ce qu'emportent les commissions publiques ou judiciaires » (*Ontario Deputy Judges Assn. c. Ontario* (2006), 80 O.R. (3d) 481 (C.A.), par. 36).

[56] Un « délai raisonnable » s'entend du temps qu'il faut pour mettre sur pied un comité aussitôt que certains juges sont nommés à la nouvelle charge. Puisqu'une rémunération minimale adéquate assure l'intégrité judiciaire, l'examen rétroactif devrait avoir lieu dans un délai raisonnable après la nomination des juges à la nouvelle charge. En imposant cette condition d'un « délai raisonnable », nous ne parlons pas ici du délai de trois à cinq ans dont il est question dans le *Renvoi de 1997*. En effet, ce délai vise une fin différente, à savoir « parer à la possibilité que l'inaction du gouvernement puisse servir de moyen de manipulation financière du fait qu'on

judges' real salaries to fall because of inflation, and also to protect against the possibility that judges' salaries will drop below the adequate minimum required by judicial independence" (*1997 Reference*, at para. 147). In order to achieve this objective, the Court deemed that "[a] commission must convene if a fixed period of time (e.g., three to five years) has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors" (para. 147). As we are here dealing with very different circumstances and purpose, the "reasonable time" period for retroactive review will be much shorter. It will reflect the time required to implement the reform, to establish the appropriate review committee and to ensure proper participation by the new judicial officers. It will generally be measured in months, and not in years.

(3) *Should Sitting Judges "Transferred" to a New Office Be Treated Differently?*

[57] With respect to sitting judges who are transferred to a new office, the appellants argue that the *1997 Reference* requires that any changes in the remuneration of sitting judges require prior committee review, regardless of whether a new office is created. Governments cannot by-pass this requirement simply by making changes to a judicial office. From the sitting judges' perspective, whether it occurs in an existing or new judicial office, a change in remuneration has the same implications for them, and for the existing relationship between the executive and the judiciary.

[58] There is some force to these submissions. As discussed, the purpose of the committee process is to maintain a depoliticized relationship between the judiciary and the other branches of government and to guard against the possibility or perception of political interference through economic manipulation (*1997 Reference*, at paras. 138-47 and 166). No doubt the impact on the judge and on the relationship between the executive and the judge holding a new judicial office is greater where a judicial relationship already

laisserait les traitements réels des juges reculer à cause de l'inflation, et aussi pour parer à la possibilité que ces traitements tombent sous le minimum requis pour assurer l'indépendance de la magistrature » (*Renvoi de 1997*, par. 147). Afin d'atteindre cet objectif, la Cour estime dans le *Renvoi de 1997* que « la commission doit se réunir si une période déterminée (par exemple de trois à cinq années) s'est écoulée depuis la présentation de son dernier rapport, afin d'étudier le caractère adéquat des traitements des juges à la lumière du coût de la vie et d'autres facteurs pertinents » (par. 147). Comme en l'espèce les circonstances et l'objet sont très différents, le « délai raisonnable » dans lequel l'examen rétroactif doit avoir lieu sera beaucoup plus court. Il est fonction du temps nécessaire à la réforme, à la constitution du comité et à une participation adéquate des nouveaux officiers de justice. Il se calcule de façon générale en mois et non en années.

(3) *Les juges en exercice qui « sont transférés » à une nouvelle charge doivent-ils être traités différemment?*

[57] Les appelants soutiennent que le *Renvoi de 1997* exige que toute modification à la rémunération des juges en exercice, que ce soit en raison de la création d'une nouvelle charge ou non, soit soumise à l'examen préalable d'un comité. Les gouvernements ne sauraient se soustraire à cette exigence en modifiant simplement une charge judiciaire. Du point de vue des juges en exercice, les effets d'une modification à leur rémunération sont les mêmes pour eux et pour les rapports entre l'exécutif et le judiciaire, que la modification découle de la création d'une nouvelle charge ou qu'elle intervienne dans le cadre d'une charge existante.

[58] Ces arguments sont pertinents. Comme nous l'avons mentionné, l'objectif des comités est de maintenir des rapports dépolitisés entre le judiciaire et les autres pouvoirs de l'État, et d'éviter la possibilité d'ingérence politique exercée par le biais de la manipulation financière ou la perception qu'une telle situation existe (*Renvoi de 1997*, par. 138-147 et 166). Il ne fait aucun doute que les effets sur le juge titulaire d'une nouvelle charge et sur les rapports entre ce dernier et l'exécutif sont plus importants

exists. According to the appellants, sitting judges should therefore receive the enhanced protections accorded in the *1997 Reference*, namely prior review of all proposed changes in remuneration.

[59] But in our view, in the context of broader judicial reforms, the same reasons that justify deferring committee review for newly appointed judges apply equally to sitting judges. It falls within the legislature's constitutional authority to implement court reforms for important public policy reasons. Requiring prior review for sitting judges would create delays for judicial reforms in the public interest and, as in the case at bar, potentially prolong an unconstitutional judicial regime. As such, though prior review normally affords sitting judges enhanced judicial independence protections, requiring prior review in circumstances where a new judicial office is created for the purposes of remedying an otherwise unconstitutional regime may actually undermine judicial independence and negatively affect public perception. And the principle of judicial independence exists for the benefit of the public, not for the judge. Viewed from the perspective of the public, a review within a reasonable time for all judges is an effective safeguard for financial security, even if some judges were previously serving in another judicial office.

[60] In addition, there are important pragmatic reasons for review within a reasonable time when a new judicial office is filled in part by those transferred from another judicial office. If remuneration of sitting judges must be reviewed prior to the reform, but remuneration of newly appointed judges may be reviewed after, a committee would need to be convened twice — once before the reform, and once again after. By contrast, if the remuneration of transferred judges is reviewed at the same time as that of the newly appointed judges, the committee can review all the remuneration together, in the context of the whole reform. This enables the committee to better fulfill its mandate.

lorsqu'il existe déjà un lien judiciaire. Selon les appelants, les juges en exercice devraient en conséquence bénéficier des protections accrues accordées dans le *Renvoi de 1997* et notamment l'examen préalable de toute modification proposée à la rémunération.

[59] Or, à notre avis, dans le contexte d'une réforme judiciaire générale, les raisons qui justifient que soit reportée la tenue d'un comité dans le cas des juges nouvellement nommés s'appliquent tout autant aux juges en exercice. Les législatures ont le pouvoir constitutionnel d'adopter des réformes judiciaires pour des raisons importantes d'intérêt public. Exiger un examen préalable dans le cas de juges en exercice retarderait la mise en œuvre des réformes judiciaires fondées sur l'intérêt public, et risque, comme en l'espèce, de prolonger un régime judiciaire inconstitutionnel. Ainsi, bien qu'un examen préalable assure normalement aux juges en exercice des garanties accrues en matière d'indépendance judiciaire, exiger un examen préalable, alors qu'une charge judiciaire est créée pour corriger un régime inconstitutionnel, risque en fait de porter atteinte à l'indépendance judiciaire et de miner la perception du public. Rappelons que le principe de l'indépendance judiciaire existe au profit du public et non du juge. Pour le public, la tenue dans un délai raisonnable d'un examen portant sur la situation de tous les juges protège efficacement la sécurité financière, même si certains juges occupaient antérieurement une autre charge judiciaire.

[60] En outre, d'importantes raisons pratiques justifient de tenir l'examen dans un délai raisonnable lorsqu'une nouvelle charge judiciaire est pourvue en partie par des personnes qui occupaient l'ancienne. S'il fallait examiner la rémunération des juges en exercice avant la réforme, et celle des nouveaux juges après, il faudrait réunir le comité deux fois. En revanche, si la rémunération des juges transférés est examinée en même temps que celle des juges nouvellement nommés, le comité peut examiner les deux traitements à la lumière de l'ensemble de la réforme et ainsi mieux s'acquitter de son mandat.

[61] For example, examining the two groups of judges separately may lead to contradictory results. By contrast, in a unified committee process, where the committee can review all the remuneration of the new judicial office at the same time, the committee may make recommendations about any proposed remuneration differential between judges occupying the same office. Similarly, when provincial legislatures create new courts that include functions that used to be exercised by other judges, these judges' remuneration may be taken into account in the analysis of the overall remuneration of the judges to be appointed. Indeed, since it is dealing with a new or different office, for which the remuneration has not been considered in the past, the remuneration committee has more latitude in its initial review.

[62] This being said, because sitting judges are in an existing relationship with the government, this relationship is more susceptible to the risk of manipulation. The principles in the *1997 Reference* warrant additional protection for sitting judges. Thus, while the government retains the discretion to set the remuneration of newly appointed judges, the government may not change (increase, decrease or freeze) the remuneration of sitting judges until after the committee review. When the government complies with this obligation to maintain the salaries of the sitting judges until committee review, the committee can make retroactive and forward-looking recommendations with regards to the salaries of the sitting judges.

[63] Thus, in our view, where a new judicial office has been created, judges who have held another judicial office should be treated the same as newly appointed judges when it comes to the timing of the requirement for committee review of remuneration: review within a reasonable time after their appointment is required. However, their remuneration cannot be changed until after the review has taken place.

[61] À titre d'exemple, examiner séparément les deux catégories de juges risque de donner lieu à des résultats contradictoires. Cependant, dans le cadre d'un processus intégré où il examine en même temps toutes les rémunérations rattachées à la nouvelle charge judiciaire, le comité peut faire des recommandations au sujet de tout écart proposé dans la rémunération des juges occupant la même charge. De même, lorsque les législatures provinciales créent de nouveaux tribunaux intégrant des fonctions auparavant exercées par d'autres juges, la rémunération de ces derniers peut être prise en compte dans l'analyse de la rémunération globale des prochains titulaires. En fait, puisque son examen porte sur une charge nouvelle ou différente, dont la rémunération n'a pas déjà été examinée, le comité dispose de plus de latitude dans son examen initial.

[62] Cela dit, comme les juges en exercice entretiennent déjà des rapports avec le gouvernement, le risque de manipulation est accru. Les principes établis dans le *Renvoi de 1997* justifient une protection supplémentaire dans leur cas. Ainsi, bien que le gouvernement puisse, en vertu de son pouvoir discrétionnaire, fixer la rémunération des nouveaux juges, il ne peut modifier (augmenter, réduire ou geler) le traitement des juges en exercice tant que le comité n'a pas procédé à l'examen. Lorsque le gouvernement respecte l'obligation de maintenir la rémunération de ces juges jusqu'à l'examen, le comité est en mesure de faire des recommandations rétroactives et prospectives à ce sujet.

[63] C'est pourquoi nous croyons que, lorsqu'une nouvelle charge est créée, il faut traiter les juges qui ont occupé une autre charge de la même manière que les nouveaux lorsqu'il s'agit de déterminer le moment où il convient de constituer le comité : il faut tenir un examen dans un délai raisonnable suivant la nomination. Cependant, la rémunération des juges en exercice ne peut être modifiée avant la tenue de l'examen.

(4) *What Qualifies as a "New Judicial Office"?*

[64] While the financial security guarantee of judicial independence requires committee review prior to any changes to the remuneration of a judicial office, we have concluded that prior review is not required when a judicial reform results in the creation of a new judicial office. Therefore, in the context of judicial reform, it is important to determine whether a new judicial office has been created. Often, it will be obvious when a new judicial office has been created. But sometimes, the line between a new judicial office and minor changes to an existing office can be hard to draw. The criteria for what constitutes a new judicial office varied in the arguments and judgments below.

[65] The application judge was of the view that the Act created a new judicial office (paras. 4, 47 and 142). However, it is unclear which criteria the application judge applied in coming to this conclusion. The Court of Appeal also opined that the Act established a new judicial office. In doing so, it compared the functions and employment conditions of the old and new offices. In the Court of Appeal's view, because these functions and employment conditions were sufficiently different, the Act created a new judicial office (paras. 72-78). The Attorney General of Quebec endorses the appeal court's analysis. The appellants argue that no new office was created because in reality, judges in the "new" office exercised the same functions as the old office: the new office simply included better tenure guarantees.

[66] We agree with the appellants that mere adjustments to an existing office do not automatically create a new judicial office. Where the remuneration of an existing judicial office is revised in any way, our jurisprudence is clear: prior committee review is essential to guarantee financial security. However, where a new office is created, a legislature's constitutional authority to reform the justice

(4) *Qu'est-ce qui caractérise une « nouvelle charge judiciaire »?*

[64] Bien que la garantie de sécurité financière qu'exige l'indépendance judiciaire demande qu'un comité procède à un examen préalablement à toute modification proposée à la rémunération associée à une charge judiciaire, nous avons conclu que cet examen n'est pas nécessaire lorsqu'une réforme judiciaire aboutit à la création d'une nouvelle charge. En conséquence, dans le contexte d'une réforme judiciaire, il est important de déterminer s'il y a eu création d'une nouvelle charge judiciaire. Souvent, ce sera évident. Parfois, la distinction entre la création d'une nouvelle charge et une légère modification d'une charge existante sera plus difficile à mesurer. La nature des éléments constitutifs d'une nouvelle charge judiciaire a varié selon les arguments plaidés devant les juridictions inférieures et les jugements de celles-ci.

[65] Le juge saisi de la requête a conclu que la Loi créait une nouvelle charge judiciaire (par. 4, 47 et 142). Toutefois, on ne sait pas exactement quels critères il a appliqués pour parvenir à cette conclusion. La Cour d'appel a également conclu que la Loi créait une nouvelle charge judiciaire. Pour trancher, elle a comparé les fonctions et les conditions d'emploi de l'ancienne et de la nouvelle charge. Selon elle, puisque ces fonctions et conditions d'emploi différaient suffisamment, la Loi créait une nouvelle charge judiciaire (par. 72-78). La procureure générale du Québec appuie l'analyse de la Cour d'appel. Les appelants affirment qu'aucune nouvelle charge judiciaire n'a été créée, car, en réalité, les juges occupant la « nouvelle » charge exercent les mêmes fonctions qu'auparavant : la nouvelle charge comporte simplement de meilleures garanties d'inamovibilité.

[66] Nous convenons avec les appelants que de simples modifications à une charge existante ne créent pas automatiquement une nouvelle charge. En cas de modification, quelle qu'elle soit, à la rémunération associée à une charge judiciaire existante, notre jurisprudence est claire : l'examen préalable par un comité est essentiel au maintien de la garantie de sécurité financière. Toutefois, lorsqu'une

system and the practical realities of real reform justify retroactive review.

[67] Financial security can be implicated both by changes to the mandate of a judicial office, as well as by changes to the conditions that have direct financial implications for the office-holders, because any such changes can be seen as potential pressure or manipulation. Thus, we agree with the Court of Appeal that the judicial function and the conditions of employment are relevant considerations in determining whether a judicial office has merely been changed, or whether a new judicial office has been created.

[68] At what point do such reforms create a new office, such that they justify deferral of arm's-length review?

[69] In our view, changes to judicial functions, and changes to other conditions that impact judicial independence — including conditions related to such things as tenure, financial security, selection, and administrative independence — are all relevant to assessing whether a new judicial office is created. A new judicial office is created if these changes, viewed as a whole, and in context, create a new office.

[70] The analysis is holistic: the court must look at the change to judicial functions alongside the other changes to the conditions that impact judicial independence, in light of the context of the reform. The focus is on whether the overall effect of the reform is to create a new judicial office.

(5) *Were These Requirements Satisfied in the Case at Bar?*

[71] In the present case, modifications to the Quebec judicial order were necessary and urgent following the judgment of the Quebec Court of Appeal, which concluded that the regime then in place in the

nouvelle charge est créée, le pouvoir constitutionnel de la législature de réformer le système de justice et les réalités pratiques d'une véritable réforme justifient la tenue d'un examen rétroactif.

[67] Tant les modifications apportées au mandat d'une charge judiciaire que celles apportées aux conditions ayant des répercussions financières directes sur les titulaires de la charge peuvent affecter le principe de la sécurité financière, car elles sont susceptibles d'être perçues comme des pressions ou une manipulation. C'est pourquoi nous sommes d'accord avec la Cour d'appel pour affirmer que l'examen des fonctions de la charge judiciaire et des conditions d'emploi est pertinent lorsqu'il s'agit de déterminer si une charge a simplement été modifiée ou si une nouvelle charge a été créée.

[68] Dans quelles circonstances de telles modifications créent-elles une nouvelle charge, de sorte qu'il soit justifié de reporter l'examen indépendant?

[69] À notre avis, les modifications apportées aux fonctions judiciaires et aux autres conditions qui touchent à l'indépendance judiciaire — y compris celles liées à l'inamovibilité, à la sécurité financière, à la sélection et à l'indépendance administrative — sont pertinentes lorsqu'il s'agit de décider si une nouvelle charge a été créée. Une nouvelle charge judiciaire est créée si ces modifications, considérées dans leur ensemble et dans leur contexte, créent une nouvelle charge.

[70] L'analyse est globale : le tribunal doit examiner les modifications apportées aux fonctions de la charge judiciaire ainsi qu'aux conditions qui ont une incidence sur l'indépendance judiciaire, en tenant compte du contexte de la réforme. La question est donc de déterminer si la réforme a pour conséquence la création d'une nouvelle charge judiciaire.

(5) *Ces conditions ont-elles été respectées en l'espèce?*

[71] En l'espèce, il était nécessaire et urgent de modifier l'ordre judiciaire du Québec en raison du jugement de la Cour d'appel du Québec, qui avait conclu que le régime alors en place dans la province

province did not adequately ensure the tenure guarantee of judicial independence. The 2004 reforms served the public good and advanced the underlying interests of judicial independence.

[72] However, these reforms must also comply with the requirements for the financial security guarantee of judicial independence. In our view, the reform failed to comply with these requirements. For the reasons that follow, we find that the reform breached the financial security guarantee of judicial independence because the remuneration for 2004 to 2007 was not reviewed within a reasonable time after the new appointments. Indeed, the remuneration for that period has never been reviewed.

(a) Did the Reform Create a New Judicial Office?

[73] We agree with the Court of Appeal that the Act created a new judicial office. Viewed as a whole, the changes from the reform did indeed create a new judicial office.

[74] The context for the reform is relevant: the government implemented a reform to the system of justices of the peace following the Quebec Court of Appeal's decision in *Pomerleau* that the existing system violated judicial independence. The reform provided tenure for the judicial offices.

[75] Looking at the judicial functions, the PJPs have a narrower jurisdiction than the old office of JPEP: the PJPs do not have jurisdiction to preside over bail hearings and do not hear summary prosecutions under Part XXVII of the *Criminal Code*, as the old JPEPs did. Although in practice the JPEPs never exercised these functions, it remains that, in law, the new office of PJP had a different jurisdiction than that of JPEP (trial decision, at paras. 23 and 83; appeal decision, at paras. 10 and 74).

n'assurait pas adéquatement la garantie d'inamovibilité qu'exige l'indépendance judiciaire. La réforme de 2004 a servi l'intérêt public et a favorisé les intérêts sous-jacents de l'indépendance judiciaire.

[72] Or, cette réforme doit également respecter les critères liés à la garantie de sécurité financière qu'exige l'indépendance judiciaire. À notre avis, elle ne les a pas respectés. Pour les motifs qui suivent, nous concluons que la réforme a porté atteinte à la garantie de sécurité financière qu'exige l'indépendance judiciaire parce que la rémunération en vigueur de 2004 à 2007 n'a pas été examinée dans un délai raisonnable après les nouvelles nominations. En fait, elle n'a jamais été examinée.

a) La réforme a-t-elle créé une nouvelle charge judiciaire?

[73] Nous convenons avec la Cour d'appel que la Loi a créé une nouvelle charge judiciaire. Considérées globalement, les modifications découlant de la réforme ont effectivement créé une nouvelle charge judiciaire.

[74] Le contexte de la réforme est pertinent : le gouvernement a réformé le régime des juges de paix après la décision rendue par la Cour d'appel du Québec dans l'affaire *Pomerleau* selon laquelle le régime en place ne respectait pas le principe de l'indépendance judiciaire. La réforme a instauré l'inamovibilité des charges.

[75] Si on examine les fonctions judiciaires, on constate que la juridiction des JPM est plus restreinte que celle des anciens JPPE : les JPM n'ont pas compétence pour présider les enquêtes sur mise en liberté sous caution et ne peuvent présider les audiences sur les poursuites sommaires intentées en vertu de la partie XXVII du *Code criminel*, contrairement aux anciens JPPE. Bien qu'en pratique, ces derniers n'aient jamais exercé ces fonctions, il n'en demeure pas moins qu'en droit, la juridiction des nouveaux JPM diffère de celle des JPPE (décision de première instance, par. 23 et 83; décision d'appel, par. 10 et 74).

[76] Looking at the conditions that impact judicial independence, there are many differences in these conditions. The PJPs benefit from greater judicial independence guarantees than did the JPEPs. For instance, though both PJPs and JPEPs could only be removed from office by virtue of a report from the Court of Appeal after a request from the Minister of Justice, the JPEPs were appointed for renewable five-year terms, whereas the PJPs now enjoy tenure until the age of 70. Additionally, the remuneration and other benefits associated with the office of PJP are now subject to periodic committee review. Furthermore, the selection criteria of the PJPs are now set out in the *CJA*. Finally, the PJPs are now integrated into the Court of Québec and are thus subject to the authority of the Chief Judge of the Court of Québec, something which was not provided for by the *CJA* with regards to the JPEPs before 2004. As such, clearly there are significant changes to the conditions that impact judicial independence.

[77] It is also worth noting that the Act completely substitutes Part III.1 of the *CJA* (Act, s. 1), which deals with justices of the peace, that s. 26 of the Act provides that former JPEPs "become" PJPs, and that s. 35 of the Act requires that PJPs take a new oath, a logical consequence of holding a new office. Additionally, during the parliamentary debates leading up to the adoption of the Act, there are several references in passing to the creation of a new judicial office (Quebec, National Assembly, *Journal des débats*, vol. 38, No. 75, 1st Sess., 37th Leg., May 20, 2004, at p. 4543; *Journal des débats de la Commission permanente des institutions*, vol. 38, No. 54, 1st Sess., 37th Leg., May 28, 2004, at p. 18).

[78] Looking at the effects of the reform overall, we conclude that the reform created a new judicial office.

(b) Did a Committee Review the Remuneration Within a Reasonable Time After the Appointment of the Judges?

[79] Since the Act created a new judicial office, the initial remuneration of all the judges appointed

[76] Si on examine les conditions touchant l'indépendance judiciaire, on constate qu'elles ont beaucoup changé. Les JPM bénéficient de garanties d'indépendance judiciaire plus étendues que les JPPE. À titre d'exemple, les JPPE ne pouvaient être destitués que sur rapport de la Cour d'appel après une demande du ministre de la Justice, comme les JPM, mais les JPPE étaient nommés pour un mandat renouvelable de cinq ans, alors que les JPM peuvent maintenant siéger jusqu'à l'âge de 70 ans. De plus, le traitement et les autres avantages liés à la charge de JPM sont maintenant soumis périodiquement à l'examen d'un comité. Qui plus est, les critères de sélection des JPM sont désormais énoncés dans la *LTJ*. Enfin, les JPM relèvent de la Cour du Québec et sont donc soumis à l'autorité du juge en chef de ce tribunal, ce que la *LTJ* ne prévoyait pas à l'égard des JPPE avant 2004. Ainsi, les conditions touchant l'indépendance judiciaire ont beaucoup changé.

[77] Il convient également de souligner que la Loi remplace intégralement la partie III.1 de la *LTJ* (Loi, article premier), qui porte sur les juges de paix, que l'art. 26 de la Loi prévoit que les anciens JPPE « deviennent » des JPM et que l'art. 35 de la Loi exige que les JPM prêtent de nouveau serment, ce qui est logique puisqu'ils assument une nouvelle charge. De plus, durant les débats parlementaires ayant mené à l'adoption de la Loi, on a fait plusieurs fois référence à la création d'une nouvelle charge judiciaire (Québec, Assemblée nationale, *Journal des débats*, vol. 38, nº 75, 1re sess., 37e lég., 20 mai 2004, p. 4543; *Journal des débats de la Commission permanente des institutions*, vol. 38, nº 54, 1re sess., 37e lég., 28 mai 2004, p. 18).

[78] Si on examine les effets de la réforme dans son ensemble, nous concluons qu'elle a créé une nouvelle charge judiciaire.

b) La rémunération a-t-elle été examinée par un comité de la rémunération des juges dans un délai raisonnable après la nomination des juges?

[79] Comme la Loi a créé une nouvelle charge judiciaire, le traitement initial de tous les juges

to this office (whether they were appointed for the first time or transferred from the now-abolished office of JPEP) needed to be reviewed retroactively, within a reasonable time after their appointment.

[80] As s. 32 of the Act provides that "[d]espite sections 2 to 8, the committee on the remuneration of judges will not exercise its functions with regard to presiding justices of the peace until a committee is formed in 2007 with respect to judges of the Court of Québec and municipal courts", it effectively prohibits any review of the initial PJP remuneration prior to 2007. Indeed, although the office of PJP was established in 2004, the remuneration of the judges occupying this new office could only be reviewed starting in 2007. This contravenes the constitutional requirement that the initial remuneration of judges occupying a new office must be reviewed by a remuneration committee within a reasonable time after their appointment. There are no compelling reasons why a review could not proceed well before 2007. None were offered. The time period should be measured in months, not years. Obviously, three years is not a reasonable time. As such, s. 32 of the Act infringes the financial security guarantee of judicial independence.

[81] Additionally, as ss. 27 and 30 of the Act respectively provide for a freeze in the remuneration of the six former JPEPs and the establishment of the remuneration of the newly appointed PJPs by executive order, without referencing the need to retroactively submit the remuneration to a remuneration committee, we are of the view that ss. 27 and 30 also infringe judicial independence. Indeed, when a legislature creates a new judicial office, it is constitutionally required to provide for salary committee review in the legislation establishing the new judicial office. Finally, s. 27 of the Act infringes judicial independence because it freezes the remuneration of sitting judges before a committee has reviewed this remuneration, contrary to the requirements of the financial security guarantee.

nommés à cette charge (pour la première fois ou après l'abolition de la charge de JPPE) devait être examiné rétroactivement, dans un délai raisonnable après leur nomination.

[80] L'article 32 de la Loi prévoit que « [m]algré les articles 2 à 8 de la présente loi, le Comité de la rémunération des juges n'exerce ses attributions eu égard aux juges de paix magistrats qu'à compter du moment où il sera procédé à la nomination des membres du comité qui sera formé en 2007 à l'égard des juges de la Cour du Québec et des cours municipales ». Il interdit ainsi tout examen de la rémunération initiale des JPM avant 2007. En effet, bien que la charge de JPM ait été créée en 2004, la rémunération des juges qui occupent cette nouvelle charge ne pouvait être examinée qu'à compter de 2007. Il s'agit là d'un manquement à l'exigence constitutionnelle selon laquelle la rémunération initiale des juges occupant une nouvelle charge est examinée par un comité dans un délai raisonnable après leur nomination. Aucune raison valable n'explique pourquoi l'examen ne pouvait être tenu bien avant 2007, et aucune n'a été avancée. Le délai aurait dû se calculer en mois, non en années. Évidemment, un délai de trois ans ne constitue pas un délai raisonnable. En conséquence, l'art. 32 de la Loi porte atteinte à la garantie de sécurité financière qu'exige l'indépendance judiciaire.

[81] En outre, puisque les art. 27 et 30 de la Loi prévoient respectivement un gel de la rémunération des six anciens JPPE et l'établissement, par décret, de la rémunération des JPM nouvellement nommés, mais n'exigent pas l'examen rétroactif de la rémunération par un comité, nous sommes d'avis que ces dispositions portent également atteinte à l'indépendance judiciaire. En effet, la législature qui crée une nouvelle charge judiciaire est tenue par la Constitution de prévoir, dans la loi constituant la charge, l'examen de la rémunération par un comité établi à cette fin. Enfin, l'art. 27 de la Loi porte atteinte à l'indépendance judiciaire en ce sens qu'il a pour effet de geler la rémunération de juges en exercice avant qu'un comité n'examine la question, ce qui est contraire aux exigences de la garantie de sécurité financière.

[82] The appellants also submitted that the government was not permitted to appoint new PJPs at a lower remuneration than the old JPEPs' remuneration. We disagree. Where a reform results in the creation of a new judicial office, and sitting judges are transferred to that new office, the government may be entirely justified in holding their remuneration at existing levels and appointing new judges into the same category at a lower remuneration. But the government does not have *carte blanche* in this matter. Both the remuneration of newly appointed judges and any proposed changes to the remuneration of the transferred judges must be subject to review by a committee. In the case at bar, three remuneration committees found that the salary gap between the transferred judges and the newly appointed judges was appropriate. Based on the findings of the remuneration committees, we are satisfied that this salary gap, by itself, did not infringe the financial security guarantee of judicial independence.

(c) Was There a Violation of the Financial Security Guarantee After 2007?

[83] The appellants also challenge the validity of executive Order 932-2008, adopting the 2008 Johnson Committee recommendations and setting remuneration for 2007 to 2010. In our view, this Order is valid. Remuneration committees reviewed PJP remuneration periodically starting in 2007. As such, there was no violation of judicial independence after 2007 and no defect in the 2008 Order.

[84] It is true that the post-2007 remuneration derived from an initial level of remuneration which was never reviewed, contrary to constitutional requirements. That being said, the criteria the committees were required to apply make it clear that a change in the baseline remuneration would have had a limited impact on future remuneration reviews. Indeed, under s. 246.42 of the *CJA*, "the level and prevailing trend of the remuneration received by the judges concerned, as compared to that received by other persons receiving remuneration out of public

[82] Les appelants soutiennent également que le gouvernement n'avait pas le droit de nommer de nouveaux JPM et de leur accorder une rémunération moindre que celle des anciens JPPE. Nous ne sommes pas d'accord. Lorsqu'une réforme entraîne la création d'une nouvelle charge judiciaire, il peut se révéler tout à fait justifié pour le gouvernement de maintenir la rémunération des juges en poste transférés à la nouvelle charge et de fixer une rémunération moindre pour les nouveaux juges qu'il nomme dans la même catégorie. Cependant, le gouvernement n'a pas carte blanche. La rémunération des juges nouvellement nommés et les modifications proposées à la rémunération des juges transférés doivent être soumises à l'examen d'un comité. Dans le cas qui nous occupe, trois comités ont conclu que l'écart salarial entre les juges transférés et les juges nouvellement nommés était justifié. À la lumière de ces conclusions, nous sommes d'avis qu'en soi, cet écart salarial n'a pas porté atteinte à la garantie de sécurité financière qu'exige l'indépendance judiciaire.

c) Y a-t-il eu atteinte à la garantie de sécurité financière après 2007?

[83] Les appelants contestent également la validité du Décret 932-2008 en vertu duquel les recommandations du Comité Johnson de 2008 ont été adoptées, et la rémunération de 2007 à 2010, fixée. À notre avis, ce décret est valide. À compter de 2007, la rémunération des JPM a été soumise périodiquement à l'examen d'un comité. Il n'y a donc pas eu d'atteinte à l'indépendance judiciaire après 2007, et le décret de 2008 n'est entaché d'aucun vice.

[84] Certes, après 2007, la rémunération était calculée en fonction du traitement initial, qui n'avait jamais été examiné, ce qui est contraire aux exigences constitutionnelles. Cela dit, il ressort clairement des critères que les comités étaient tenus d'appliquer qu'une modification à la rémunération initiale aurait eu un effet limité sur les examens à venir. D'ailleurs, suivant l'art. 246.42 de la *LTJ*, « l'état et l'évolution comparés de la rémunération des juges concernés d'une part, et de celle des autres personnes rémunérées sur les fonds publics,

funds" constitutes only 1 of 10 factors which the committee must consider when determining judges' remuneration. For instance, the committees were also required to consider remuneration for similar offices in other provinces.

[85] Additionally, we emphasize that judicial independence exists for the benefit of the public, and does not serve as a means of labour arbitration to ensure better remuneration for judges. As this Court stated in *Ell*, at para. 29, judicial independence is "for the benefit of the judged, not the judges", as "[j]udicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice" (see also *Bodner*, at paras. 4 and 6). Consequently, "[t]he benefit that the members of those courts derive is purely secondary" (*1997 Reference*, at para. 9). As such, even if the actual remuneration of PJPs after 2007 may have been in some way affected by the lack of remuneration committee review from 2004 to 2007, this problem is not one with judicial independence itself, since the constitutional requirements necessary to the protection of judicial independence were met from 2007 onwards. Indeed, since the government complied with its constitutional obligation to periodically submit PJP remuneration to a committee from 2007 onwards, as required by the *1997 Reference*, public confidence in judicial independence was in no way undermined for that period. Any impact that the lack of committee review from 2004 to 2007 may have had on PJP remuneration after 2007 cannot be said to have raised constitutional concerns.

VII. Pensions

[86] The appellants challenge the participation of PJPs in the public service management personnel pension plan. They argue that because the pension plan is not designed for the career of a judge, and is less remunerative than the pension plan for the judges of the Court of Québec, the pension plan does not meet the basic minimum threshold required for the office of a judge. As such, the participation

d'autre part » n'est que l'un des dix facteurs que le comité doit prendre en considération lorsqu'il établit la rémunération des juges. À titre d'exemple, le comité doit également tenir compte de la rémunération des juges exerçant des fonctions similaires dans d'autres provinces.

[85] De plus, nous rappelons que l'indépendance judiciaire existe au profit du public et ne saurait constituer un moyen d'arbitrage pour les juges en vue d'obtenir une hausse de leur traitement. Comme l'a affirmé la Cour dans l'arrêt *Ell*, par. 29, l'indépendance judiciaire existe « au profit de la personne jugée et non des juges », puisque « [l]'indépendance judiciaire est non pas une fin en soi, mais un moyen de préserver notre ordre constitutionnel et de maintenir la confiance du public dans l'administration de la justice » (voir également *Bodner*, par. 4 et 6). En conséquence, « [l]'avantage qui en découle pour les juges n'est qu'un aspect purement accessoire » (*Renvoi de 1997*, par. 9). Ainsi, même s'il est possible que la rémunération des JPM après 2007 ait souffert en quelque sorte de l'absence d'examen entre 2004 et 2007, il ne s'agit pas d'un problème d'indépendance judiciaire comme tel, puisque les exigences constitutionnelles relatives à la protection de l'indépendance judiciaire ont été respectées dès 2007. En effet, le gouvernement s'est conformé dès lors à son obligation constitutionnelle de soumettre périodiquement à l'examen d'un comité la rémunération des JPM, comme l'exigeait le *Renvoi de 1997*. La confiance du public à l'égard de l'indépendance judiciaire n'a donc en aucun cas été minée pendant cette période. On ne peut pas dire que l'absence d'examen, entre 2004 et 2007, ait eu sur la rémunération des JPM après 2007 des effets d'ordre constitutionnel.

VII. Régimes de retraite

[86] Les appelants contestent la participation des JPM au régime de retraite du personnel d'encadrement de la fonction publique. Ils affirment que, comme le régime de retraite n'est pas conçu en fonction de la carrière judiciaire, et qu'il est moins avantageux que le régime de retraite des juges de la Cour du Québec, il ne satisfait pas au seuil minimal requis par la charge de juge. Ainsi, la participation

of PJPs in this pension plan infringes judicial independence. To them, changes to pensions should be analyzed separately from changes to remuneration as a whole.

des JPM à ce régime de retraite porte atteinte à l'indépendance judiciaire. Selon eux, les modifications apportées au régime de retraite doivent être analysées séparément de celles touchant la rémunération dans son ensemble.

[87] The courts below rejected this argument. The application judge declined to comment on the merits of the pension plan, but relied on the Johnson and D'Amours committees' endorsements of the plan. For its part, the Court of Appeal also relied on the committees' recommendations, since these conclusions were not unreasonable. They found that a reasonable and well-informed person would find that the constitutionally required minimum threshold was met. We agree with the courts below.

[87] Les juridictions inférieures ont rejeté cet argument. Le juge saisi de la requête a refusé de se prononcer sur le bien-fondé du régime de retraite et s'en est remis aux Comités Johnson et D'Amours, qui l'avaient approuvé. Pour sa part, la Cour d'appel a également accepté les recommandations des comités, puisque leurs conclusions n'étaient pas déraisonnables. Elles ont jugé qu'une personne raisonnable et bien informée estimerait que le seuil minimal requis par la Constitution avait été respecté. Nous sommes d'accord avec les juridictions inférieures.

[88] The issue before us concerns the adequacy of the pensions and not the impact of the change from a previous pension plan to a new one. In regards to the adequacy argument, it bears repeating that one of the main roles of a remuneration committee is precisely to determine whether the overall remuneration of judges — which includes pensions — is adequate.

[88] La question dont nous sommes saisis est de savoir si le régime de retraite est adéquat, et ne vise pas les effets du passage de l'ancien régime au nouveau. À ce sujet, nous rappelons que l'une des principales fonctions d'un comité est précisément de décider si la rémunération globale des juges — y compris le régime de retraite — est adéquate.

[89] As discussed above, the third element of the institutional dimension of financial security is that remuneration may not fall below a basic minimum level required for the office of a judge (*1997 Reference*, at para. 135; *Bodner*, at para. 8; *Mackin*, at para. 59). This is so because public confidence in judicial independence would be undermined "if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation" (*1997 Reference*, at para. 135; see also paras. 192-96). In articulating this element in the *1997 Reference*, Lamer C.J. stressed that this element is not for the benefit of the judiciary, but for the public (para. 193):

[89] Comme nous l'avons souligné, le troisième élément de la dimension institutionnelle de la sécurité financière exige que la rémunération ne puisse être inférieure au seuil minimal que requiert la charge de juge (*Renvoi de 1997*, par. 135; *Bodner*, par. 8; *Mackin*, par. 59). La confiance du public dans l'indépendance judiciaire serait sapée « si les traitements versés aux juges étaient si bas que ces derniers risqueraient d'être perçus comme étant vulnérables aux pressions politiques exercées par le biais de la manipulation financière » (*Renvoi de 1997*, par. 135; voir également les par. 192-196). Dans le *Renvoi de 1997*, le juge en chef Lamer souligne, au moment de le formuler, que cet élément n'existe pas au profit des juges, mais bien au profit du public (par. 193) :

I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial

Je veux qu'il soit bien clair que le fait de garantir un traitement minimal ne vise pas à avantager les juges. La sécurité financière est plutôt un moyen d'assurer l'indépendance de

independence, and is therefore for the benefit of the public. As Professor Friedland has put it, speaking as a concerned citizen, it is "for our sake, not for theirs" ([*A Place Apart: Judicial Independence and Accountability in Canada* (1995), at] p. 56).

[90] Pensions are part of judicial remuneration (*Valente*, at p. 704; *Beauregard*, at p. 75). Pensions must be examined with a view to their place in the overall compensation package for judges. For example, a less generous pension may be offset by more substantial salary and other benefits; viewed together, the overall remuneration might well meet the minimum constitutional threshold. This does not mean, however, that specific problems relating to pensions will never arise. For example, the total absence of a pension plan might raise concerns that overall remuneration cannot cure. And, of course, any proposed changes to the pension — as any other changes to remuneration — must be subject to prior review by a remuneration committee.

[91] Judicial independence does not require that a pension plan be exclusive or controlled by judges (*Valente*, at p. 708); nor does it require that all judges enjoy the same level of remuneration. Conversely, there is no reason in principle why a public service pension cannot apply to judges. There is also no reason in principle not to have a distinct and separate part of a pension plan specifically tailored for judges, although the absence of such a tailored plan does not automatically infringe judicial independence. Membership in a public sector pension plan does not preclude adapting that plan to the specific characteristics of judicial office. For example, justices of the peace in Ontario are members of a Public Sector Pension Plan, but are also members of a Supplemental Plan, which provides additional benefits.

[92] The appellants argue that their pension plan does not meet the basic constitutional minimum threshold. The management personnel pension plan is designed for career public servants with around 35 years of service at retirement. But a career as a

la magistrature et, de ce fait, elle est à l'avantage du public. Comme l'a dit le professeur Friedland, en tant que citoyen concerné, une telle mesure est « dans notre propre intérêt » ([*Une place à part : l'indépendance et la responsabilité de la magistrature au Canada* (1995),] p. 64).

[90] Le régime de retraite fait partie de la rémunération des juges (*Valente*, p. 704; *Beauregard*, p. 75). Son examen doit tenir compte de la place qu'il occupe dans l'ensemble de la rémunération des juges. À titre d'exemple, un régime de retraite moins généreux pourrait être compensé par un traitement plus élevé et d'autres avantages; il en résulterait possiblement une rémunération globale qui respecte le seuil minimal constitutionnel. Or, cela ne signifie pas qu'il n'y aura jamais de problème lié au régime de retraite. À titre d'exemple, l'absence de régime de retraite soulèvera probablement des préoccupations que la rémunération globale ne permettra pas de dissiper. Bien entendu, toute modification proposée au régime — comme toute modification à la rémunération — doit être soumise à l'examen préalable d'un comité.

[91] L'indépendance judiciaire n'exige pas qu'un régime de retraite soit exclusif aux juges ou contrôlé par eux (*Valente*, p. 708); elle n'exige pas non plus la même rémunération pour tous les juges. À l'inverse, aucune raison de principe n'empêche les juges de participer à un régime de retraite public. Aucune raison de principe n'empêche non plus qu'une partie distincte d'un régime de retraite soit adaptée aux juges, quoique l'absence d'un régime sur mesure ne porte pas automatiquement atteinte à l'indépendance judiciaire. Ce n'est pas parce que les juges participent à un régime de retraite du secteur public que ce régime ne peut être adapté aux particularités propres à la fonction. À titre d'exemple, les juges de paix de l'Ontario sont membres d'un régime de retraite du secteur public, mais sont également membres d'un régime complémentaire, qui leur confère des prestations supplémentaires.

[92] Les appelants soutiennent que leur régime de retraite ne respecte pas le seuil minimal constitutionnel. Le régime de retraite du personnel d'encadrement est conçu pour les fonctionnaires de carrière, qui ont cumulé environ 35 ans de service au moment

PJP is typically shorter. Under the current pension plan, a PJP appointed at the age of 43 and retiring at age 65 would only receive 44 percent of their average salary from their three best years before retirement, whereas a judge of the Court of Québec would receive about 65 percent of their average salary from the same period. This pension plan is far less remunerative than that of the judges of the Court of Québec, which is more properly tailored to the shorter career of a judge. The appellants argue that because the pension plan is not designed for the shorter career of a judge, the pension plan does not meet the basic minimum threshold required for the office of a judge.

[93] It is common ground that the Pension Plan of Management Personnel available to PJPs is less advantageous and more costly than the pension plan enjoyed by the judges of the Court of Québec. In fact, in its representations before the D'Amours and Clair committees, the Conférence des juges de paix magistrats asked to participate in the Court of Québec judges' pension plan.

[94] However, the Johnson, D'Amours and Clair committees evaluated the pension plan, and found that it was adequate. While the PJPs may not enjoy a pension plan as beneficial as that of the judges of the Court of Québec, this is not the constitutional question at hand. The question is whether this pension plan, as part of overall remuneration, meets a minimum threshold such that these judges are not "perceived as susceptible to political pressure through economic manipulation" (*1997 Reference*, at para. 135).

[95] In our view, in light of overall remuneration and the findings of the three committees, the remuneration, including the pension, meets the minimum constitutional threshold. Therefore, s. 178 of the *CJA*, which mandates the participation of PJPs in the Pension Plan of Management Personnel, is valid.

VIII. Conclusion

[96] We conclude that ss. 27, 30 and 32 of the Act infringe the institutional financial security guarantee

de leur retraite. Or, la carrière d'un JPM est généralement de plus courte durée. Selon le régime de retraite actuel, un JPM qui serait nommé à 43 ans et prendrait sa retraite à 65 ans recevrait seulement 44 p. 100 de son salaire moyen des trois meilleures années de rémunération précédant sa retraite, alors qu'un juge de la Cour du Québec en recevrait environ 65 p. 100. Ce régime de retraite est beaucoup moins généreux que celui des juges de la Cour du Québec, qui est davantage adapté à la carrière plus courte d'un juge. Les appelants affirment donc que leur régime de retraite ne respecte pas le seuil minimal requis par la charge de juge.

[93] Personne ne conteste que le régime de retraite du personnel d'encadrement auquel participent les JPM est moins avantageux et plus onéreux que celui des juges de la Cour du Québec. En fait, dans ses observations devant les Comités D'Amours et Clair, la Conférence des juges de paix magistrats a demandé à participer au régime de retraite des juges de la Cour du Québec.

[94] Cependant, les Comités Johnson, D'Amours et Clair ont évalué le régime de retraite et ont conclu qu'il était adéquat. Bien que les JPM ne bénéficient pas d'un régime de retraite aussi avantageux que celui des juges de la Cour du Québec, il ne s'agit pas là de la question constitutionnelle qui nous occupe. La question consiste plutôt à savoir si ce régime de retraite, qui fait partie de la rémunération globale, respecte le seuil minimal requis pour que ces juges ne soient pas « perçus comme étant vulnérables aux pressions politiques exercées par le biais de la manipulation financière » (*Renvoi de 1997*, par. 135).

[95] À notre avis, compte tenu de la rémunération globale des JPM ainsi que des conclusions des trois comités, la rémunération, y compris le régime de retraite, satisfait au seuil minimal constitutionnel. En conséquence, l'art. 178 de la *LTJ*, qui impose aux JPM de participer au régime de retraite du personnel d'encadrement, est valide.

VIII. Conclusion

[96] Nous concluons que les art. 27, 30 et 32 de la Loi portent atteinte à la garantie de sécurité

of judicial independence, and are thus contrary to s. 11(*d*) of the *Charter* and the preamble to the *Constitution Act, 1867*.

[97] This infringement is not justified under s. 1 of the *Charter*. Indeed, an infringement of judicial independence can only be justified where there are "dire and exceptional financial emergencies caused by extraordinary circumstances such as the outbreak of war or imminent bankruptcy" (*Mackin*, at para. 72, citing the *1997 Reference*, at para. 137). To justify an infringement, the government must adduce evidence to justify why the independent, effective and objective process has been circumvented (*Mackin*, at para. 73, citing the *1997 Reference*, at paras. 277 et seq.). We are far from that threshold here. The Attorney General of Quebec makes no submissions on this issue and adduces no evidence that would justify an infringement. There is no evidence of a dire financial emergency; in fact, the Attorney General of Quebec does not raise financial considerations as the basis or justification for any of the government's action. Therefore, there is nothing that would meet the high threshold of justification under s. 1.

[98] Having found that ss. 27, 30 and 32 of the Act infringe judicial independence, and that this infringement is not saved by s. 1, we conclude that these sections are unconstitutional.

[99] However, neither Order 932-2008, nor s. 178 of the *CJA* infringes judicial independence.

IX. Remedy

[100] Having determined that the failure to provide for retroactive review of the new judicial office within a reasonable time after the appointments was a breach of the financial security guarantee of judicial independence between 2004 and 2007, there remains the question of the appropriate remedy.

financière institutionnelle qu'exige l'indépendance judiciaire et qu'ils sont donc contraires à l'al. 11*d*) de la *Charte* ainsi qu'au préambule de la *Loi constitutionnelle de 1867*.

[97] Cette atteinte n'est pas justifiée au regard de l'article premier de la *Charte*. En effet, un manquement au principe de l'indépendance judiciaire ne peut être justifié qu'en cas de « crise financière exceptionnellement grave provoquée par des circonstances extraordinaires, telles que le déclenchement d'une guerre ou une faillite imminente » (*Mackin*, par. 72, citant le *Renvoi de 1997*, par. 137). Pour justifier une atteinte, le gouvernement doit présenter des éléments de preuve expliquant pourquoi le processus indépendant, efficace et objectif a été contourné (*Mackin*, par. 73, citant le *Renvoi de 1997*, par. 277 et suiv.). En l'espèce, ce critère est loin d'avoir été respecté. La procureure générale du Québec n'a présenté aucune observation sur cette question et n'a produit aucune preuve qui justifierait une telle atteinte. Rien ne démontre qu'il existe une crise financière grave; en fait, la procureure générale du Québec n'a soulevé aucun facteur financier susceptible de fonder ou de justifier les mesures du gouvernement. En conséquence, le critère élevé de justification exigé par l'article premier n'est pas satisfait en l'espèce.

[98] Comme nous avons conclu que les art. 27, 30 et 32 de la Loi portent atteinte à l'indépendance judiciaire et qu'elle ne peut se justifier au regard de l'article premier, nous concluons à l'inconstitutionnalité de ces dispositions.

[99] Toutefois, ni le Décret 932-2008 ni l'art. 178 de la *LTJ* ne portent atteinte à l'indépendance judiciaire.

IX. Réparation

[100] Comme nous avons conclu que le défaut de prévoir un examen rétroactif de la nouvelle charge judiciaire dans un délai raisonnable après les nominations portait atteinte à la garantie de sécurité financière qu'exige l'indépendance judiciaire pour la période de 2004 à 2007, nous devons maintenant nous pencher sur la question de la réparation appropriée.

[101] The appellants ask this Court to declare the impugned sections invalid. Further, they argue that if these sections are invalid, then all the executive orders setting remuneration since 2004 are also invalid. They ask this Court to order committee review of all remuneration since 2004. By contrast, the Attorney General of Quebec asks that any remedy be limited to a declaration of invalidity and a declaration that in the future, a committee must review the initial remuneration of a new office.

[102] While we agree there was a breach in the financial security guarantee, the extensive remedy requested by the appellants goes too far.

[103] First, we declare ss. 27, 30 and 32 of the Act invalid. However, the other impugned provisions (s. 178 of the *CJA*, and Order 932-2008) remain valid.

[104] Additionally, because the breach to judicial independence arises from the lack of committee review for the period between 2004 and 2007, we order that a remuneration committee review remuneration of all PJPs for this period only. The committee must consider all factors bearing on remuneration, including the remuneration of the previous judicial office. This committee review signals that a breach of judicial independence cannot remain unaddressed, and serves to promote future government compliance with the requirements of judicial independence.

[105] However, as discussed above, any impact on remuneration after 2007 is not due to a violation of judicial independence after 2007; as a result, judicial independence does not require that the subsequent Order 932-2008 be struck.

[106] That being said, although one of the guarantees of judicial independence was compromised between 2004 and 2007, the judicial decisions rendered by the PJPs throughout that period are

[101] Les appelants demandent à la Cour de déclarer invalides les dispositions contestées. De plus, ils soutiennent que l'invalidité de ces dispositions emporte celle de tous les décrets établissant la rémunération adoptés depuis 2004. Ils demandent à la Cour d'ordonner l'examen par un comité de l'ensemble des rémunérations fixées depuis 2004. En revanche, la procureure générale du Québec demande que la réparation soit limitée à une déclaration d'invalidité ainsi qu'à une déclaration selon laquelle, à l'avenir, un comité devra examiner la rémunération initiale associée à une nouvelle charge.

[102] Même si nous convenons qu'il y a eu atteinte à la garantie de sécurité financière, nous sommes d'avis que la réparation demandée par les appelants est exagérée.

[103] Premièrement, même si nous déclarons les art. 27, 30 et 32 de la Loi invalides, les autres dispositions contestées (l'art. 178 de la *LTJ* et le Décret 932-2008) demeurent valides.

[104] De plus, comme l'atteinte à l'indépendance judiciaire découle de l'absence d'examen par un comité entre 2004 et 2007, nous ordonnons que la rémunération de tous les JPM soit examinée par un comité, mais seulement pour cette période. Le comité doit tenir compte de tous les facteurs ayant une incidence sur la rémunération, y compris la rémunération associée à la charge judiciaire antérieure. Non seulement pareil examen établit qu'il faudra toujours remédier à une atteinte à l'indépendance judiciaire, mais il contribue également à obliger le gouvernement à respecter pour l'avenir les exigences de l'indépendance judiciaire.

[105] Cependant, comme nous l'avons souligné, les répercussions sur la rémunération après 2007 ne découlent pas d'une atteinte à l'indépendance judiciaire survenue après cette année; en conséquence, l'annulation du Décret 932-2008 n'est pas nécessaire.

[106] Cela dit, même si l'une des garanties qu'exige l'indépendance judiciaire a été compromise entre 2004 et 2007, les décisions judiciaires rendues par les JPM durant cette période sont valides :

valid: ". . . absent a demonstration of positive and substantial injustice in the circumstances of a particular case, the doctrine of necessity will prevent the reopening of past decisions of [courts] by reason only of their lack of independence" (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3, at para. 8).

[107] We would allow the appeal in part, and order costs in favour of the appellants.

APPENDIX

I. Legislative Provisions

Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace, S.Q. 2004, c. 12

26. Justices of the peace appointed before 30 June 2004 in accordance with section 158 of the Courts of Justice Act (R.S.Q., chapter T-16), to whom section 162 of that Act was made applicable by their deed of appointment and who are in office on that date become presiding justices of the peace. They are deemed to have been appointed to hold office during good behaviour in accordance with Division II of Part III.1 of the Courts of Justice Act, as amended by this Act, and, for the purposes of section 161 of that Act, to have established their residence in the place where they were residing on 30 June 2004.

Justices of the peace referred to in the first paragraph who were on leave without pay from the public service are, from the date of coming into force of this section, deemed to have resigned from their public service position.

27. Persons who became presiding justices of the peace by virtue of section 26 retain the salary they were receiving before the coming into force of section 26, until that salary is equal to the salary to be determined by the Government pursuant to section 175 of the Courts of Justice Act.

They also retain the employment conditions, including the employment benefits and the pension plan, formerly applicable to them. However, during the six months following the coming into force of section 26, they may

« . . . en l'absence de démonstration d'une injustice concrète et substantielle dans les circonstances particulières d'un cas donné, la doctrine de la nécessité aura pour effet d'empêcher le réexamen des décisions passées des cours [. . .] sur le seul fondement de l'absence d'indépendance de ces tribunaux » (*Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1998] 1 R.C.S. 3, par. 8).

[107] Nous sommes d'avis d'accueillir en partie le pourvoi et d'adjuger les dépens aux appelants.

ANNEXE

I. Dispositions législatives

Loi modifiant la Loi sur les tribunaux judiciaires et d'autres dispositions législatives eu égard au statut des juges de paix, L.Q. 2004, c. 12

26. Les juges de paix nommés avant le 30 juin 2004 conformément à l'article 158 de la Loi sur les tribunaux judiciaires (L.R.Q., chapitre T-16), auxquels l'article 162 de cette loi était rendu applicable par leur acte de nomination et qui sont en fonction à cette date, deviennent juges de paix magistrats. Ils sont réputés avoir été nommés durant bonne conduite suivant les dispositions de la section II de la partie III.1 de la Loi sur les tribunaux judiciaires telle que modifiée par la présente loi et, aux fins de l'application de l'article 161 de cette loi, avoir établi leur résidence au lieu dans lequel ils résidaient le 30 juin 2004.

Parmi ces personnes, celles qui étaient en congé sans solde de la fonction publique sont, à compter de l'entrée en vigueur du présent article, réputées avoir remis à cette date leur démission de leur poste de fonctionnaires.

27. Les personnes devenues juges de paix magistrats par l'effet de l'article 26 conservent le traitement qu'elles recevaient avant l'entrée en vigueur de l'article 26, jusqu'à ce que ce traitement soit égal à celui qui sera établi par le gouvernement en application de l'article 175 de la Loi sur les tribunaux judiciaires (L.R.Q., chapitre T-16).

Elles conservent également les conditions de travail, y compris les avantages sociaux et le régime de retraite, qui leur étaient jusque-là applicables. Elles peuvent toutefois, dans les six mois suivant l'entrée en vigueur

elect to become members of the pension plan established under the Act respecting the Pension Plan of Management Personnel (R.S.Q., chapter R-12.1) by sending a notice to that effect to the Commission administrative des régimes de retraite et d'assurances established under the Act respecting the Government and Public Employees Retirement Plan (R.S.Q., chapter R-10). In that case, and if they were formerly members of the pension plan established under the Act respecting the Civil Service Superannuation Plan (R.S.Q., chapter R-12), section 42 and the first paragraph of section 139 of the Act respecting the Pension Plan of Management Personnel apply, with the necessary modifications.

30. The Government determines, by order, the salary and employment conditions of presiding justices of the peace appointed on or after 30 June 2004, including their employment benefits other than the pension plan. The order remains applicable until the first order is made under section 175 of the Courts of Justice Act (R.S.Q., chapter T-16) enacted by section 1.

32. Despite sections 2 to 8, the committee on the remuneration of judges will not exercise its functions with regard to presiding justices of the peace until a committee is formed in 2007 with respect to judges of the Court of Québec and municipal courts.

II. Constitutional Questions

The Chief Justice stated the following constitutional questions on August 18, 2015:

1. Do ss. 27, 30 and 32 of the *Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace*, S.Q. 2004, c. 12, violate the principle of judicial independence guaranteed by:

   (a) the *Constitution Act, 1867* or

   (b) section 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

2. If so, in respect of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

de l'article 26, opter de participer au régime de retraite établi par la Loi sur le régime de retraite du personnel d'encadrement (L.R.Q., chapitre R-12.1) en transmettant un avis à cet effet à la Commission administrative des régimes de retraite et d'assurances constituée en vertu de la Loi sur le régime de retraite des employés du gouvernement et des organismes publics (L.R.Q., chapitre R-10). Dans ce cas, et si elles participaient au régime de retraite établi par la Loi sur le régime de retraite des fonctionnaires (L.R.Q., chapitre R-12), l'article 42 et le premier alinéa de l'article 139 de la Loi sur le régime de retraite du personnel d'encadrement s'appliquent, compte tenu des adaptations nécessaires.

30. Le gouvernement fixe, par décret, le traitement et les conditions de travail des juges de paix magistrats nommés à compter du 30 juin 2004, y compris leurs avantages sociaux autres que le régime de retraite. Ce décret demeure applicable jusqu'à l'adoption du premier décret pris en application de l'article 175 de la Loi sur les tribunaux judiciaires (L.R.Q., chapitre T-16) édicté par l'article 1 de la présente loi.

32. Malgré les articles 2 à 8 de la présente loi, le Comité de la rémunération des juges n'exerce ses attributions eu égard aux juges de paix magistrats qu'à compter du moment où il sera procédé à la nomination des membres du comité qui sera formé en 2007 à l'égard des juges de la Cour du Québec et des cours municipales

II. Questions constitutionnelles

La Juge en chef a formulé les questions constitutionnelles suivantes le 18 août 2015 :

1. Les articles 27, 30 et 32 de la *Loi modifiant la Loi sur les tribunaux judiciaires et d'autres dispositions législatives eu égard au statut des juges de paix*, L.Q. 2004, c. 12, contreviennent-ils au principe d'indépendance judiciaire garanti par :

   a) la *Loi constitutionnelle de 1867* ou

   b) l'alinéa 11*d*) de la *Charte canadienne des droits et libertés*?

2. Dans l'affirmative, quant à l'al. 11*d*) de la *Charte canadienne des droits et libertés*, s'agit-il d'une atteinte portée par une règle de droit dans des limites qui sont raisonnables et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique suivant l'article premier de la *Charte*?

3. Does s. 178 of the *Courts of Justice Act*, CQLR, c. T-16, as amended by the *Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace*, S.Q. 2004, c. 12, violate the principle of judicial independence guaranteed by:

   (a) the *Constitution Act, 1867* or

   (b) section 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

4. If so, in respect of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

5. Does the Décret 932-2008, (2008) 140 G.O. 2, 5681, concerning the pay and other working conditions of presiding justices of the peace, violate the principle of judicial independence guaranteed by:

   (a) the *Constitution Act, 1867* or

   (b) section 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

6. If so, in respect of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

We answer the constitutional questions as follows:

Question 1: Sections 27, 30 and 32 of the Act violate the principle of judicial independence.

Question 2: No.

Question 3: No.

Question 4: It is unnecessary to answer this question.

Question 5: No.

Question 6: It is unnecessary to answer this question.

3. L'article 178 de la *Loi sur les tribunaux judiciaires*, RLRQ, c. T-16, tel que modifié par la *Loi modifiant la Loi sur les tribunaux judiciaires et d'autres dispositions législatives eu égard au statut des juges de paix*, L.Q. 2004, c. 12, contrevient-il au principe d'indépendance judiciaire garanti par :

   a) la *Loi constitutionnelle de 1867* ou

   b) l'alinéa 11*d*) de la *Charte canadienne des droits et libertés*?

4. Dans l'affirmative, quant à l'al. 11*d*) de la *Charte canadienne des droits et libertés*, s'agit-il d'une atteinte portée par une règle de droit dans des limites qui sont raisonnables et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique suivant l'article premier de la *Charte*?

5. Le Décret 932-2008, (2008) 140 G.O. 2, 5681, concernant le traitement et les autres conditions de travail des juges de paix magistrats, contrevient-il au principe d'indépendance judiciaire garanti par :

   a) la *Loi constitutionnelle de 1867* ou

   b) l'alinéa 11*d*) de la *Charte canadienne des droits et libertés*?

6. Dans l'affirmative, quant à l'al. 11*d*) de la *Charte canadienne des droits et libertés*, s'agit-il d'une atteinte portée par une règle de droit dans des limites qui sont raisonnables et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique suivant l'article premier de la *Charte*?

Nous répondons ainsi aux questions constitutionnelles :

Première question : Les articles 27, 30 et 32 de la Loi contreviennent au principe de l'indépendance judiciaire.

Deuxième question : Non.

Troisième question : Non.

Quatrième question : Il n'est pas nécessaire de répondre à cette question.

Cinquième question : Non.

Sixième question : Il n'est pas nécessaire de répondre à cette question.

Appeal allowed in part with costs.

Solicitors for the appellants: Lavery, de Billy, Montréal.

Solicitor for the respondents: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Montréal and Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener Conférence des juges de la Cour du Québec: Casavant Mercier, Montréal.

Solicitors for the intervener the Association of Justices of the Peace of Ontario: Lenczner Slaght Royce Smith Griffin, Toronto.

Pourvoi accueilli en partie avec dépens.

Procureurs des appelants : Lavery, de Billy, Montréal.

Procureure des intimées : Procureure générale du Québec, Québec.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Montréal et Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureurs de l'intervenante la Conférence des juges de la Cour du Québec : Casavant Mercier, Montréal.

Procureurs de l'intervenante l'Association des juges de paix de l'Ontario : Lenczner Slaght Royce Smith Griffin, Toronto.

Delgamuukw, also known as Earl Muldoe, suing on his own behalf and on behalf of all the members of the Houses of Delgamuukw and Haaxw (and others suing on their own behalf and on behalf of thirty-eight Gitksan Houses and twelve Wet'suwet'en Houses as shown in Schedule 1) *Appellants/ Respondents on the cross-appeal*

v.

Her Majesty The Queen in Right of the Province of British Columbia *Respondent/ Appellant on the cross-appeal*

and

The Attorney General of Canada *Respondent*

and

The First Nations Summit, the Musqueam Nation *et al.* (as shown in Schedule 2), the Westbank First Nation, the B.C. Cattlemen's Association *et al.* (as shown in Schedule 3), Skeena Cellulose Inc., Alcan Aluminum Ltd. *Interveners*

INDEXED AS: DELGAMUUKW *v.* BRITISH COLUMBIA

File No.: 23799.

1997: June 16, 17; 1997: December 11.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka,* Cory, McLachlin and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Aboriginal rights — Aboriginal land title — Claim made for large tract — Content of aboriginal title — How aboriginal title protected by s. 35(1) of Constitution Act, 1982 — What required to

*Sopinka J. took no part in this judgment.

Delgamuukw, connu également sous le nom d'Earl Muldoe, en son propre nom et au nom de tous les membres des maisons Delgamuukw et Haaxw (et d'autres personnes en leur propre nom et au nom des membres de trente-huit maisons Gitksan et de douze maisons Wet'suwet'en, selon ce qui est indiqué à l'annexe 1) *Appelants/ Intimés dans le pourvoi incident*

c.

Sa Majesté la Reine du chef de la province de la Colombie-Britannique *Intimée/ Appelante dans le pourvoi incident*

et

Le procureur général du Canada *Intimé*

et

Le First Nations Summit, la Nation Musqueam et autres (selon ce qui est indiqué à l'annexe 2), la Première nation de Westbank, la B.C. Cattlemen's Association et autres (selon ce qui est indiqué à l'annexe 3), Skeena Cellulose Inc., Alcan Aluminium Ltée *Intervenants*

RÉPERTORIÉ: DELGAMUUKW *c.* COLOMBIE-BRITANNIQUE

N° du greffe: 23799.

1997: 16 et 17 juin; 1997: 11 décembre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka*, Cory, McLachlin et Major.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Droits ancestraux — Titre aborigène sur des terres — Revendication d'un vaste territoire — Contenu du titre aborigène — Comment l'art. 35(1) de la Loi constitutionnelle de 1982 protège-

*Le juge Sopinka n'a pas pris part au jugement.

prove aboriginal title — Whether claim to self-government made out — Whether province could extinguish aboriginal rights after 1871, either under own jurisdiction or through the operation of s. 88 of the Indian Act (incorporating provincial laws of general application by reference) — Constitution Act, 1982, s. 35(1) — Indian Act, R.S.C., 1985, c. I-5, s. 88.

Constitutional law — Aboriginal rights — Aboriginal land title — Evidence — Oral history and native law and tradition — Weight to be given evidence — Ability of Court to interfere with trial judge's factual findings.

Courts — Procedure — Land claims — Aboriginal title and self-government — Claim altered but no formal amendments to pleadings made — Whether pleadings precluded the Court from entertaining claims.

The appellants, all Gitksan or Wet'suwet'en hereditary chiefs, both individually and on behalf of their "Houses", claimed separate portions of 58,000 square kilometres in British Columbia. For the purpose of the claim, this area was divided into 133 individual territories, claimed by the 71 Houses. This represents all of the Wet'suwet'en people, and all but 12 of the Gitksan Houses. Their claim was originally for "ownership" of the territory and "jurisdiction" over it. (At this Court, this was transformed into, primarily, a claim for aboriginal title over the land in question.) British Columbia counterclaimed for a declaration that the appellants have no right or interest in and to the territory or alternatively, that the appellants' cause of action ought to be for compensation from the Government of Canada.

At trial, the appellants' claim was based on their historical use and "ownership" of one or more of the territories. In addition, the Gitksan Houses have an "adaawk" which is a collection of sacred oral tradition about their ancestors, histories and territories. The Wet'suwet'en each have a "kungax" which is a spiritual song or dance or performance which ties them to their land. Both of these were entered as evidence on behalf of the appellants. The most significant evidence of spiritual connection between the Houses and their territory

t-il le titre aborigène? — Quels sont les éléments de preuve requis pour établir le titre aborigène? — Le bien-fondé de la revendication de l'autonomie gouvernementale a-t-il été établi? — La province pouvait-elle, après 1871, éteindre des droits ancestraux soit par l'exercice de sa propre compétence soit par l'effet de l'art. 88 de la Loi sur les Indiens (qui incorpore par renvoi les lois provinciales d'application générale)? — Loi constitutionnelle de 1982, art. 35(1) — Loi sur les Indiens, L.R.C. (1985), ch. I-5, art. 88.

Droit constitutionnel — Droits ancestraux — Titre aborigène sur des terres — Preuve — Récits oraux et règles de droit et traditions autochtones — Poids à donner aux éléments de preuve — Pouvoir d'intervention de la Cour quant aux conclusions de fait du juge de première instance.

Tribunaux — Procédure — Revendications territoriales — Titre aborigène et autonomie gouvernementale — Revendication modifiée mais sans modification formelle des actes de procédure — Les actes de procédure empêchent-ils la Cour d'entendre les revendications?

Les appelants, tous des chefs héréditaires Wet'suwet'en ou Gitksan, revendiquent tant en leur propre nom qu'au nom de leurs «maisons» des parties distinctes d'un territoire de 58 000 kilomètres carrés situé en Colombie-Britannique. Aux fins de la revendication, ce grand territoire a été divisé en 133 territoires distincts, revendiqués par les 71 maisons. Y sont représentés tous les Wet'suwet'en et toutes les maisons Gitksan, à l'exception de 12. Initialement, les appelants revendiquaient la «propriété» du territoire et la «compétence» sur celuici. (Devant la Cour, cette revendication a changé et est devenue principalement la revendication d'un titre aborigène sur le territoire en question.) La Colombie-Britannique a présenté une demande reconventionnelle dans laquelle elle sollicite une déclaration portant que les appelants n'ont aucun droit ou intérêt dans le territoire, ou, subsidiairement, que la cause d'action des appelants devrait être l'obtention d'une indemnité de la part du gouvernement du Canada.

Au procès, les appelants ont fondé leur revendication sur la «propriété» et l'utilisation historiques d'un ou de plusieurs des territoires. En outre, les maisons Gitksan ont un «adaawk», c'est-à-dire un ensemble de traditions orales sacrées au sujet de leurs ancêtres, de leur histoire et de leurs territoires. Chaque maison Wet'suwet'en possède un «kungax», c'est-à-dire un chant, une danse ou une représentation spirituelle qui les rattache à leur territoire. Ces deux éléments ont été déposés en preuve au nom des appelants. Le signe le plus important du lien

was a feast hall where the Gitksan and Wet'suwet'en peoples tell and retell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands. The feast has a ceremonial purpose but is also used for making important decisions.

spirituel entre les différentes maisons et leur territoire est la salle des célébrations. C'est là que les Wet'suwet'en et les Gitksan disent et redisent leurs récits et identifient leurs territoires afin de se rappeler le lien sacré qu'ils entretiennent avec leurs terres. Ces célébrations ont une fin rituelle, mais elles sont aussi l'occasion de prise de décisions importantes.

The trial judge did not accept the appellants' evidence of oral history of attachment to the land. He dismissed the action against Canada, dismissed the plaintiffs' claims for ownership and jurisdiction and for aboriginal rights in the territory, granted a declaration that the plaintiffs were entitled to use unoccupied or vacant land subject to the general law of the province, dismissed the claim for damages and dismissed the province's counterclaim. No order for costs was made. On appeal, the original claim was altered in two different ways. First, the claims for ownership and jurisdiction were replaced with claims for aboriginal title and self-government, respectively. Second, the individual claims by each House were amalgamated into two communal claims, one advanced on behalf of each nation. There were no formal amendments to the pleadings to this effect. The appeal was dismissed by a majority of the Court of Appeal.

Le juge de première instance n'a pas accepté les récits oraux que les appelants présentaient comme éléments de preuve de leur attachement au territoire. Il a rejeté l'action contre le Canada, il a rejeté les revendications, par les demandeurs, de la propriété du territoire, de la compétence sur celui-ci ou de droits ancestraux à son égard, il a accordé une déclaration portant que les demandeurs avaient le droit d'utiliser toute terre inoccupée ou vacante, sous réserve du respect des lois d'application générale de la province, il a rejeté la demande de dommages-intérêts et il a rejeté la demande reconventionnelle de la province. Il n'a rendu aucune ordonnance concernant les dépens. En appel, la revendication initiale a été modifiée de deux façons. Premièrement, les revendications relatives à la propriété des territoires et à la compétence sur ceux-ci ont été remplacées respectivement par la revendication du titre aborigène et la revendication de l'autonomie gouvernementale. Deuxièmement, les revendications individuelles présentées par chaque maison ont été fusionnées en deux revendications collectives, une au nom de chaque nation. Aucune modification en ce sens n'a été apportée formellement aux actes de procédure. L'appel a été rejeté par la Cour d'appel à la majorité.

The principal issues on the appeal, some of which raised a number of sub-issues, were as follows: (1) whether the pleadings precluded the Court from entertaining claims for aboriginal title and self-government; (2) what was the ability of this Court to interfere with the factual findings made by the trial judge; (3) what is the content of aboriginal title, how is it protected by s. 35(1) of the *Constitution Act, 1982*, and what is required for its proof; (4) whether the appellants made out a claim to self-government; and, (5) whether the province had the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the *Indian Act*.

Les principales questions dans le pourvoi sont les suivantes: (1) Les actes de procédure empêchent-ils la Cour d'examiner les revendications relatives au titre aborigène et à l'autonomie gouvernementale? (2) Quel pouvoir notre Cour a-t-elle de modifier les conclusions de fait du juge de première instance? (3) Quel est le contenu du titre aborigène, comment est-il protégé par le par. 35(1) de la *Loi constitutionnelle de 1982* et comment fait-on la preuve de son existence? (4) Les appelants ont-ils établi le bien-fondé de leur revendication de l'autonomie gouvernementale? (5) La province avait-elle, après 1871, le pouvoir d'éteindre des droits ancestraux soit par l'exercice de sa propre compétence soit par l'effet de l'art. 88 de la *Loi sur les Indiens*?

Held: The appeal should be allowed in part and the cross-appeal should be dismissed.

Arrêt: Le pourvoi est accueilli en partie et le pourvoi incident est rejeté.

Whether the Claims Were Properly Before the Court

Per Lamer C.J. and Cory, McLachlin, and Major JJ.: The claims were properly before the Court. Although the pleadings were not formally amended, the trial judge did allow a *de facto* amendment to permit a claim for aboriginal rights other than ownership and jurisdiction. The respondents did not appeal this *de facto* amendment and the trial judge's decision on this point must accordingly stand.

No amendment was made with respect to the amalgamation of the individual claims brought by the individual Gitksan and Wet'suwet'en Houses into two collective claims, one by each nation, for aboriginal title and self-government. The collective claims were simply not in issue at trial and to frame the case on appeal in a different manner would retroactively deny the respondents the opportunity to know the appellants' case.

A new trial is necessary. First, the defect in the pleadings prevented the Court from considering the merits of this appeal. The parties at a new trial would decide whether any amendment was necessary to make the pleadings conform with the other evidence. Then, too, appellate courts, absent a palpable and overriding error, should not substitute their own findings of fact even when the trial judge misapprehended the law which was applied to those facts. Appellate intervention is warranted, however, when the trial court fails to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when applying the rules of evidence and interpreting the evidence before it.

Per La Forest and L'Heureux-Dubé JJ.: The amalgamation of the appellants' individual claims technically prevents a consideration of the merits. However, there is a more substantive problem with the pleadings. The appellants sought a declaration of "aboriginal title" but attempted, in essence, to prove that they had complete control over the territory. It follows that what the appellants sought by way of declaration and what they set out

La Cour était-elle régulièrement saisie des revendications?

Le juge en chef Lamer et les juges Cory, McLachlin et Major: La Cour était régulièrement saisie des revendications. Même si les actes de procédure n'ont pas été formellement modifiés, le juge de première instance a bel et bien accepté une modification *de facto* pour permettre la revendication de droits ancestraux autres que la propriété et la compétence. Les intimés n'ont pas interjeté appel contre cette modification *de facto* et la décision du juge de première instance sur ce point doit être maintenue.

Aucune modification n'a été apportée en ce qui a trait à la fusion des revendications individuelles présentées par les maisons Wet'suwet'en et Gitksan en deux revendications collectives, une pour chaque nation, sollicitant un titre aborigène et l'autonomie gouvernementale. Les revendications collectives n'étaient tout simplement pas en litige en première instance, et redéfinir le litige en appel aurait pour effet de nier rétroactivement aux intimés la possibilité de savoir quelle est la cause des appelants.

Il est nécessaire de tenir un nouveau procès. Premièrement, le vice dans les actes de procédure a empêché la Cour d'examiner le fond du pourvoi. Il reviendra aux parties à un nouveau procès de se demander si une modification est nécessaire pour rendre les actes de procédure conformes à la preuve. En outre, sauf erreur manifeste et dominante, les cours d'appel ne devraient pas substituer leurs propres conclusions de fait à celles du juge de première instance, même lorsque ce dernier a mal saisi le droit qu'il a appliqué aux faits en question. Par contre, une cour d'appel est justifiée d'intervenir dans le cas où le juge de première instance n'a pas tenu compte des difficultés de preuve inhérentes à l'examen des revendications de droits ancestraux, lorsqu'il a appliqué les règles de preuve et a interprété la preuve qui lui était présentée.

Les juges La Forest et L'Heureux-Dubé: La fusion des revendications individuelles des appelants a empêché, sur le plan de la forme, la Cour d'examiner le fond de l'affaire. Cependant, les actes de procédure posent un problème encore plus substantiel. Même si les appelants ont sollicité un jugement déclarant l'existence d'un «titre aborigène», ils ont essentiellement tenté d'établir qu'ils exerçaient un contrôle complet sur le territoire en question. Il s'ensuit que ce que les appelants ont demandé à la Cour de leur reconnaître, par voie de jugement déclaratoire, et ce qu'ils se sont efforcés d'établir

to prove by way of the evidence were two different matters. A new trial should be ordered.

McLachlin J. was in substantial agreement.

The Ability of the Court to Interfere with the Trial Judge's Factual Findings

Per Lamer C.J. and Cory, McLachlin and Major JJ.: The factual findings made at trial could not stand because the trial judge's treatment of the various kinds of oral histories did not satisfy the principles laid down in *R. v. Van der Peet*. The oral histories were used in an attempt to establish occupation and use of the disputed territory which is an essential requirement for aboriginal title. The trial judge refused to admit or gave no independent weight to these oral histories and then concluded that the appellants had not demonstrated the requisite degree of occupation for "ownership". Had the oral histories been correctly assessed, the conclusions on these issues of fact might have been very different.

The Content of Aboriginal Title, How It Is Protected by s. 35(1) of the Constitution Act, 1982, and the Requirements Necessary to Prove It

Per Lamer C.J. and Cory, McLachlin and Major JJ.: Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures. The protected uses must not be irreconcilable with the nature of the group's attachment to that land.

Aboriginal title is *sui generis*, and so distinguished from other proprietary interests, and characterized by several dimensions. It is inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown. Another dimension of aboriginal title is its sources: its recognition by the *Royal Proclamation, 1763* and the relationship between the common law which recognizes occupation as proof of possession and systems of aboriginal law pre-existing assertion of British sovereignty. Finally, aboriginal title is held communally.

par la preuve, étaient deux choses différentes. La tenue d'un nouveau procès doit être ordonnée.

Le juge McLachlin est largement en accord avec ces motifs.

Le pouvoir de la Cour de modifier les conclusions de fait du juge de première instance

Le juge en chef Lamer et les juges Cory, McLachlin et Major: Les conclusions de fait tirées en première instance ne pouvaient être maintenues en raison du fait que le traitement accordé aux divers types de récits oraux par le juge de première instance ne respecte pas les principes établis dans *R. c. Van der Peet*. Ces récits ont été invoqués pour tenter d'établir l'occupation et l'utilisation du territoire contesté, condition essentielle à l'existence du titre aborigène. Après avoir refusé d'admettre ces récits oraux ou de leur accorder quelque valeur probante indépendante que ce soit, le juge de première instance est arrivé à la conclusion que les appelants n'avaient pas démontré l'existence du degré d'occupation requis du territoire pour fonder la «propriété» de celui-ci. Si le juge du procès avait apprécié correctement les récits oraux, ses conclusions sur ces questions de fait auraient pu être très différentes.

Le contenu du titre aborigène, la façon dont il est protégé par le par. 35(1) de la Loi constitutionnelle de 1982 et les exigences en matière de preuve de son existence

Le juge en chef Lamer et les juges Cory, McLachlin et Major: Le titre aborigène comprend le droit d'utiliser et d'occuper de façon exclusive les terres détenues en vertu de ce titre pour différentes fins qui ne doivent pas nécessairement être des aspects de coutumes, pratiques et traditions autochtones faisant partie intégrante d'une culture autochtone distinctive. Ces utilisations protégées ne doivent pas être incompatibles avec la nature de l'attachement qu'a le groupe concerné pour ces terres.

Le titre aborigène est un droit *sui generis*; il se distingue de ce fait des autres intérêts de propriété et est caractérisé par différentes dimensions. Le titre aborigène est inaliénable et ne peut être transféré, cédé ou vendu à personne d'autre que la Couronne. Les origines du titre aborigène constituent une autre dimension de celui-ci: sa reconnaissance par la *Proclamation royale de 1763* et le rapport entre la common law, qui reconnaît l'occupation comme preuve de la possession en droit, et les systèmes juridiques autochtones qui existaient avant l'affirmation de la souveraineté britannique. Finalement, le titre aborigène est détenu collectivement.

The exclusive right to use the land is not restricted to the right to engage in activities which are aspects of aboriginal practices, customs and traditions integral to the claimant group's distinctive aboriginal culture. Canadian jurisprudence on aboriginal title frames the "right to occupy and possess" in broad terms and, significantly, is not qualified by the restriction that use be tied to practice, custom or tradition. The nature of the Indian interest in reserve land which has been found to be the same as the interest in tribal lands is very broad and incorporates present-day needs. Finally, aboriginal title encompasses mineral rights and lands held pursuant to aboriginal title should be capable of exploitation. Such a use is certainly not a traditional one.

The content of aboriginal title contains an inherent limit in that lands so held cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands. This inherent limit arises because the relationship of an aboriginal community with its land should not be prevented from continuing into the future. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture. Land held by virtue of aboriginal title may not be alienated because the land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value. Finally, the importance of the continuity of the relationship between an aboriginal community and its land, and the non-economic or inherent value of that land, should not be taken to detract from the possibility of surrender to the Crown in exchange for valuable consideration. On the contrary, the idea of surrender reinforces the conclusion that aboriginal title is limited. If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so.

Aboriginal title at common law was recognized well before 1982 and is accordingly protected in its full form by s. 35(1). The constitutionalization of common law aboriginal rights, however, does not mean that those rights exhaust the content of s. 35(1). The existence of an aboriginal right at common law is sufficient, but not

Le droit exclusif d'utiliser les terres ne comprend pas simplement le droit d'exercer des activités qui sont des aspects de coutumes, pratiques et traditions autochtones faisant partie intégrante de la culture distinctive du groupe autochtone qui revendique le droit. La jurisprudence canadienne relative au titre aborigène définit le «droit d'occuper et de posséder» en termes généraux et, fait important, ne l'assortit pas d'une réserve le limitant aux utilisations liées à des coutumes, pratiques ou traditions. La nature du droit des Indiens sur les terres des réserves, qui a été déclaré être le même que leur droit sur les terres tribales, est très générale et intègre les besoins actuels des collectivités autochtones. Finalement, le titre aborigène comprend les droits miniers, et les terres détenues en vertu d'un titre aborigène devraient pouvoir être exploitées pour ces ressources, ce qui ne constitue certes pas une utilisation traditionnelle.

Le contenu du titre aborigène comporte une limite intrinsèque, savoir que les terres détenues en vertu d'un titre aborigène ne peuvent pas être utilisées d'une manière incompatible avec la nature de l'attachement qu'ont les revendicateurs pour ces terres. Cette limite intrinsèque découle du fait que rien ne devrait empêcher ce rapport de continuer dans le futur. L'occupation est définie en fonction des activités qui ont été exercées sur les terres et des utilisations qui ont été faites de celles-ci par le groupe en question. Si des terres font l'objet d'une telle occupation, il existera entre ce groupe et les terres visées un lien spécial tel que les terres feront partie intégrante de la définition de la culture distinctive du groupe. Les terres détenues en vertu d'un titre aborigène sont inaliénables parce qu'elles ont en elles-mêmes une valeur intrinsèque et unique dont jouit la collectivité qui possède le titre aborigène sur celles-ci. La collectivité ne peut pas faire de ces terres des utilisations qui détruiraient cette valeur. Enfin, l'importance de la continuité du rapport qu'entretient une collectivité autochtone avec ses terres et la valeur non économique ou intrinsèque de celles-ci ne devraient pas être considérées comme faisant obstacle à la possibilité d'une cession à la Couronne moyennant contrepartie de valeur. Au contraire, l'idée de cession renforce la conclusion que le titre aborigène est limité. Si les autochtones désirent utiliser leurs terres d'une manière que ne permet pas le titre, ils doivent alors les céder et les convertir en terres non visées par un titre aborigène.

Le titre aborigène a été reconnu en common law bien avant 1982 et est par conséquent protégé dans sa forme complète par le par. 35(1). Toutefois, la constitutionnalisation par le par. 35(1) des droits ancestraux reconnus en common law ne signifie pas que ces droits épuisent le contenu du par. 35(1). L'existence d'un droit ancestral

necessary, for the recognition and affirmation of that right by s. 35(1).

Constitutionally recognized aboriginal rights fall along a spectrum with respect to their degree of connection with the land. At the one end are those aboriginal rights which are practices, customs and traditions integral to the distinctive aboriginal culture of the group claiming the right but where the use and occupation of the land where the activity is taking place is not sufficient to support a claim of title to the land. In the middle are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. At the other end of the spectrum is aboriginal title itself which confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s. 35(1), including site-specific rights to engage in particular activities.

Aboriginal title is a right to the land itself. That land may be used, subject to the inherent limitations of aboriginal title, for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1). Those activities are parasitic on the underlying title. Section 35(1), since its purpose is to reconcile the prior presence of aboriginal peoples with the assertion of Crown sovereignty, must recognize and affirm both aspects of that prior presence — first, the occupation of land, and second, the prior social organization and distinctive cultures of aboriginal peoples on that land.

The test for the identification of aboriginal rights to engage in particular activities and the test for the identification of aboriginal title, although broadly similar, are

reconnu en common law est donc suffisante, mais pas nécessaire, pour la reconnaissance et la confirmation de ce droit par le par. 35(1).

Les droits ancestraux reconnus et confirmés par le par. 35(1) s'étalent le long d'un spectre, en fonction de leur degré de rattachement avec le territoire visé. À une extrémité du spectre, il y a le cas des droits ancestraux qui sont des coutumes, pratiques et traditions faisant partie intégrante de la culture autochtone distinctive du groupe qui revendique le droit en question mais où l'occupation et l'utilisation du territoire sur lequel l'activité est pratiquée sont insuffisantes pour étayer la revendication du titre sur celui-ci. Au milieu du spectre, on trouve les activités qui, par nécessité, sont pratiquées sur le territoire et, de fait, pourraient même être étroitement rattachées à une parcelle de terrain particulière. Bien qu'un groupe autochtone puisse être incapable de démontrer l'existence d'un titre sur le territoire, il peut quand même avoir le droit — spécifique à un site — de s'adonner à une activité particulière. À l'autre extrémité du spectre, il y a le titre aborigène proprement dit, qui confère quelque chose de plus que le droit d'exercer des activités spécifiques à un site qui sont des aspects de coutumes, pratiques et traditions de cultures autochtones distinctives. L'existence de droits spécifiques à un site peut être établie même si l'existence d'un titre ne peut pas l'être. Étant donné que les droits ancestraux peuvent varier en fonction de leur degré de rattachement au territoire, il est possible que certains groupes autochtones soient incapables d'établir le bien-fondé de leur revendication d'un titre, mais qu'ils possèdent néanmoins des droits ancestraux reconnus et confirmés par le par. 35(1), notamment des droits spécifiques à un site d'exercer des activités particulières.

Le titre aborigène est le droit au territoire lui-même. Sous réserve des limites inhérentes au titre aborigène, ce territoire peut être utilisé pour diverses activités, dont aucune ne doit nécessairement être protégée individuellement en tant que droit ancestral prévu au par. 35(1). Ces activités sont des parasites du titre sous-jacent. Comme l'objet du par. 35(1) est de concilier la présence antérieure des peuples autochtones en Amérique du Nord avec l'affirmation de la souveraineté de la Couronne, cette disposition doit reconnaître et confirmer les deux aspects de cette préexistence, savoir l'occupation du territoire, d'une part, et l'organisation sociale antérieure et les cultures distinctives des peuples autochtones habitant ce territoire, d'autre part.

Bien que le critère applicable pour déterminer l'existence de droits ancestraux autorisant l'exercice d'activités particulières et le critère applicable pour détermi-

distinct in two ways. First, under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy. Second, whereas the time for the identification of aboriginal rights is the time of first contact, the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land.

In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title. In the context of aboriginal title, sovereignty is the appropriate time period to consider for several reasons. First, from a theoretical standpoint, aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law. Aboriginal title is a burden on the Crown's underlying title. The Crown, however, did not gain this title until it asserted sovereignty and it makes no sense to speak of a burden on the underlying title before that title existed. Aboriginal title crystallized at the time sovereignty was asserted. Second, aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact. Under common law, the act of occupation or possession is sufficient to ground aboriginal title and it is not necessary to prove that the land was a distinctive or integral part of the aboriginal society before the arrival of Europeans. Finally, the date of sovereignty is more certain than the date of first contact.

Both the common law and the aboriginal perspective on land should be taken into account in establishing the proof of occupancy. At common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land. Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources. In considering whether occupation sufficient

ner l'existence d'un titre aborigène comportent de grandes similitudes, ils se distinguent l'un de l'autre de deux façons: premièrement, dans le cadre du critère relatif au titre aborigène, l'exigence que le territoire fasse partie intégrante de la culture distincte des demandeurs est subsumée sous l'exigence d'occupation; deuxièmement, alors que c'est le moment du premier contact avec les Européens qui est le moment pertinent pour la détermination des droits ancestraux, dans le cas du titre aborigène, c'est le moment de l'affirmation par la Couronne de sa souveraineté sur le territoire.

Pour établir le bien-fondé de la revendication d'un titre aborigène, le groupe autochtone qui revendique le titre doit démontrer qu'il occupait les terres en question au moment où la Couronne a affirmé sa souveraineté sur ces terres. Lorsqu'il est question de titre aborigène, la période de l'affirmation de la souveraineté est celle qui doit être prise en considération, et ce pour plusieurs raisons. Premièrement, d'un point de vue théorique, le titre aborigène découle de l'occupation antérieure du territoire par les peuples autochtones et du rapport entre la common law et les régimes juridiques autochtones préexistants. Le titre aborigène grève le titre sous-jacent de la Couronne. Cependant, celle-ci n'a acquis ce titre qu'à compter du moment où elle a affirmé sa souveraineté sur le territoire en question et il serait absurde de parler d'une charge grevant le titre sous-jacent avant que celui-ci ait existé. Le titre aborigène s'est cristallisé au moment de l'affirmation de la souveraineté. Deuxièmement, le titre aborigène ne soulève pas le problème que pose la distinction entre les coutumes, pratiques et traditions distinctives faisant partie intégrante d'une société autochtone et celles qui ont été introduites par suite du contact avec les Européens ou influencées par celui-ci. En vertu de la common law, le fait de l'occupation ou de la possession suffit pour fonder un titre aborigène, et il n'est pas nécessaire de prouver que le territoire en question faisait partie intégrante de la société autochtone visée avant l'arrivée des Européens ou qu'il était un élément distinctif de celle-ci. Finalement, la date de l'affirmation de la souveraineté a un caractère plus certain que celle du premier contact avec les Européens.

Tant la common law que le point de vue des autochtones à l'égard du territoire devraient être pris en compte dans la démonstration de l'occupation. En common law, l'occupation physique fait preuve de la possession en droit, fait qui à son tour fondera le droit au titre sur les terres. L'occupation physique peut être prouvée par différents faits, allant de la construction de bâtiments à l'utilisation régulière de secteurs bien définis du territoire pour y pratiquer la chasse, la pêche ou d'autres types d'exploitation de ses ressources, en pas-

to ground title is established, the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed must be taken into account. Given the occupancy requirement, it was not necessary to include as part of the test for aboriginal title whether a group demonstrated a connection with the piece of land as being of central significance to its distinctive culture. Ultimately, the question of physical occupation is one of fact to be determined at trial.

sant par la délimitation et la culture de champs. Dans l'examen de la question de savoir si on a fait la preuve d'une occupation suffisante pour fonder un titre aborigène, il faut tenir compte de la taille, du mode de vie, des ressources matérielles et des habiletés technologiques du groupe concerné, ainsi que de la nature des terres revendiquées. Compte tenu de l'exigence d'occupation, il n'est pas nécessaire d'inclure dans le critère relatif au titre aborigène la question de savoir si le groupe concerné a démontré que le lien qui le rattache au territoire visé est d'une importance fondamentale pour sa culture distinctive. En définitive, la preuve de l'occupation physique est une question de fait à trancher au procès.

If present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation. Since conclusive evidence of pre-sovereignty occupation may be difficult, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title. An unbroken chain of continuity need not be established between present and prior occupation. The fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained. The only limitation on this principle might be that the land not be used in ways which are inconsistent with continued use by future generations of aboriginals.

Si l'occupation actuelle est invoquée comme preuve de l'occupation antérieure à l'affirmation de la souveraineté, il faut qu'il y ait une continuité entre l'occupation antérieure à l'affirmation de la souveraineté et l'occupation actuelle. Étant donné qu'il peut s'avérer difficile d'apporter des éléments de preuve concluants d'une occupation antérieure à l'affirmation de la souveraineté, une collectivité autochtone peut produire, au soutien de la revendication d'un titre aborigène, des éléments de preuve de l'occupation actuelle comme preuve de l'occupation antérieure à l'affirmation de la souveraineté. Il n'est pas nécessaire de faire la preuve d'une continuité parfaite entre l'occupation actuelle et l'occupation antérieure. Le fait que la nature de l'occupation ait changé ne fera généralement pas obstacle à la revendication d'un titre aborigène, dans la mesure où un lien substantiel entre le peuple et le territoire en question a été maintenu. La seule restriction à ce principe pourrait être qu'il ne soit pas fait du territoire des utilisations incompatibles avec son usage continu par les générations autochtones futures.

At sovereignty, occupation must have been exclusive. This requirement flows from the definition of aboriginal title itself, which is defined in terms of the right to exclusive use and occupation of land. The test must take into account the context of the aboriginal society at the time of sovereignty. The requirement of exclusive occupancy and the possibility of joint title can be reconciled by recognizing that joint title can arise from shared exclusivity. As well, shared, non-exclusive aboriginal rights short of aboriginal title but tied to the land and permitting a number of uses can be established if exclusivity cannot be proved. The common law should develop to recognize aboriginal rights as they were rec-

L'occupation doit avoir été exclusive au moment de l'affirmation de la souveraineté. Cette exigence d'exclusivité découle de la définition même du titre aborigène, défini comme étant le droit d'utiliser et d'occuper de façon exclusive les terres visées. Le critère doit prendre en compte le contexte de la société autochtone au moment de l'affirmation de la souveraineté. Il est possible de concilier l'exigence d'occupation exclusive et l'existence possible d'un titre conjoint en reconnaissant qu'un titre conjoint peut découler d'une exclusivité partagée. De même, l'existence de droits ancestraux non exclusifs partagés ne constituant pas un titre, mais par ailleurs liés au territoire et permettant certaines utilisations, peut être établie, même si l'exclusivité ne peut être prouvée. La common law doit évoluer pour reconnaître les droits ancestraux qui étaient reconnus soit par

ognized by either *de facto* practice or by aboriginal systems of governance.

Per La Forest and L'Heureux-Dubé JJ.: "Aboriginal title" is based on the continued occupation and use of the land as part of the aboriginal peoples' traditional way of life. This *sui generis* interest is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts. It is personal in that it is generally inalienable except to the Crown and, in dealing with this interest, the Crown is subject to a fiduciary obligation to treat the aboriginal peoples fairly. There is reluctance to define more precisely the right of aboriginal peoples to live on their lands as their forefathers had lived.

The approach to defining the aboriginal right of occupancy is highly contextual. A distinction must be made between (1) the recognition of a general right to occupy and possess ancestral lands and (2) the recognition of a discrete right to engage in an aboriginal activity in a particular area. The latter has been defined as the traditional use, by a tribe of Indians, that has continued from pre-contact times of a particular area for a particular purpose. By contrast, a general claim to occupy and possess vast tracts of territory is the right to use the land for a variety of activities related to the aboriginal society's habits and mode of life. As well, in defining the nature of "aboriginal title", reference need not be made to statutory provisions and regulations dealing with reserve lands.

In defining the nature of "aboriginal title", reference need not be made to statutory provisions and regulations dealing specifically with reserve lands. Though the interest of an Indian band in a reserve has been found to be derived from, and to be of the same nature as, the interest of an aboriginal society in its traditional tribal lands, it does not follow that specific statutory provisions governing reserve lands should automatically apply to traditional tribal lands.

The "key" factors for recognizing aboriginal rights under s. 35(1) are met in the present case. First, the nature of an aboriginal claim must be identified precisely with regard to particular practices, customs and traditions. When dealing with a claim of "aboriginal

une pratique *de facto*, soit par un régime de gestion autochtone.

Les juges La Forest et L'Heureux-Dubé: Le «titre aborigène» se fonde sur l'occupation et l'utilisation ininterrompues des terres visées par le peuple autochtone dans le cadre de son mode de vie traditionnel. Ce droit *sui generis* n'équivaut pas à la propriété en fief simple et il ne peut pas non plus être décrit au moyen des concepts traditionnels du droit des biens. Il est personnel en ce sens qu'il est généralement inaliénable, sauf en faveur de la Couronne qui, dans ses opérations concernant un tel droit, est assujettie à une obligation de fiduciaire, savoir celle de traiter équitablement les peuples autochtones. On hésite à définir avec plus de précision le droit des peuples autochtones de continuer à vivre sur leurs terres comme l'avaient fait leurs ancêtres.

Le point de vue adopté pour définir le droit d'occupation ancestral est éminemment contextuel. Il est nécessaire de faire la distinction entre les deux aspects suivants: (1) la reconnaissance d'un droit général d'occuper et de posséder des terres ancestrales; (2) la reconnaissance d'un droit distinct d'exercer une activité autochtone dans une région particulière. Ce dernier aspect a été défini comme étant l'utilisation traditionnelle — remontant avant l'arrivée des Européens — que fait une tribu indienne d'un territoire donné, à une fin particulière. À l'opposé, une revendication générale visant le droit d'occuper et de posséder de vastes étendues de territoire concerne le droit d'utiliser ces terres pour y exercer différentes activités liées aux habitudes et au mode de vie de la société autochtone concernée. En outre, en définissant la nature du «titre aborigène», il n'est pas nécessaire de se référer aux dispositions législatives et réglementaires concernant les terres des réserves.

En définissant la nature du «titre aborigène», il n'est pas nécessaire de se référer aux dispositions législatives et réglementaires visant spécifiquement les terres des réserves. Même s'il a été jugé que le droit que possède une bande indienne sur une réserve découle du droit de la société autochtone sur ses terres tribales traditionnelles, il ne s'ensuit aucunement que les dispositions législatives particulières régissant les terres des réserves s'appliquent automatiquement aux terres tribales traditionnelles.

Il est satisfait, dans le présent pourvoi, aux facteurs «clés» permettant de reconnaître des droits ancestraux en vertu du par. 35(1). Premièrement, la nature d'une revendication autochtone doit être rattachée précisément à des coutumes, pratiques et traditions particulières. Le

title", the court will focus on the occupation and use of the land as part of the aboriginal society's traditional way of life.

Second, an aboriginal society must specify the area that has been continuously used and occupied by identifying general boundaries. Exclusivity means that an aboriginal group must show that a claimed territory is indeed its ancestral territory and not the territory of an unconnected aboriginal society. It is possible that two or more aboriginal groups may have occupied the same territory and therefore a finding of joint occupancy would not be precluded.

Third, the aboriginal right of possession is based on the continued occupation and use of traditional tribal lands since the assertion of Crown sovereignty. However, the date of sovereignty may not be the only relevant time to consider. Continuity may still exist where the present occupation of one area is connected to the pre-sovereignty occupation of another area. Also, aboriginal peoples claiming a right of possession may provide evidence of present occupation as proof of prior occupation. Further, it is not necessary to establish an unbroken chain of continuity.

Fourth, if aboriginal peoples continue to occupy and use the land as part of their traditional way of life, the land is of central significance to them. Aboriginal occupancy refers not only to the presence of aboriginal peoples in villages or permanently settled areas but also to the use of adjacent lands and even remote territories used to pursue a traditional mode of life. Occupancy is part of aboriginal culture in a broad sense and is, therefore, absorbed in the notion of distinctiveness. The *Royal Proclamation, 1763* supports this approach to occupancy.

McLachlin J. was in substantial agreement.

Infringements of Aboriginal Title: The Test of Justification

Per Lamer C.J. and Cory, McLachlin and Major JJ.: Constitutionally recognized aboriginal rights are not absolute and may be infringed by the federal and pro-

tribunal qui examine la revendication d'un «titre aborigène» se demande principalement si l'occupation et l'utilisation des terres visées faisaient partie du mode de vie traditionnel de la société autochtone concernée.

Deuxièmement, la société autochtone doit spécifier le territoire qui a été utilisé et occupé de façon ininterrompue en en indiquant les limites générales. L'exclusivité signifie que le groupe autochtone doit établir que le territoire qu'il revendique est, en fait, son territoire ancestral et non celui d'une autre société autochtone avec laquelle il n'a aucun lien. Comme il est possible que deux groupes autochtones ou plus aient occupé le même territoire, il est donc possible de conclure à l'existence d'une occupation conjointe.

Troisièmement, le droit de possession ancestral se fonde sur l'occupation et l'utilisation ininterrompues de terres tribales traditionnelles depuis l'affirmation par la Couronne de sa souveraineté. Cependant, il est possible que la date de l'affirmation de la souveraineté ne soit pas le seul moment pertinent dont il faille tenir compte. Il peut encore y avoir continuité lorsque l'occupation actuelle d'une région est liée à l'occupation d'une autre région avant l'affirmation de la souveraineté. En outre, les peuples autochtones qui revendiquent un droit de possession peuvent présenter des éléments de preuve de l'occupation actuelle du territoire visé pour établir son occupation antérieure. De plus, il n'est pas nécessaire de faire la preuve d'une continuité parfaite.

Quatrièmement, si des peuples autochtones continuent d'occuper et d'utiliser le territoire visé dans le cadre de leur mode de vie traditionnel, ce territoire a une importance fondamentale pour eux. La notion d'occupation d'un territoire par des autochtones ne s'entend pas seulement de la présence de peuples autochtones dans des villages ou des établissements permanents, mais également de l'utilisation de terres adjacentes et même de territoires éloignés dans le cadre d'un mode de vie traditionnel. L'occupation constitue un aspect de la culture autochtone prise dans un sens large et s'intègre, par conséquent, à la notion de caractère distinctif. Cette approche relative à la nature de l'occupation est étayée par la *Proclamation royale de 1763*.

Le juge McLachlin est largement en accord avec ces motifs.

Les atteintes au titre aborigène: le critère de justification

Le juge en chef Lamer et les juges Cory, McLachlin et Major: Les droits ancestraux reconnus et confirmés par la Constitution ne sont pas absolus, et tant le gouver-

vincial governments if the infringement (1) furthers a compelling and substantial legislative objective and (2) is consistent with the special fiduciary relationship between the Crown and the aboriginal peoples. The development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, and the building of infrastructure and the settlement of foreign populations to support those aims, are objectives consistent with this purpose. Three aspects of aboriginal title are relevant to the second part of the test. First, the right to exclusive use and occupation of land is relevant to the degree of scrutiny of the infringing measure or action. Second, the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples, suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation and, in most cases, the duty will be significantly deeper than mere consultation. And third, lands held pursuant to aboriginal title have an inescapable economic component which suggests that compensation is relevant to the question of justification as well. Fair compensation will ordinarily be required when aboriginal title is infringed.

nement fédéral que les gouvernements provinciaux peuvent y porter atteinte si (1) l'atteinte au droit ancestral visé se rapporte à la poursuite d'un objectif législatif impérieux et réel; (2) l'atteinte est compatible avec les rapports spéciaux de fiduciaire qui existent entre la Couronne et les peuples autochtones. L'extension de l'agriculture, de la foresterie, de l'exploitation minière et de l'énergie hydroélectrique, le développement économique général de l'intérieur de la Colombie-Britannique, la protection de l'environnement et des espèces menacées d'extinction, ainsi que la construction des infrastructures et l'implantation des populations requises par ces fins, sont des types d'objectifs compatibles avec cet objet. Trois aspects du titre aborigène sont pertinents quant à la deuxième étape du critère. Premièrement, le droit d'utiliser et d'occuper de façon exclusive les terres visées est pertinent pour ce qui est du degré d'examen auquel est soumis la mesure ou l'acte qui porte atteinte au titre. Deuxièmement, le droit de choisir les utilisations qui peuvent être faites de ces terres, sous réserve de la restriction ultime que ces usages ne sauraient détruire la capacité de ces terres d'assurer la subsistance des générations futures de peuples autochtones, indique qu'il est possible de respecter les rapports de fiduciaire entre la Couronne et les peuples autochtones en faisant participer les peuples autochtones à la prise des décisions concernant leurs terres. Il y a toujours obligation de consultation et, dans la plupart des cas, l'obligation exigera beaucoup plus qu'une simple consultation. Troisièmement, les terres détenues en vertu d'un titre aborigène ont une composante économique inéluctable qui montre que l'indemnisation est également un facteur pertinent à l'égard de la question de la justification. Il sera généralement nécessaire de verser une juste indemnité en cas d'atteinte à un titre aborigène.

Per La Forest and L'Heureux-Dubé JJ.: Rights that are recognized and affirmed are not absolute. Government regulation can therefore infringe upon aboriginal rights if it meets the test of justification under s. 35(1). The approach is highly contextual.

Les juges La Forest et L'Heureux-Dubé: Les droits qui sont reconnus et confirmés ne sont pas absolus. Des mesures de réglementation prises par le gouvernement peuvent porter atteinte aux droits ancestraux si elles satisfont au critère de justification des atteintes aux droits visés au par. 35(1). La méthode adoptée est éminemment contextuelle.

The general economic development of the interior of British Columbia, through agriculture, mining, forestry and hydroelectric power, as well as the related building of infrastructure and settlement of foreign populations, are valid legislative objectives that, in principle, satisfy the first part of the justification analysis. Under the second part, these legislative objectives are subject to accommodation of the aboriginal peoples' interests. This accommodation must always be in accordance with

Le développement économique général de l'intérieur de la Colombie-Britannique par l'agriculture, l'exploitation minière, la foresterie et l'énergie hydroélectrique, ainsi que la construction des infrastructures et l'implantation des populations requises par ce développement sont des objectifs législatifs réguliers qui, en principe, satisfont au premier volet du critère de justification. Dans le cadre du second volet de ce critère, ces objectifs législatifs doivent tenir compte des intérêts des peuples

the honour and good faith of the Crown. One aspect of accommodation of "aboriginal title" entails notifying and consulting aboriginal peoples with respect to the development of the affected territory. Another aspect is fair compensation.

McLachlin J. was in substantial agreement.

Self-Government

Per The Court: The errors of fact made by the trial judge, and the resultant need for a new trial, made it impossible for this Court to determine whether the claim to self-government had been made out.

Extinguishment

Per Lamer C.J. and Cory, McLachlin and Major JJ.: Section 91(24) of the *Constitution Act, 1867* (the federal power to legislate in respect of Indians) carries with it the jurisdiction to legislate in relation to aboriginal title, and by implication, the jurisdiction to extinguish it. The ownership by the provincial Crown (under s. 109) of lands held pursuant to aboriginal title is separate from jurisdiction over those lands. Notwithstanding s. 91(24), provincial laws of general application apply *proprio vigore* to Indians and Indian lands.

A provincial law of general application cannot extinguish aboriginal rights. First, a law of general application cannot, by definition, meet the standard "of clear and plain intention" needed to extinguish aboriginal rights without being *ultra vires* the province. Second, s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on "Indianness" or the "core of Indianness".

Provincial laws which would otherwise not apply to Indians *proprio vigore* are allowed to do so by s. 88 of the *Indian Act* which incorporates by reference provincial laws of general application. This provision, however, does not "invigorate" provincial laws which are invalid because they are in relation to Indians and Indian lands.

autochtones. Cette prise en compte doit toujours être faite conformément à l'obligation de la Couronne d'agir honorablement et de bonne foi. L'un des aspects de cette prise en compte, dans un tel contexte, consiste à informer et à consulter les peuples autochtones relativement au développement du territoire visé. Un autre aspect de la prise en compte est la question de la juste indemnisation.

Le juge McLachlin est largement en accord avec ces motifs.

L'autonomie gouvernementale

La Cour: En raison des erreurs de fait commises par le juge de première instance et de la nécessité de tenir un nouveau procès qui en a découlé, il est impossible pour la Cour de décider si le bien-fondé de la revendication de l'autonomie gouvernementale a été établi.

L'extinction

Le juge en chef Lamer et les juges Cory, McLachlin et Major: Le paragraphe 91(24) de la *Loi constitutionnelle de 1867* (le pouvoir du fédéral de légiférer sur les Indiens) emporte le pouvoir de légiférer relativement au titre aborigène et par implication, celui d'éteindre ce titre. Le droit de propriété de la province sur les terres détenues en vertu d'un titre aborigène (en vertu de l'art. 109) est distinct de la compétence exercée à l'égard de ces terres. Malgré le par. 91(24), les lois provinciales d'application générale s'appliquent *proprio vigore* (d'elles-mêmes) aux Indiens et aux terres indiennes.

Une loi provinciale d'application générale ne peut pas éteindre des droits ancestraux. Premièrement, par définition, une loi provinciale d'application générale ne peut pas, sans être *ultra vires*, respecter la norme de l'«intention claire et expresse» établie à l'égard de l'extinction des droits ancestraux. Deuxièmement, le par. 91(24) protège le fondement de la compétence du fédéral, même contre les lois provinciales d'application générale, par l'application du principe de l'exclusivité des compétences. Il a été dit que ce fondement se rapporte à des questions touchant à la «quiddité indienne», ou indianité, ou à l'«essentiel de l'indianité».

Des règles de droit provinciales qui autrement ne s'appliqueraient pas d'elles-mêmes aux Indiens peuvent le faire par l'effet de l'art. 88 de la *Loi sur les Indiens*, qui incorpore par renvoi les lois provinciales d'application générale. Cependant, cette disposition ne «revigore» pas des règles de droit provinciales qui sont invalides parce qu'elles se rapportent aux Indiens et aux terres indiennes.

Per La Forest and L'Heureux-Dubé JJ.: The province had no authority to extinguish aboriginal rights either under the *Constitution Act, 1867* or by virtue of s. 88 of the *Indian Act*.

McLachlin J. was in substantial agreement.

Cases Cited

By Lamer C.J.

Considered: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Côté*, [1996] 3 S.C.R. 139; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, aff'g *sub nom. St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; **referred to:** *R. v. Pamajewon*, [1996] 2 S.C.R. 821; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Mabo v. Queensland* (1992), 107 A.L.R. 1; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751; *Dick v. The Queen*, [1985] 2 S.C.R. 309; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Chartier v. Attorney General of Quebec*, [1979] 2 S.C.R. 474; *Kruger v. The Queen*, [1978] 1 S.C.R. 104; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Uukw v. R.*, [1987] 6 W.W.R. 155; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *Roberts v. Canada*, [1989] 1 S.C.R. 322; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657; *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941); *R. v. Sutherland*, [1980] 2 S.C.R. 451; *R. v. Francis*, [1988] 1 S.C.R. 1025; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285.

By La Forest J.

Considered: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *R. v. Van der Peet*, [1996] 2 S.C.R.

Les juges La Forest et L'Heureux-Dubé: La province n'avait pas le pouvoir d'éteindre des droits ancestraux en vertu de la *Loi constitutionnelle de 1867* ni par l'effet de l'art. 88 de la *Loi sur les indiens*.

Le juge McLachlin est largement en accord avec ces motifs.

Jurisprudence

Citée par le juge en chef Lamer

Arrêts examinés: *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *R. c. Adams*, [1996] 3 R.C.S. 101; *R. c. Côté*, [1996] 3 R.C.S. 139; *St. Catherine's Milling and Lumber Co. c. The Queen* (1888), 14 A.C. 46, conf. *sub nom. St. Catharines Milling and Lumber Co. c. The Queen* (1887), 13 R.C.S. 577; *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313; *Baker Lake c. Ministre des Affaires indiennes et du Nord canadien*, [1980] 1 C.F. 518; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; **arrêts mentionnés:** *R. c. Pamajewon*, [1996] 2 R.C.S. 821; *R. c. Sioui*, [1990] 1 R.C.S. 1025; *Mabo c. Queensland* (1992), 107 A.L.R. 1; *Four B Manufacturing Ltd. c. Travailleurs unis du vêtement d'Amérique*, [1980] 1 R.C.S. 1031; *Parents naturels c. Superintendent of Child Welfare*, [1976] 2 R.C.S. 751; *Dick c. La Reine*, [1985] 2 R.C.S. 309; *Stein c. Le navire «Kathy K»*, [1976] 2 R.C.S. 802; *N.V. Bocimar S.A. c. Century Insurance Co. of Canada*, [1987] 1 R.C.S. 1247; *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Chartier c. Procureur général du Québec*, [1979] 2 R.C.S. 474; *Kruger c. La Reine*, [1978] 1 R.C.S. 104; *R. c. Taylor* (1981), 62 C.C.C. (2d) 227; *Simon c. La Reine*, [1985] 2 R.C.S. 387; *Uukw c. R.*, [1987] 6 W.W.R. 155; *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654; *Roberts c. Canada*, [1989] 1 R.C.S. 322; *Bande indienne de la rivière Blueberry c. Canada (Ministère des Affaires indiennes et du Nord canadien)*, [1995] 4 R.C.S. 344; *Mitchell c. Bande indienne Peguis*, [1990] 2 R.C.S. 85; *Bande indienne de St. Mary's c. Cranbrook (Ville)*, [1997] 2 R.C.S. 657; *United States c. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941); *R. c. Sutherland*, [1980] 2 R.C.S. 451; *R. c. Francis*, [1988] 1 R.C.S. 1025; *Derrickson c. Derrickson*, [1986] 1 R.C.S. 285.

Citée par le juge La Forest

Arrêts examinés: *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654; *R. c. Van der Peet*, [1996] 2

507; *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **referred to:** *R. v. Wesley*, [1932] 4 D.L.R. 774; *Sikyea v. The Queen*, [1964] S.C.R. 642, aff'g *R. v. Sikyea* (1964), 43 D.L.R. (2d) 150.

R.C.S. 507; *R. c. Côté*, [1996] 3 R.C.S. 139; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672; *R. c. Sparrow*, [1990] 1 R.C.S. 1075; **arrêts mentionnés:** *R. c. Wesley*, [1932] 4 D.L.R. 774; *Sikyea c. The Queen*, [1964] R.C.S. 642, conf. *R. c. Sikyea* (1964), 43 D.L.R. (2d) 150.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 91(24), 109.
Constitution Act, 1982, s. 35(1).
Indian Act, R.S.C., 1985, c. I-5, ss. 18, 88.
Indian Oil and Gas Act, R.S.C., 1985, c. I-7, s. 6(2).
Royal Proclamation, 1763, R.S.C., 1985, App. II, No.1.
Treaty Between Her Majesty And The United Stated Of America, For The Settlement Of The Oregon Boundary (*Oregon Boundary Treaty, 1846*), TS 120.

Lois et règlements cités

Loi constitutionnelle de 1867, art. 91(24), 109.
Loi constitutionnelle de 1982, art. 35(1).
Loi sur le pétrole et le gaz des terres indiennes, L.R.C. (1985), ch. I-7, art. 6(2).
Loi sur les Indiens, L.R.C. (1985), ch. I-5, art. 18, 88.
Proclamation royale de 1763, L.R.C. (1985), app. II, nº 1.
Treaty Between Her Majesty And The United States Of America, For The Settlement Of The Oregon Boundary (*Oregon Boundary Treaty, 1846*), TS 120.

Authors Cited

Burn, E. H. *Cheshire and Burn's Modern Law of Real Property*, 14th ed. London: Butterworths, 1988.
Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*, vols. 1 (*Looking Forward, Looking Back*) and 2 (*Restructuring the Relationship*). Ottawa: The Commission, 1996.
Gagne, Jocelyn. "The Content of Aboriginal Title at Common Law: A Look at the Nishga Claim" (1982-83), 47 *Sask. L. Rev.* 309.
Hogg, Peter W. *Constitutional Law of Canada*, 3rd ed. Scarborough, Ont.: Carswell, 1992.
Howard, Michael Newman, Peter Crane and Daniel A. Hochberg. *Phipson on Evidence*, 14th ed. London: Sweet & Maxwell, 1990.
Macklem, Patrick. "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991), 36 *McGill L.J.* 382.
McLeod, Clay. "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past" (1992), 30 *Alta. L. Rev.* 1276.
McNeil, Kent. *Common Law Aboriginal Title*. Oxford: Clarendon Press, 1989.
McNeil, Kent. "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 *Sup. Ct. L. Rev.* 255.

Doctrine citée

Burn, E. H. *Cheshire and Burn's Modern Law of Real Property*, 14th ed. London: Butterworths, 1988.
Canada. Commission royale sur les peuples autochtones. *Rapport de la Commission royale sur les peuples autochtones*, vol. 1 (*Un passé, un avenir*) et 2 (*Une relation à redéfinir*). Ottawa: La Commission, 1996.
Gagne, Jocelyn. «The Content of Aboriginal Title at Common Law: A Look at the Nishga Claim» (1982-83), 47 *Sask. L. Rev.* 309.
Hogg, Peter W. *Constitutional Law of Canada*, 3rd ed. Scarborough, Ont.: Carswell, 1992.
Howard, Michael Newman, Peter Crane and Daniel A. Hochberg. *Phipson on Evidence*, 14th ed. London: Sweet & Maxwell, 1990.
Macklem, Patrick. «First Nations Self-Government and the Borders of the Canadian Legal Imagination» (1991), 36 *R.D. McGill* 382.
McLeod, Clay. «The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past» (1992), 30 *Alta. L. Rev.* 1276.
McNeil, Kent. *Common Law Aboriginal Title*. Oxford: Clarendon Press, 1989.
McNeil, Kent. «The Constitutional Rights of the Aboriginal Peoples of Canada» (1982), 4 *Sup. Ct. L. Rev.* 255.

McNeil, Kent. "The Meaning of Aboriginal Title". In Michael Asch, ed., *Aboriginal and Treaty Rights in Canada*. Vancouver: U.B.C. Press, 1997.

Megarry, Robert E., and H. W. R. Wade. *The Law of Real Property*, 4th ed. London: Stevens, 1975.

O'Reilly, James. "La *Loi constitutionnelle de 1982*, droit des autochtones" (1984), 25 *C. de D.* 125.

Pentney, William. "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982* Part II — Section 35: The Substantive Guarantee" (1988), 22 *U.B.C. L. Rev.* 207.

Sanders, Douglas. "Pre-Existing Rights: The Aboriginal Peoples of Canada". In Gérald-A. Beaudoin and Ed Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed. Toronto: Carswell, 1989, 707.

Sanders, Douglas. "The Rights of the Aboriginal Peoples of Canada" (1983), 61 *Can. Bar Rev.* 314.

Slattery, Brian. *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*. Saskatoon: University of Saskatchewan Native Law Centre, 1983.

Slattery, Brian. "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-83), 8 *Queen's L.J.* 232.

Slattery, Brian. "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727.

McNeil, Kent. «The Meaning of Aboriginal Title». In Michael Asch, ed., *Aboriginal and Treaty Rights in Canada*. Vancouver: U.B.C. Press, 1997.

Megarry, Robert E., and H. W. R. Wade. *The Law of Real Property*, 4th ed. London: Stevens, 1975.

O'Reilly, James. «La *Loi constitutionnelle de 1982*, droit des autochtones» (1984), 25 *C. de D.* 125.

Pentney, William. «The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982* Part II — Section 35: The Substantive Guarantee» (1988), 22 *U.B.C. L. Rev.* 207.

Sanders, Douglas. «Les droits préexistants: les peuples autochtones du Canada». Dans Gérald-A. Beaudoin et Ed Ratushny, dir., *Charte canadienne des droits et libertés*, 2e éd. Montréal: Wilson & Lafleur, 1989, 779.

Sanders, Douglas. «The Rights of the Aboriginal Peoples of Canada» (1983), 61 *R. du B. can.* 314.

Slattery, Brian. *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*. Saskatoon: University of Saskatchewan Native Law Centre, 1983.

Slattery, Brian. «The Constitutional Guarantee of Aboriginal and Treaty Rights» (1982-83), 8 *Queen's L.J.* 232.

Slattery, Brian. «Understanding Aboriginal Rights» (1987), 66 *R. du B. can.* 727.

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (1993), 30 B.C.A.C. 1, 49 W.A.C. 1, 104 D.L.R. (4th) 470, [1993] 5 W.W.R. 97, [1993] 5 C.N.L.R. 1, [1993] B.C.J. No. 1395 (QL), varying an order of McEachern C.J., [1991] 3 W.W.R. 97, [1991] 5 C.N.L.R. xiii, (1991), 79 D.L.R. (4th) 185, [1991] B.C.J. No. 525 (QL), and dismissing British Columbia's cross-appeal as abandoned. Appeal allowed in part; cross-appeal dismissed.

Stuart Rush, Q.C., Peter Grant, Michael Jackson, Louise Mandell and *David Paterson*, for the appellants and respondents on the cross-appeal, the Gitksan Hereditary Chiefs *et al.*

Marvin R. V. Storrow, Q.C., Joanne R. Lysyk and *Joseph C. McArthur*, for the appellants and respondents on the cross-appeal, the Wet'suwet'en Hereditary Chiefs *et al.*

POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de la Colombie-Britannique (1993), 30 B.C.A.C. 1, 49 W.A.C. 1, 104 D.L.R. (4th) 470, [1993] 5 W.W.R. 97, [1993] 5 C.N.L.R. 1, [1993] B.C.J. No. 1395 (QL), modifiant une ordonnance du juge en chef McEachern, [1991] 3 W.W.R. 97, [1991] 5 C.N.L.R. xiii, (1991), 79 D.L.R. (4th) 185, [1991] B.C.J. No. 525 (QL), et rejetant le pourvoi incident de la Colombie-Britannique pour cause d'abandon. Pourvoi accueilli en partie; pourvoi incident rejeté.

Stuart Rush, c.r., Peter Grant, Michael Jackson, Louise Mandell et *David Paterson*, pour les appelants et intimés dans le pourvoi incident, les chefs héréditaires Gitksan et autres.

Marvin R. V. Storrow, c.r., Joanne R. Lysyk et *Joseph C. McArthur*, pour les appelants et intimés dans le pourvoi incident, les chefs héréditaires Wet'suwet'en et autres.

Joseph J. Arvay, *Q.C.*, *Mark G. Underhill* and *Brenda Edwards*, for the respondent and appellant on the cross-appeal, Her Majesty the Queen in Right of the Province of British Columbia.

Graham Garton, *Q.C.*, *Judith Bowers*, *Q.C.*, *Murray T. Wolf* and *Geoffrey S. Lester*, for the respondent the Attorney General of Canada.

Arthur Pape, *Harry A. Slade*, *Peter Hogg* and *Jean Teillet*, for the intervener the First Nations Summit.

Jack Woodward and *Albert C. Peeling*, for the intervener the Westbank First Nation.

Marvin R. V. Storrow, *Q.C.*, *Joanne R. Lysyk* and *Joseph C. McArthur*, for the interveners the Musqueam Nation *et al.*

J. Keith Lowes, for the interveners the B.C. Cattlemen's Association *et al*.

Charles F. Willms, for the intervener Skeena Cellulose Inc.

J. Edward Gouge, *Q.C.*, and *Jill M. Marks*, for the intervener Alcan Aluminum Ltd.

The judgment of Lamer C.J. and Cory and Major JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 This appeal is the latest in a series of cases in which it has fallen to this Court to interpret and apply the guarantee of existing aboriginal rights found in s. 35(1) of the *Constitution Act, 1982*. Although that line of decisions, commencing with *R. v. Sparrow*, [1990] 1 S.C.R. 1075, proceeding through the *Van der Peet* trilogy (*R. v. Van der Peet*, [1996] 2 S.C.R. 507, *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *R. v. Gladstone*, [1996] 2 S.C.R. 723), and ending in *R. v. Pamajewon*, [1996] 2 S.C.R. 821, *R. v. Adams*, [1996] 3 S.C.R. 101, and *R. v. Côté*, [1996] 3 S.C.R. 139, have laid down the jurisprudential framework for s. 35(1), this appeal raises a set of

Joseph J. Arvay, *c.r.*, *Mark G. Underhill* et *Brenda Edwards*, pour l'intimée et appelante dans le pourvoi incident, Sa Majesté la Reine du chef de la province de la Colombie-Britannique.

Graham Garton, *c.r.*, *Judith Bowers*, *c.r.*, *Murray T. Wolf* et *Geoffrey S. Lester*, pour l'intimé le procureur général du Canada.

Arthur Pape, *Harry A. Slade*, *Peter Hogg* et *Jean Teillet*, pour l'intervenant le First Nations Summit.

Jack Woodward et *Albert C. Peeling*, pour l'intervenante la Première nation de Westbank.

Marvin R. V. Storrow, *c.r.*, *Joanne R. Lysyk* et *Joseph C. McArthur*, pour les intervenants la Nation Musqueam et autres.

J. Keith Lowes, pour les intervenants la B.C. Cattlemen's Association et autres.

Charles F. Willms, pour l'intervenante Skeena Cellulose Inc.

J. Edward Gouge, *c.r.*, et *Jill M. Marks*, pour l'intervenante Alcan Aluminium Ltée.

Version française du jugement du juge en chef Lamer et des juges Cory et Major rendu par

LE JUGE EN CHEF —

I. Introduction

Le présent pourvoi est le plus récent d'une série d'affaires où notre Cour a été appelée à interpréter et à appliquer la garantie relative aux droits ancestraux existants prévue au par. 35(1) de la *Loi constitutionnelle de 1982*. Bien que cette série de décisions — qui a commencé par l'arrêt *R. c. Sparrow*, [1990] 1 R.C.S. 1075, s'est poursuivie par la trilogie *Van der Peet* (*R. c. Van der Peet*, [1996] 2 R.C.S. 507, *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672, et *R. c. Gladstone*, [1996] 2 R.C.S. 723), et s'est terminée par les arrêts *R. c. Pamajewon*, [1996] 2 R.C.S. 821, *R. c. Adams*, [1996] 3 R.C.S. 101, et *R. c. Côté*, [1996] 3 R.C.S. 139 — ait établi le cadre jurisprudentiel d'analyse du

eral application: *Dick*, *supra*, at pp. 326-27; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, at p. 297; *Francis*, *supra*, at pp. 1030-31. However, it is important to note, in Professor Hogg's words, that s. 88 does not "invigorate" provincial laws which are invalid because they are in relation to Indians and Indian lands (*Constitutional Law of Canada* (3rd ed. 1992), at p. 676; also see *Dick*, *supra*, at p. 322). What this means is that s. 88 extends the effect of provincial laws of general application which cannot apply to Indians and Indian lands because they touch on the Indianness at the core of s. 91(24). For example, a provincial law which regulated hunting may very well touch on this core. Although such a law would not apply to aboriginal people *proprio vigore*, it would still apply through s. 88 of the *Indian Act*, being a law of general application. Such laws are enacted to conserve game and for the safety of all.

183 The respondent B.C. Crown argues that since such laws are *intra vires* the province, and applicable to aboriginal persons, s. 88 could allow provincial laws to extinguish aboriginal rights. I reject this submission, for the simple reason that s. 88 does not evince the requisite clear and plain intent to extinguish aboriginal rights. The provision states in full:

> **88.** Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

I see nothing in the language of the provision which even suggests the intention to extinguish aboriginal rights. Indeed, the explicit reference to treaty rights in s. 88 suggests that the provision

les lois provinciales d'application générale: *Dick*, précité, aux pp. 326 et 327; *Derrickson c. Derrickson*, [1986] 1 R.C.S. 285, à la p. 297; *Francis*, précité, aux pp. 1030 et 1031. Toutefois, il est important de souligner, dans les mots du professeur Hogg, que l'art. 88 ne [TRADUCTION] «revigore» pas des règles de droit provinciales qui sont invalides parce qu'elles se rapportent aux Indiens et aux terres indiennes (*Constitutional Law of Canada* (3e éd. 1992), à la p. 676; voir aussi *Dick*, précité, à la p. 322). Ce que cela veut dire, c'est que l'art. 88 étend l'effet des lois provinciales d'application générale qui ne sauraient autrement s'appliquer aux Indiens et aux terres indiennes parce qu'elles touchent à la quiddité indienne qui est au cœur du par. 91(24). Par exemple, une règle de droit provinciale réglementant la chasse peut très bien affecter ce fondement. Même si une telle loi ne s'appliquait pas d'elle-même aux peuples autochtones, elle le ferait néanmoins sous l'effet de l'art. 88 de la *Loi sur les Indiens*, en tant que loi d'application générale. De telles lois sont adoptées pour la conservation du gibier et pour assurer la sécurité de tous.

La province intimée prétend que, comme les provinces ont le pouvoir d'adopter de telles lois et que celles-ci sont applicables aux autochtones, l'art. 88 pourrait autoriser l'extinction de droits ancestraux par des règles de droit provinciales. Je rejette cet argument pour la simple raison que l'intention claire et expresse requise pour l'extinction de droits ancestraux ne ressort pas de l'art. 88. Cette disposition est rédigée ainsi:

> **88.** Sous réserve des dispositions de quelque traité et de quelque autre loi fédérale, toutes les lois d'application générale et en vigueur dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf dans la mesure où ces lois sont incompatibles avec la présente loi ou quelque arrêté, ordonnance, règle, règlement ou règlement administratif pris sous son régime, et sauf dans la mesure où ces lois contiennent des dispositions sur toute question prévue par la présente loi ou sous son régime.

Selon moi, il n'y a rien dans le texte de cette disposition qui suggère même l'intention d'éteindre des droits ancestraux. De fait, l'allusion explicite aux droits issus de traités à l'art. 88 indique que cette

was clearly not intended to undermine aboriginal rights.

VI. Conclusion and Disposition

For the reasons I have given above, I would allow the appeal in part, and dismiss the cross-appeal. Reluctantly, I would also order a new trial.

I conclude with two observations. The first is that many aboriginal nations with territorial claims that overlap with those of the appellants did not intervene in this appeal, and do not appear to have done so at trial. This is unfortunate, because determinations of aboriginal title for the Gitksan and Wet'suwet'en will undoubtedly affect their claims as well. This is particularly so because aboriginal title encompasses an exclusive right to the use and occupation of land, i.e., to the exclusion of both non-aboriginals and members of other aboriginal nations. It may, therefore, be advisable if those aboriginal nations intervened in any new litigation.

Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) — "the reconciliation of the pre-existence

disposition n'est manifestement pas censée porter atteinte aux droits ancestraux.

VI. Conclusion et dispositif

184 Pour les motifs que je viens d'exposer, je suis d'avis d'accueillir le pourvoi en partie et de rejeter le pourvoi incident. À regret, j'ordonnerais également la tenue d'un nouveau procès.

185 Je vais conclure par deux observations. En premier lieu, de nombreuses nations autochtones dont les revendications territoriales chevauchent celles des appelants ne sont pas intervenues dans le présent pourvoi et ne paraissent pas l'avoir fait en première instance. Cette situation est malheureuse parce que les décisions relatives au titre aborigène des Gitksan et des Wet'suwet'en auront indubitablement un effet sur les revendications de ces autres nations autochtones, particulièrement en raison du fait que le titre aborigène comprend le droit exclusif d'utiliser et d'occuper des terres, c'est-à-dire de le faire à l'exclusion des non-autochtones et des membres d'autres nations autochtones. Par conséquent, peut-être serait-il souhaitable que ces autres nations autochtones interviennent dans une nouvelle instance.

186 En second lieu, la présente affaire a été longue et coûteuse, non seulement sur le plan financier mais aussi sur le plan humain. En ordonnant la tenue d'un nouveau procès, je n'encourage pas nécessairement les parties à introduire une instance et à régler leur différend devant les tribunaux. Comme il a été dit dans *Sparrow*, à la p. 1105, le par. 35(1) «procure [. . .] un fondement constitutionnel solide à partir duquel des négociations ultérieures peuvent être entreprises». Devraient également participer à ces négociations les autres nations autochtones qui ont un intérêt dans le territoire revendiqué. En outre, la Couronne a l'obligation morale, sinon légale, d'entamer et de mener ces négociations de bonne foi. En fin de compte, c'est au moyen de règlements négociés — toutes les parties négociant de bonne foi et faisant les compromis qui s'imposent — processus renforcé par les arrêts de notre Cour, que nous pourrons réaliser ce que, dans *Van der Peet*, précité, au par. 31, j'ai déclaré être l'objet fondamental du par. 35(1),

of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.

The reasons of La Forest and L'Heureux-Dubé JJ. were delivered by

187 LA FOREST J. — I have read the reasons of the Chief Justice, and while I agree with his conclusion, I disagree with various aspects of his reasons and in particular, with the methodology he uses to prove that aboriginal peoples have a general right of occupation of certain lands (often referred to as "aboriginal title").

188 I begin by considering why a new trial is necessary in this case. It is true, as the Chief Justice points out, that the amalgamation of the appellants' individual claims represents a defect in the pleadings and, technically speaking, this prevents us from considering the merits of the case. However, in my view, there is a more substantive problem with the pleadings in this case. Before this Court, the appellants sought a declaration of "aboriginal title" but attempted, in essence, to prove that they had complete control over the territory in question. The appellants effectively argued on appeal, as they did at trial, that by virtue of their social and land tenure systems — consisting of Chief authority, Houses, feasts, crests, and totem poles — they acquired an absolute interest in the claimed territory, including ownership of and jurisdiction over the land. The problem with this approach is that it requires proof of governance and control as opposed to proof of general occupation of the affected land. Only the latter is the *sine qua non* of "aboriginal title". It follows that what the appellants sought by way of declaration from this Court and what they set out to prove by way of the evidence were two different matters. In light of this substantive defect in the pleadings, a new trial

c'est-à-dire «concilier la préexistence des sociétés autochtones et la souveraineté de Sa Majesté». Il faut se rendre à l'évidence, nous sommes tous ici pour y rester.

Version française des motifs des juges La Forest et L'Heureux-Dubé rendus par

LE JUGE LA FOREST — J'ai lu les motifs du Juge en chef et, bien que je souscrive à sa conclusion, je suis en désaccord avec divers aspects de ses motifs et en particulier avec la méthode dont il se sert pour établir que les peuples autochtones ont un droit général d'occupation de certaines terres (souvent appelé «titre aborigène»).

Je vais d'abord examiner les raisons pour lesquelles la tenue d'un nouveau procès est nécessaire en l'espèce. Il est vrai, comme le souligne le Juge en chef, que la fusion des revendications individuelles des appelants constitue un vice affectant les actes de procédure et que, sur le plan de la forme, cela nous empêche d'examiner le fond de l'affaire. Cependant, à mon avis, les actes de procédure en l'espèce posent un problème encore plus substantiel. En effet, même si, devant notre Cour, les appelants ont sollicité un jugement déclarant l'existence d'un «titre aborigène», ils ont essentiellement tenté d'établir qu'ils exerçaient un contrôle complet sur le territoire en question. En appel, les appelants ont effectivement prétendu, comme ils l'avaient fait en première instance, qu'en vertu de leur régime de tenure foncière et de leur organisation sociale — constituée de l'autorité des chefs, de maisons, de célébrations, d'armoiries et de mâts totémiques — ils ont acquis un intérêt absolu sur le territoire revendiqué, y compris la propriété des terres visées et la compétence sur celles-ci. Le problème que pose cette approche est qu'elle exige qu'on prouve la gestion et le contrôle des terres visées, plutôt que l'occupation générale de celles-ci. Or, seule la preuve du deuxième fait est la condition *sine qua non* de l'existence du «titre aborigène». Il s'ensuit que ce que les appelants ont demandé à notre Cour de leur reconnaître, par voie de jugement déclaratoire, et ce qu'ils se sont efforcés d'établir par la preuve, étaient deux choses différentes. Étant donné ce vice substantiel entachant les actes de procédure, la tenue d'un

CITATION: Drew v. Kaker, 2023 ONSC 4589
COURT FILE NO.: FC-23-205
DATE: 2023/08/08

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MICHAEL DREW, Applicant

AND:

SUNBUL KAKER, Respondent

BEFORE: Justice Jennifer Breithaupt Smith

COUNSEL: T. Miller, Counsel for the Applicant

T. Lattanzio, Counsel, for the Respondent

HEARD: August 8, 2023 – IN CHAMBERS

ENDORSEMENT

[1] No one appearing. Matter addressed in Chambers.

[2] The Respondent brings an urgent motion alleging that the Applicant has overheld the child and denied her any meaningful parenting time. She alleges that the child has been kept out of his daycare by the Applicant, who she attests is a drug dealer living in a hotel with the child. The Respondent's Notice of Motion and Affidavit were delivered to Applicant's counsel by email at 3:27 p.m. today. The Respondent has requested that the Court determine whether this matter is urgent for scheduling purposes.

[3] The procedure in Central South Region is governed by the Notice to the Public and Profession effective February 13, 2023 (the "Consolidated Notice"). The Consolidated Notice provides an avenue for urgent matters to be addressed outside of the usual course. This is for judicial direction as to scheduling for an urgent hearing timeslot, and, in family litigation matters, is entirely without prejudice to the determination of urgency under the *Rosen* test (see *Rosen* v. *Rosen*, 2005 CanLII 480 (ON SC)). At page 5 of the Consolidated Notice, the following guidance appears:

> Urgent matters are matters which require immediate access to the court and for which it is impractical to follow the standard procedures. Generally, a matter is urgent if a court order is necessary to preserve life, the health or safety of a child, liberty, property, to address the immediate danger of a child's removal from Ontario and time is of the essence. Urgent requests are to be made by e-mail to the respective Trial Co-ordinator Offices.

[4] I find this matter to be urgent for triage purposes, having regard to the potentially dangerous situation in which the parties' young child may currently be living (that is, if Father is in fact dealing drugs from a hotel room).

[5] Central South Region is woefully underserviced at this time. The Unified Family Court at Kitchener, as a single example, continues to wait for a fifth chair to be filled which has now been vacant for roughly two years. The four judges of the Unified Family Court at Kitchener are thus each doing 125% of their expected workload, and this is only one example of a problem that is rampant throughout Ontario and, indeed, across the country. Our generalist colleagues, who otherwise assist us whenever possible, are themselves overburdened. Many are booking additional cases to be heard before and after the regular court day's proceedings. This is completely unsustainable. It is incomprehensible that the public, and particularly vulnerable children and families, should be so poorly assisted. Until such time as judicial vacancies are taken seriously, it cannot be said that litigants truly have access to justice.

[6] The only available urgent slot is on August 24, 2023 at 10:00 a.m. This family cannot wait for that date unless there is the possibility of a substantive judicial decision being rendered, which cannot be done at a conference. In order to alleviate any requirement that the *Rosen* test for urgency need be argued on the motion, and to preserve the available urgent date for argument, I am therefore booking this matter for an Urgent Case Conference, at a special appointment time on Thursday, August 10, 2023 at 9:30 a.m., with the motion to be argued on August 24, 2023 at 10:00 a.m.

[7] In the circumstances, Temporary Order to go:

1. The Respondent's Notice of Motion and Affidavit dated August 8, 2023 are to be accepted by Court staff for filing in the absence of proof of service.

2. The matter is scheduled for an urgent case conference on **Thursday, August 10, 2023 at 9:30 a.m.**, to be conducted virtually via Zoom at:
   https://ca01web.zoom.us/j/65212670916?pwd=eG1SVklBSzdBNTNqdUJKZC91QTU3dz09
   or by calling toll free: **1-855-703-8985**.
   Meeting ID: **652 1267 0916** Passcode: **980471**

3. The requirement for Case Conference Briefs is waived. By 4:00 p.m. on Wednesday, August 9, 2023, counsel are to email a short memorandum setting out each party's position to the Judiciary Assistants, attention Justice Breithaupt Smith, noting the file name and number in the subject line, to: kitchener.scjja@ontario.ca CC: kitchener.superior.court@ontario.ca.

4. The matter is further scheduled for argument of the Respondent's Motion on **Thursday, August 24, 2023 at 10:00 a.m.**, to be conducted virtually via Zoom at such exact connection details as will be provided by the Trial Co-ordination Office.

5. The Applicant shall serve and file any responding material on the motion by **Monday**, **August 14, 2023**.

6. The Respondent shall serve and file any reply material by **Friday, August 18, 2023**.

7. Both parties to provide Confirmations and Draft Temporary Orders in the usual course.

J. Breithaupt Smith J.

DATE: August 8, 2023

Her Majesty The Queen in Right of Alberta *Appellant*

v.

Devon Gary Ell, John Michael Maguire and Roselynne Margaret Spencer *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General for Saskatchewan and Association of Justices of the Peace of Ontario *Interveners*

INDEXED AS: ELL *v.* ALBERTA

Neutral citation: 2003 SCC 35.

File No.: 28261.

2003: February 12; 2003: June 26.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Judicial independence — Security of tenure — Justices of the peace — Provincial legislation requiring all justices of the peace who exercise judicial functions to meet qualifications decided upon by an independent Judicial Council — Whether legislation infringes guarantees of judicial independence — Whether removal from office of justices of the peace who did not meet qualifications violated their security of tenure — Canadian Charter of Rights and Freedoms, s. 11(d) — Constitution Act, 1867, preamble — Justice of the Peace Act, R.S.A. 1980, c. J-3, s. 2.4(8) — Justice Statutes Amendment Act, 1998, S.A. 1998, c. 18.

The respondents are challenging the constitutionality of legislative reforms that seek to improve the qualifications and independence of Alberta's justices of the peace. The challenged amendments to the *Justice of the Peace Act* require all justices of the peace who exercise judicial functions to meet qualifications decided upon by an independent Judicial Council. The Judicial Council

Sa Majesté la Reine du chef de l'Alberta *Appelante*

c.

Devon Gary Ell, John Michael Maguire et Roselynne Margaret Spencer *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Québec, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan et Association of Justices of the Peace of Ontario *Intervenants*

RÉPERTORIÉ : ELL *c.* ALBERTA

Référence neutre : 2003 CSC 35.

N^{o} du greffe : 28261.

2003 : 12 février; 2003 : 26 juin.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit constitutionnel — Indépendance judiciaire — Inamovibilité — Juges de paix — Loi provinciale exigeant que tous les juges de paix qui exercent des fonctions judiciaires aient les qualifications fixées par un conseil de la magistrature indépendant — La loi porte-t-elle atteinte aux garanties d'indépendance judiciaire? — La destitution des juges de paix n'ayant pas les qualifications requises porte-t-elle atteinte à leur inamovibilité? — Charte canadienne des droits et libertés, art. 11d) — Loi constitutionnelle de 1867, préambule — Justice of the Peace Act, R.S.A. 1980, ch. J-3, art. 2.4(8) — Justice Statutes Amendment Act, 1998, S.A. 1998, ch. 18.

Les intimés contestent la constitutionnalité de réformes législatives destinées à relever les qualifications des juges de paix albertains et à accroître leur indépendance. Les modifications contestées, qui ont été apportées à la *Justice of the Peace Act* exigent que tous les juges de paix qui exercent des fonctions judiciaires aient les qualifications fixées par un conseil de la magistrature

unanimously agreed on minimum qualifications of membership in the Law Society of Alberta and five years related experience. The respondents, who had been appointed as justices of the peace prior to the amendments, did not meet these requirements. They were removed from office and were offered administrative positions as non-presiding justices of the peace. The respondents applied for a declaration that s. 2.4(8) of the amended *Justice of the Peace Act*, which removed them from office, contravened their constitutionally required security of tenure and independence. The chambers judge granted the application and declared the provision to be of no force and effect as it applied to them. The Court of Appeal upheld the decision.

Held: The appeal should be allowed.

The principle of judicial independence applies to the position of the respondents as a result of their authority to exercise judicial functions directly related to the enforcement of law in the court system and to perform numerous judicial functions that significantly affect the rights and liberties of individuals. The respondents played an important role in assisting the provincial and superior courts in fulfilling the judiciary's constitutional mandate and they were constitutionally required to be independent in the exercise of their duties. The Legislature's removal of the respondents from office did not violate their security of tenure, however, and so did not contravene the principle of judicial independence. The essence of security of tenure is that members of a tribunal be free from arbitrary or discretionary removal from office. Removal from office that is reasonably intended to further the interests that underlie the principle of judicial independence — namely, public confidence in the administration of justice, and the maintenance of a strong and independent judiciary that is able to uphold the rule of law and the values of our Constitution — is not arbitrary. It is evident that in this case the Legislature concluded that the positive impact of the reforms on the interests that underlie judicial independence outweighed any negative impact of the respondents' removal from office. A reasonable and informed person would perceive the legislative amendments to strengthen the qualifications and independence of Alberta's justices of the peace.

The respondents do not dispute the merits of the reforms but argue that the amendments should apply only to new appointments to office. Once it is established that the office is in need of significant structural reform, however, a requirement of "grandfathering" incumbents serves only to delay that reform. Moreover, public confidence in the administration of justice could be harmed by

indépendant. Le conseil de la magistrature a convenu à l'unanimité que, pour être nommé, il fallait au moins être membre du barreau de l'Alberta et avoir au moins cinq ans d'expérience pertinente. Les intimés, qui avaient été nommés juges de paix avant les modifications apportées, ne satisfaisaient pas à ces exigences. Ils ont été destitués et se sont vu offrir des fonctions administratives à titre de juges de paix non présidant. Les intimés ont présenté une demande de jugement déclarant que le par. 2.4(8) de la *Justice of the Peace Act* modifiée, à l'origine de leur destitution, portait atteinte à l'inamovibilité et à l'indépendance dont ils doivent bénéficier en vertu de la Constitution. Le juge en chambre a accueilli la demande et déclaré la disposition inopérante à leur égard. La Cour d'appel de l'Alberta a confirmé cette décision.

Arrêt : Le pourvoi est accueilli.

Le principe de l'indépendance judiciaire s'applique à la charge des intimés en raison de leur pouvoir d'exercer des fonctions judiciaires directement liées à l'application de la loi au sein du système judiciaire, ainsi que maintes fonctions judiciaires ayant une incidence importante sur les droits et libertés des citoyens. Les intimés aidaient grandement les cours provinciales et supérieures à remplir le mandat constitutionnel confié au pouvoir judiciaire et leur indépendance dans l'exercice de leurs fonctions était une exigence constitutionnelle. Cependant, la destitution des intimés par la législature ne portait pas atteinte à leur inamovibilité et ne contrevenait donc pas au principe de l'indépendance judiciaire. L'inamovibilité vise essentiellement à empêcher que les membres d'un tribunal fassent l'objet d'une destitution arbitraire ou discrétionnaire. N'est pas arbitraire la destitution raisonnablement conçue pour servir les intérêts qui sous-tendent le principe de l'indépendance judiciaire — à savoir la confiance du public dans l'administration de la justice et le maintien d'un pouvoir judiciaire fort et indépendant capable de faire respecter la primauté du droit et les valeurs consacrées par notre Constitution. Il est évident qu'en l'espèce la législature a conclu que l'incidence positive des réformes sur les intérêts qui sous-tendent l'indépendance judiciaire l'emportait sur l'incidence négative de la destitution des intimés. Une personne raisonnable et renseignée considérerait que les modifications législatives renforcent l'indépendance des juges de paix albertains et relèvent leurs qualifications.

Les intimés ne contestent pas le bien-fondé des réformes, mais ils font valoir que les modifications ne devraient s'appliquer qu'aux nouvelles nominations. Toutefois, dès qu'il est établi que la charge a besoin d'une réforme structurelle importante, l'établissement d'une disposition maintenant les « droits acquis » des titulaires de la charge ne contribue qu'à retarder la mise

retaining those individuals who do not meet the qualifications for eligibility that an independent Judicial Council, with intimate knowledge of the duties of office, have determined to be the minimum necessary. Finally, the manner in which the reforms were implemented lessened as much as possible the legislation's adverse impact upon the respondents.

Cases Cited

Referred to: *Reference re Adoption Act*, [1938] S.C.R. 398; *R. v. Bush* (1888), 15 O.R. 398; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13; *Baron v. Canada*, [1993] 1 S.C.R. 416; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35; *R. v. Généreux*, [1992] 1 S.C.R. 259.

Statutes and Regulations Cited

Act of Settlement, 12 & 13 Will. 3, c. 2.
Act to Amend the Justices of the Peace Act, R.S.N.W.T. 1988, c. 39 (Supp.), ss. 5, 8.
Canadian Charter of Rights and Freedoms, ss. 1, 7, 8, 11(*d*), (*e*).
Constitution Act, 1867, preamble, ss. 92(14), 96 to 100.
Criminal Code, R.S.C. 1985, c. C-46, ss. 2 "justice", 515.
Justice of the Peace Act, R.S.A. 1980, c. J-3, ss. 2.1(1) [ad. 1998, c. 18, s. 3], (2) [*idem*], (5) [*idem*], 2.2 [*idem*], 2.4(8) [*idem*], 5 [rep. 1998, c. 18, s. 3], 5.1 [ad. 1991, c. 21, s. 16; rep. 1998, c. 18, s. 3], 5.2 [*idem*].
Justices of the Peace Act, 1988, S.S. 1988-89, c. J-5.1, s. 6(7).
Justices of the Peace Act, 1989, S.O. 1989, c. 46, s. 4(4).
Justice Statutes Amendment Act, 1998, S.A. 1998, c. 18, s. 3.
Miscellaneous Statutes Amendment Act, 1991, S.A. 1991, c. 21, s. 16.

Authors Cited

Alberta Hansard, March 11, 1998, p. 811.
Doob, Anthony N., Patricia M. Baranek and Susan M. Addario. *Understanding Justices: A Study of Canadian Justices of the Peace*. Toronto: Centre of Criminology, University of Toronto, 1991.
Friedland, Martin L. *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts*. Toronto: University of Toronto Press, 1965.

en œuvre de cette réforme. De plus, le maintien en poste de personnes ne satisfaisant pas aux conditions minimales d'admissibilité fixées par un conseil de la magistrature indépendant, qui a une connaissance approfondie des fonctions de la charge, pourrait avoir pour effet d'ébranler la confiance du public dans l'administration de la justice. Enfin, la manière dont les réformes ont été mises en œuvre a réduit au minimum l'incidence négative de la mesure législative sur les intimés.

Jurisprudence

Arrêts mentionnés : *Reference re Adoption Act*, [1938] R.C.S. 398; *R. c. Bush* (1888), 15 O.R. 398; *Valente c. La Reine*, [1985] 2 R.C.S. 673; *Beauregard c. Canada*, [1986] 2 R.C.S. 56; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3; *Mackin c. Nouveau-Brunswick (Ministre des Finances)*, [2002] 1 R.C.S. 405, 2002 CSC 13; *Baron c. Canada*, [1993] 1 R.C.S. 416; *Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3; *Therrien (Re)*, [2001] 2 R.C.S. 3, 2001 CSC 35; *R. c. Généreux*, [1992] 1 R.C.S. 259.

Lois et règlements cités

Act of Settlement, 12 & 13 Will. 3, ch. 2.
Charte canadienne des droits et libertés, art. 1, 7, 8, 11*d*), *e*).
Code criminel, L.R.C. 1985, ch. C-46, art. 2 « juge de paix », 515.
Justice of the Peace Act, R.S.A. 1980, ch. J-3, art. 2.1(1) [aj. 1998, ch. 18, art. 3], (2) [*idem*], (5) [*idem*], 2.2 [*idem*], 2.4(8) [*idem*], 5 [abr. 1998, ch. 18, art. 3], 5.1 [aj. 1991, ch. 21, art. 16; abr. 1998, ch. 18, art. 3], 5.2 [*idem*].
Justice Statutes Amendment Act, 1998, S.A. 1998, ch. 18, art. 3.
Loi constitutionnelle de 1867, préambule, art. 92(14), 96 à 100.
Loi de 1988 sur les juges de paix, L.S. 1988-89, ch. J-5,1, art. 6(7).
Loi de 1989 sur les juges de paix, L.O. 1989, ch. 46, art. 4(4).
Loi modifiant la Loi sur les juges de paix, L.R.T.N.-O. 1988, ch. 39 (suppl.), art. 5, 8.
Miscellaneous Statutes Amendment Act, 1991, S.A. 1991, ch. 21, art. 16.

Doctrine citée

Alberta Hansard, 11 mars 1998, p. 811.
Doob, Anthony N., Patricia M. Baranek and Susan M. Addario. *Understanding Justices : A Study of Canadian Justices of the Peace*. Toronto : Centre of Criminology, University of Toronto, 1991.
Friedland, Martin L. *Detention before Trial : A Study of Criminal Cases Tried in the Toronto Magistrates' Courts*. Toronto : University of Toronto Press, 1965.

Klinck, J. E. *Report of the Justice of the Peace Committee*. Alberta: Ministry of the Attorney General, 1986.

Manitoba. Law Reform Commission. *The Independence of Justices of the Peace and Magistrates*, Report No. 75. Winnipeg: Queen's Printer, 1991.

McRuer, James Chalmers. *Royal Commission Inquiry Into Civil Rights*, Report No. 1, vol. 2, c. 38. Toronto: Queen's Printer, 1968.

Mewett, Alan W. *Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario*, 1981.

APPEAL from a judgment of the Alberta Court of Appeal, [2001] 1 W.W.R. 606, 83 Alta. L.R. (3d) 215, 266 A.R. 266, 25 Admin. L.R. (3d) 17, 49 C.P.C. (4th) 18, [2000] A.J. No. 1101 (QL), 2000 ABCA 248, affirming a decision of the Court of Queen's Bench (1999), 240 A.R. 146, 28 C.P.C. (4th) 342, 60 C.R.R. (2d) 107, [1999] A.J. No. 451 (QL), 1999 ABQB 45. Appeal allowed.

Robert C. Maybank and *Christine Enns*, for the appellant.

Alan D. Hunter, *Q.C.*, *Sheilah L. Martin*, *Q.C.*, and *James T. Eamon*, for the respondents.

David Sgayias, *Q.C.*, and *Jan Brongers*, for the intervener the Attorney General of Canada.

Janet E. Minor and *Sean Hanley*, for the intervener the Attorney General of Ontario.

Monique Rousseau and *Julie Dassylva*, for the intervener the Attorney General of Quebec.

George H. Copley, *Q.C.*, for the intervener the Attorney General of British Columbia.

Graeme G. Mitchell, *Q.C.*, for the intervener the Attorney General for Saskatchewan.

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

The judgment of the Court was delivered by

1 MAJOR J. — At issue in this appeal is the constitutionality of legislative reforms that seek to improve the qualifications and independence of Alberta's

Klinck, J. E. *Report of the Justice of the Peace Committee*. Alberta : Ministry of the Attorney General, 1986.

Manitoba. Commission de réforme du droit. *The Independence of Justices of the Peace and Magistrates*, Report No. 75. Winnipeg : Queen's Printer, 1991.

McRuer, James Chalmers. *Royal Commission Inquiry Into Civil Rights*, Report No. 1, vol. 2, c. 38. Toronto : Queen's Printer, 1968.

Mewett, Alan W. *Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario*, 1981.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta, [2001] 1 W.W.R. 606, 83 Alta. L.R. (3d) 215, 266 A.R. 266, 25 Admin. L.R. (3d) 17, 49 C.P.C. (4th) 18, [2000] A.J. No. 1101 (QL), 2000 ABCA 248, confirmant une décision de la Cour du Banc de la Reine (1999), 240 A.R. 146, 28 C.P.C. (4th) 342, 60 C.R.R. (2d) 107, [1999] A.J. No. 451 (QL), 1999 ABQB 45. Pourvoi accueilli.

Robert C. Maybank et *Christine Enns*, pour l'appelante.

Alan D. Hunter, *c.r.*, *Sheilah L. Martin*, *c.r.*, et *James T. Eamon*, pour les intimés.

David Sgayias, *c.r.*, et *Jan Brongers*, pour l'intervenant le procureur général du Canada.

Janet E. Minor et *Sean Hanley*, pour l'intervenant le procureur général de l'Ontario.

Monique Rousseau et *Julie Dassylva*, pour l'intervenant le procureur général du Québec.

George H. Copley, *c.r.*, pour l'intervenant le procureur général de la Colombie-Britannique.

Graeme G. Mitchell, *c.r.*, pour l'intervenant le procureur général de la Saskatchewan.

Paul B. Schabas et *Catherine Beagan Flood*, pour l'intervenante Association of Justices of the Peace of Ontario.

Version française du jugement de la Cour rendu par

LE JUGE MAJOR — Le présent pourvoi porte sur la constitutionnalité de réformes législatives destinées à relever les qualifications des juges de paix

justices of the peace. The challenged amendments to the *Justice of the Peace Act*, R.S.A. 1980, c. J-3, require all justices of the peace who exercise judicial functions to meet qualifications decided upon by an independent Judicial Council.

The respondents, and other justices of the peace appointed prior to the amendments, did not meet the qualifications. They were removed from office, but were offered administrative positions as non-presiding justices of the peace.

The courts below held that the removal of the respondents from office contravenes the principle of judicial independence. With respect, I disagree. The principle of judicial independence must be interpreted in light of the public interests it is meant to protect: a strong and independent judiciary capable of upholding the rule of law and our constitutional order, and public confidence in the administration of justice. The reforms in this case reflect a good faith and considered decision of the Legislature that was intended to promote these interests. As a result, the legislation does not undermine the perception of independence in the mind of a reasonable and informed person, and is respectful of the principle of judicial independence. I would allow the appeal.

albertains et à accroître leur indépendance. Les modifications contestées, qui ont été apportées à la *Justice of the Peace Act*, R.S.A. 1980, ch. J-3, exigent que tous les juges de paix qui exercent des fonctions judiciaires aient les qualifications fixées par un conseil de la magistrature indépendant.

2 Les intimés, ainsi que d'autres juges de paix nommés avant les modifications apportées, n'avaient pas les qualifications requises. Ils ont été destitués, mais se sont vu offrir des fonctions administratives à titre de juges de paix non présidant.

3 Les cours d'instance inférieure ont conclu que la destitution des intimés contrevient au principe de l'indépendance judiciaire. En toute déférence, je ne partage pas leur avis. Le principe de l'indépendance judiciaire doit être interprété à la lumière des intérêts du public qu'il est censé protéger : un pouvoir judiciaire fort et indépendant capable d'assurer le respect de la primauté du droit et de notre ordre constitutionnel, et la confiance du public dans l'administration de la justice. Les réformes dont il est question en l'espèce reflètent une décision que la législature a prise de bonne foi et de façon réfléchie dans le but de promouvoir ces intérêts. Par conséquent, la mesure législative en cause ne mine pas la perception d'indépendance qu'aurait une personne raisonnable et renseignée, et elle respecte le principe de l'indépendance judiciaire. Je suis d'avis d'accueillir le pourvoi.

I. Factual Background

Justices of the peace have played an important role in Canada's administration of justice since the adoption of the position from England in the 18th century. It has long been accepted that s. 92(14) of the *Constitution Act, 1867* confers upon the provinces full control over the appointment and regulation of these judicial officers. See *Reference re Adoption Act*, [1938] S.C.R. 398, *per* Duff C.J., at p. 406, citing *R. v. Bush* (1888), 15 O.R. 398 (Q.B.), at p. 405:

> The administration of justice could not be carried on in the Provinces effectually without the appointment of justices of the peace and police magistrates, and the

I. Les faits

4 Les juges de paix jouent un rôle important dans l'administration de la justice au Canada depuis que la charge qu'ils occupent a été empruntée à l'Angleterre au XVIII^{e} siècle. Il est reconnu depuis longtemps que le par. 92(14) de la *Loi constitutionnelle de 1867* assujettit au contrôle total des provinces la nomination et la réglementation de ces officiers de justice. Voir *Reference re Adoption Act*, [1938] R.C.S. 398, p. 406, où le juge en chef Duff, cite le passage suivant de la décision *R. c. Bush* (1888), 15 O.R. 398 (B.R.), p. 405 :

> [TRADUCTION] Il ne saurait y avoir d'administration efficace de la justice dans les provinces sans la nomination de juges de paix et de magistrats de police, et la

conclusion seems to me to be irresistible that it was intended that the appointment of these and other officers, whose duty it should be to aid in the administration of justice, should be left in the hands of the Provincial Legislatures.

5 The powers and authority of justices of the peace have waxed and waned over time and across the country. In many provinces, they have come to occupy a critical role as the point of entry into the criminal justice system, with jurisdiction over bail hearings and the issuance of search warrants. As a result of an increased recognition of their important functions, numerous commissions have issued reports describing problems with the office and making recommendations for change: see Hon. J. C. McRuer, *Royal Commission Inquiry Into Civil Rights* (1968), Report No. 1, vol. 2, c. 38 ("McRuer Commission"); A. W. Mewett, *Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario* (1981) ("Mewett Report"); J. E. Klinck, *Report of the Justice of the Peace Committee* (1986); the Manitoba Law Reform Commission, *The Independence of Justices of the Peace and Magistrates* (1991), Report No. 75 ("Manitoba Report"); and A. N. Doob, P. M. Baranek and S. M. Addario, *Understanding Justices: A Study of Canadian Justices of the Peace* (1991) ("Doob Report").

6 These reports have invariably indicated a pressing need to improve both the independence and qualifications of justices of the peace. The McRuer Commission concluded, at p. 524, with regard to Ontario's justices of the peace:

> . . . the whole concept, that the office should stand as a safeguard of the civil rights of the individual against the exercise of arbitrary police power, is in many cases, and probably in most cases, little more than a sham. In saying this we do not want to be taken as condemning individuals. We are condemning a system under which many conscientious and dedicated individuals are required to work.

Many provinces have enacted significant reforms since then in an effort to meet the stated concerns: in Ontario, the *Justices of the Peace Act, 1989*, S.O. 1989, c. 46, s. 4(4); in Saskatchewan, *The Justices of*

conclusion que la nomination de ces officiers de justice et d'autres agents — dont la mission doit consister à faciliter l'administration de la justice — est censée relever des législatures provinciales me paraît incontournable.

Dans notre pays, les pouvoirs et le mandat des juges de paix ont varié au fil des ans. Dans maintes provinces, les juges de paix — compétents pour tenir des enquêtes sur cautionnement et décerner des mandats de perquisition — en sont venus à jouer un rôle crucial au seuil du système de justice criminelle. La reconnaissance accrue de l'importance de leurs fonctions est à l'origine de la publication de nombreux rapports de commission décrivant les problèmes liés à cette charge et recommandant des changements : voir l'honorable J. C. McRuer, *Royal Commission Inquiry Into Civil Rights* (1968), rapport n^{o} 1, vol. 2, ch. 38 (« commission McRuer »); A. W. Mewett, *Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario* (1981) (« rapport Mewett »); J. E. Klinck, *Report of the Justice of the Peace Committee* (1986); Commission de réforme du droit du Manitoba, *The Independence of Justices of the Peace and Magistrates* (1991), rapport n^{o} 75 (« rapport manitobain »); A. N. Doob, P. M. Baranek et S. M. Addario, *Understanding Justices : A Study of Canadian Justices of the Peace* (1991) (« rapport Doob »).

Ces rapports soulignent tous, sans exception, l'urgence d'accroître l'indépendance des juges de paix et de relever leurs qualifications. La commission McRuer a conclu ce qui suit à propos des juges de paix ontariens (à la p. 524) :

> [TRADUCTION] . . . toute l'idée selon laquelle cette charge devrait servir à protéger les droits civils des particuliers contre l'exercice arbitraire des pouvoirs de la police n'est dans bien des cas, voire dans la plupart des cas, guère plus que de la frime. Nous ne voulons pas que l'on croie que, par ces propos, nous condamnons des personnes en particulier. Nous condamnons un système dans le cadre duquel de nombreuses personnes consciencieuses et dévouées doivent travailler.

Depuis lors, maintes provinces ont adopté des réformes importantes afin de dissiper les inquiétudes exprimées : en Ontario, la *Loi de 1989 sur les juges de paix*, L.O. 1989, ch. 46, par. 4(4);

the Peace Act, 1988, S.S. 1988-89, c. J-5.1, s. 6(7); and in the Northwest Territories, *An Act to Amend the Justices of the Peace Act*, R.S.N.W.T. 1988, c. 39 (Supp.), ss. 5 and 8.

Alberta enacted legislative reforms to the office in 1991: see the *Miscellaneous Statutes Amendment Act, 1991*, S.A. 1991, c. 21, s. 16. The legislation brought in two significant changes. First, security of tenure was provided for all justices of the peace until age 70. Removal could only be for cause following a recommendation of the Justices of the Peace Review Council. Second, in an effort to tailor the qualifications of justices of the peace to their specific duties, the office was divided into the categories of sitting and non-sitting justices of the peace. Sitting justices of the peace were authorized to preside over trials of less serious offences and to sit in Provincial Court. Appointment to this position required membership in the Law Society of Alberta and five years of related experience.

Non-sitting justices of the peace were not required to meet any eligibility criteria, apart from Canadian citizenship. These judicial officers were authorized to preside over judicial interim release; to issue search warrants, summons, subpoenas and arrest warrants; and to confirm or cancel police process. They also performed numerous administrative tasks, including receiving information and affidavits, scheduling trials and hearing dates, and administering oaths. The position was divided into four sub-categories: hearing officers, who worked full-time on salary; *ad hoc* justices, who worked part-time on a per diem basis; fee justices, who were paid per transaction; and staff justices, who were employed and paid by the Department of Justice.

en Saskatchewan, *Loi de 1988 sur les juges de paix*, L.S. 1988-89, ch. J-5,1, par. 6(7); dans les Territoires du Nord-Ouest, *Loi modifiant la Loi sur les juges de paix*, L.R.T.N.-O. 1988, ch. 39 (suppl.), art. 5 et 8.

7 En Alberta, la charge a été soumise à des réformes législatives en 1991 : voir la *Miscellaneous Statutes Amendment Act, 1991*, S.A. 1991, ch. 21, art. 16. Cette loi a apporté deux changements importants. Premièrement, tous les juges de paix seraient inamovibles jusqu'à l'âge de 70 ans. Il ne pourrait y avoir destitution que pour un motif suffisant, à la suite d'une recommandation du Justices of the Peace Review Council (« conseil de surveillance des juges de paix »). Deuxièmement, en vue d'adapter les qualifications des juges de paix à leurs fonctions particulières, la charge a été divisée en deux catégories, à savoir celle des juges de paix siégeant et celle des juges de paix non siégeant. Les juges de paix siégeant étaient autorisés à présider les procès relatifs à des infractions moins graves et à siéger à la Cour provinciale. Pour être nommé à cette charge, il fallait être membre de la Law Society of Alberta (« barreau de l'Alberta ») et avoir cinq ans d'expérience pertinente.

8 Les juges de paix non siégeant n'étaient assujettis à aucun critère d'admissibilité, à part celui de la citoyenneté canadienne. Ces officiers de justice étaient autorisés à présider les audiences de mise en liberté provisoire, à décerner des mandats de perquisition, des sommations, des assignations et des mandats d'arrestation, et à confirmer ou à annuler des actes de procédure obtenus par la police. Ils accomplissaient également de nombreuses tâches administratives, dont la réception des dénonciations et des affidavits, l'établissement du rôle et des dates d'audience et la prestation de serment. La charge était divisée en quatre sous-catégories : les agents d'audience (*hearing officers*), travaillant à temps plein et touchant un salaire; les juges de paix *ad hoc* (*ad hoc justices*), travaillant à temps partiel et rémunérés à la journée; les juges de paix payés sur honoraires (*fee justices*), c'est-à-dire rémunérés à la tâche; les juges de paix salariés (*staff justices*), employés et rémunérés par le ministère de la Justice.

9 In 1998, Alberta enacted more extensive reforms, which are the subject of the present appeal. The purpose of the amendments, as expressed by Alberta's Minister of Justice, was

> to ensure the independence of the courts of Alberta in keeping with the recent decisions of the Supreme Court of Canada.
>
> (*Alberta Hansard*, March 11, 1998, at p. 811)

In a further effort to ensure that justices of the peace are qualified for the duties they perform, the amendments replace the office of non-sitting justices of the peace with the positions of presiding and non-presiding justices of the peace. In essence, presiding justices of the peace assume the judicial tasks that had previously been assigned to the non-sitting justices of the peace, and non-presiding justices of the peace are limited to their administrative tasks.

10 The amendments stipulate that in order to be appointed as a sitting or presiding justice of the peace, a person must be deemed qualified by an independent Judicial Council: *Justice Statutes Amendment Act, 1998*, S.A. 1998, c. 18, s. 2.1(1). The Judicial Council unanimously agreed on minimum qualifications of membership in the Law Society of Alberta and five years related experience. The amendments also bar persons who suffer from inherent conflicts of interest (such as government employees, law enforcement officers, prosecutors, and prison guards) from appointment: s. 2.1(5). Individuals who had previously been appointed but did not meet these requirements were precluded from holding office: s. 2.4(8). They were offered administrative positions as non-presiding justices of the peace.

11 Of the several hundred non-sitting justices of the peace appointed prior to the amendments, only 15 *ad hoc* justices met the objective requirements for appointment as presiding justices of the peace. The three respondents, who were classified as hearing officers and lacked the new qualifications, were not appointed to that office, nor were the approximately 200 fee justices and 250 staff justices. They were

En 1998, l'Alberta a adopté des réformes plus importantes, qui font l'objet du présent pourvoi. Comme l'a affirmé le ministre de la Justice de l'Alberta, ces modifications visaient à

> [TRADUCTION] garantir l'indépendance des tribunaux judiciaires albertains conformément à la jurisprudence récente de la Cour suprême du Canada.
>
> (*Alberta Hansard*, 11 mars 1998, p. 811)

Toujours dans le but de garantir que les juges de paix aient les qualifications nécessaires pour exercer leurs fonctions, les modifications remplacent la charge de juge de paix non siégeant par celles de juge de paix présidant et de juge de paix non présidant. Essentiellement, les juges de paix présidant accomplissent les tâches judiciaires auparavant confiées aux juges de paix non siégeant, et les juges de paix non présidant se voient confier uniquement des tâches administratives.

Les modifications prévoient que pour être nommée juge de paix siégeant ou juge de paix présidant, une personne doit être jugée qualifiée par un conseil de la magistrature indépendant : *Justice Statutes Amendment Act, 1998*, S.A. 1998, ch. 18, par. 2.1(1). Le conseil de la magistrature a convenu à l'unanimité que, pour être nommé, il fallait au moins être membre du barreau de l'Alberta et avoir au moins cinq ans d'expérience pertinente. Les modifications empêchent également la nomination de personnes en situation de conflit d'intérêts inhérent (tels les employés du gouvernement, les agents responsables de l'application de la loi, les procureurs et les gardiens de prison) (par. 2.1(5)). Les personnes occupant déjà cette charge, mais ne satisfaisant pas à ces conditions minimales, ne pouvaient plus rester en fonction (par. 2.4(8)). Elles se sont vu offrir des fonctions administratives à titre de juges de paix non présidant.

Parmi plusieurs centaines de juges de paix non siégeant qui avaient été nommés avant l'entrée en vigueur des modifications, seulement 15 juges de paix *ad hoc* remplissaient les conditions objectives requises pour être nommés juges de paix présidant. Les trois intimés, qui faisaient partie de la sous-catégorie des agents d'audience et qui n'avaient pas les nouvelles qualifications requises, n'ont pas été

offered positions as non-presiding justices of the peace.

The respondents brought an application to the Alberta Court of Queen's Bench for a declaration that s. 2.4(8), which removed them from office, contravened their constitutionally required security of tenure and independence. The chambers judge granted the application and declared the provision to be of no force and effect as it applied to them. The Court of Appeal for Alberta upheld the finding of the chambers judge. The Province appeals from that decision.

II. Relevant Statutory Provisions

The following provisions of the *Justice of the Peace Act*, R.S.A. 1980, c. J-3, subsequently repealed under the *Justice Statutes Amendment Act, 1998*, are relevant:

5 The appointment of a justice of the peace terminates when he attains the age of 70 years.

5.1(1) The Lieutenant Governor in Council shall, subject to the regulations, establish a Justices of the Peace Review Council.

(2) The Justices of the Peace Review Council shall

(a) review complaints respecting the lack of competence of, conduct or misbehaviour of, or neglect of duty by, justices of the peace or the inability of justices of the peace to perform their duties, and

(b) make recommendations to the Lieutenant Governor in Council in respect of matters reviewed under clause (a).

5.2 Notwithstanding section 5, the appointment of a justice of the peace may be terminated by the Lieutenant Governor in Council on the recommendation of the Justices of the Peace Review Council.

The relevant 1998 amendments to the *Justice of the Peace Act* are:

2.1(1) The Lieutenant Governor in Council may appoint a person as a justice of the peace designated as a sitting

nommés à cette charge, pas plus que les quelque 200 juges de paix payés sur honoraires et 250 juges de paix salariés. On leur a offert des postes de juge de paix non présidant.

12 Les intimés ont présenté à la Cour du Banc de la Reine de l'Alberta une demande de jugement déclarant que le par. 2.4(8), à l'origine de leur destitution, portait atteinte à l'inamovibilité et à l'indépendance dont ils doivent bénéficier en vertu de la Constitution. Le juge en chambre a accueilli la demande et déclaré la disposition inopérante à leur égard. La Cour d'appel de l'Alberta a confirmé la conclusion du juge en chambre. La province se pourvoit contre cette décision.

II. Les dispositions législatives pertinentes

13 Les dispositions suivantes de la *Justice of the Peace Act*, R.S.A. 1980, ch. J-3, subséquemment abrogées par la *Justice Statutes Amendment Act, 1998*, sont pertinentes :

[TRADUCTION]

5 Le juge de paix occupe sa charge jusqu'à l'âge de 70 ans.

5.1(1) Sous réserve des règlements, le lieutenant-gouverneur en conseil établit un conseil de surveillance des juges de paix.

(2) Le conseil de surveillance des juges de paix :

a) examine les plaintes fondées sur l'incompétence, la conduite ou l'inconduite des juges de paix, ou sur leur manquement au devoir ou leur incapacité d'exercer leurs fonctions;

b) soumet au lieutenant-gouverneur des recommandations relatives aux plaintes examinées en vertu de l'alinéa a).

5.2 Par dérogation à l'article 5, le lieutenant-gouverneur en conseil peut destituer un juge de paix, sur recommandation du conseil de surveillance des juges de paix.

Les modifications pertinentes qui ont été apportées en 1998 à la *Justice of the Peace Act* sont les suivantes :

[TRADUCTION]

2.1(1) Le lieutenant-gouverneur en conseil peut nommer une personne juge de paix désigné comme juge de paix

justice of the peace or as a presiding justice of the peace if the Judicial Council has determined that the person is qualified.

(2) An order under subsection (1) shall designate the person appointed as a sitting justice of the peace or as a presiding justice of the peace and shall designate whether the appointment is full-time or part-time.

2.2(1) The Minister may appoint a person as a justice of the peace designated as a non-presiding justice of the peace.

(2) A non-presiding justice of the peace is appointed as a justice of the peace solely for the purposes of exercising the following, to the extent that their exercise is consistent with the constitutional requirements for independence, if any:

(a) administering oaths or affirmations or taking declarations;

(b) processing judicial interim release orders;

(c) adjourning cases where a judge of the Provincial Court or a sitting justice of the peace is not present;

(d) performing any other functions and duties prescribed by the regulations.

2.4 . . .

(8) A person appointed as a justice of the peace before the coming into force of this section who is not appointed under section 2.1(1) or 2.2 may not exercise any authority or receive any remuneration as a justice of the peace after this section comes into force.

siégeant ou comme juge de paix présidant, si le conseil de la magistrature juge que cette personne est qualifiée.

(2) Le décret pris en vertu du paragraphe (1) désigne la personne nommée juge de paix siégeant ou comme juge de paix présidant, et précise si la nomination est à temps plein ou à temps partiel.

2.2(1) Le ministre peut nommer une personne juge de paix désigné comme juge de paix non présidant.

(2) Le juge de paix non présidant n'est nommé juge de paix que pour exercer les fonctions suivantes, pourvu que leur exercice soit conforme aux exigences constitutionnelles d'indépendance, s'il en est :

a) faire prêter serment ou recevoir des affirmations ou déclarations solennelles;

b) traiter les ordonnances de mise en liberté provisoire;

c) ordonner des ajournements en cas d'absence d'un juge de la Cour provinciale ou d'un juge siégeant;

d) exercer toute autre attribution conférée par règlement.

2.4 . . .

(8) Une personne nommée juge de paix avant l'entrée en vigueur de la présente disposition, qui n'a toutefois pas été nommée en vertu du par. 2.1(1) ou de l'art. 2.2, ne peut exercer aucun pouvoir ni être rémunérée en qualité de juge de paix après l'entrée en vigueur de la présente disposition.

III. Judicial History

14 At the Alberta Court of Queen's Bench, McMahon J. held that the respondents carried out judicial functions ((1999), 240 A.R. 146, 1999 ABQB 45). As such, their position attracted the constitutional principle of judicial independence. The chambers judge noted that security of tenure was at the core of this principle. He held that the retroactive imposition of an educational requirement that the respondents could not meet, and their subsequent removal from office, would necessarily undermine the perception of independence to a reasonable and informed person. As a result, he concluded that s. 2.4(8) was constitutionally invalid and was of no force and effect insofar as it relates to the

III. Historique des procédures judiciaires

Le juge McMahon de la Cour du Banc de la Reine de l'Alberta a conclu que les intimés exerçaient des fonctions judiciaires ((1999), 240 A.R. 146, 1999 ABQB 45). Par conséquent, le principe constitutionnel de l'indépendance judiciaire s'appliquait à leur charge. Le juge en chambre a souligné que l'inamovibilité était au cœur de ce principe. Il a estimé que l'exigence rétroactive d'un niveau particulier d'instruction, à laquelle les intimés ne pouvaient satisfaire, et la destitution subséquente de ces derniers mineraient nécessairement la perception d'indépendance qu'aurait une personne raisonnable et renseignée. Il a donc conclu que le par. 2.4(8) était inconstitutionnel et inopérant à l'égard des intimés,

respondents. He declared that the respondents should continue to serve as non-sitting justices of the peace and enjoy security of tenure in accordance with ss. 5, 5.1 and 5.2 of the *Justice of the Peace Act*.

The Alberta Court of Appeal dismissed the appeal and upheld the declaration of the chambers judge ([2001] 1 W.W.R. 606, 2000 ABCA 248). That court observed that the essence of security of tenure requires protection "against interference by the Executive or other appointing authority in a discretionary or arbitrary manner": see *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 698. The Court of Appeal held that this standard required that a judicial officer be removable from office only for cause following a hearing by an independent tribunal. In this case, cause has not been alleged. Accordingly, the removal of the respondents from office violated their security of tenure and contravened the principle of independence.

IV. Issues

The Chief Justice stated the following constitutional questions on May 1, 2002:

1. Does s. 2.4(8) of the *Justice of the Peace Act*, R.S.A. 1980, c. J-3, as amended, interfere with the tenure of non-sitting justices of the peace and thereby violate the principle of judicial independence guaranteed by:

   (a) the preamble of the *Constitution Act*, *1867*, or

   (b) section 11(d) of the *Canadian Charter of Rights and Freedoms*?

2. If the answer to question 1(b) is yes, is the Act demonstrably justified as a reasonable limit prescribed by law under s. 1 of the *Charter*?

V. Analysis

The primary issues in this appeal are whether the principle of judicial independence extends to the office of the respondents, and if so, whether the legislated removal of the respondents from office contravenes that principle. I agree that the principle applies to the position of the respondents as a result of their authority to exercise judicial

qui, selon lui, devraient continuer à occuper le poste de juge de paix non siégeant et à bénéficier de l'inamovibilité conformément aux art. 5, 5.1 et 5.2 de la *Justice of the Peace Act*.

15 La Cour d'appel de l'Alberta a rejeté l'appel et confirmé la validité du jugement déclaratoire du juge en chambre ([2001] 1 W.W.R. 606, 2000 ABCA 48). Elle a noté que l'inamovibilité requiert essentiellement une protection contre « toute intervention discrétionnaire ou arbitraire de la part de l'exécutif ou de l'autorité responsable des nominations » : voir *Valente c. La Reine*, [1985] 2 R.C.S. 673, p. 698. La Cour d'appel était d'avis que, selon cette norme, un officier de justice ne pouvait être destitué que pour un motif suffisant, à la suite d'une audience tenue par un tribunal indépendant. En l'espèce, aucun motif suffisant n'a été allégué. Par conséquent, la destitution des intimés portait atteinte à leur inamovibilité et contrevenait au principe de l'indépendance.

IV. Les questions en litige

16 Le 1er mai 2002, la Juge en chef a formulé les questions constitutionnelles suivantes :

1. Le paragraphe 2.4(8) de la *Justice of the Peace Act*, R.S.A. 1980, ch. J-3 et ses modifications, porte-t-il atteinte à l'inamovibilité des juges de paix non siégeant et contrevient-il, de ce fait, au principe de l'indépendance judiciaire garanti par :

   a) le préambule de la *Loi constitutionnelle de 1867* ou

   b) l'alinéa 11*d*) de la *Charte canadienne des droits et libertés*?

2. Si la réponse à la première question est affirmative, s'agit-il d'une loi dont la justification peut se démontrer en tant que limite raisonnable prescrite par une règle de droit, conformément à l'article premier de la *Charte*?

V. Analyse

17 Les principales questions en litige dans le présent pourvoi sont de savoir si le principe de l'indépendance judiciaire s'applique à la charge des intimés et, dans l'affirmative, si la destitution des intimés par voie législative contrevient à ce principe. Je reconnais que le principe s'applique à la charge des intimés en raison de leur pouvoir d'exercer des

functions. However, I conclude that the amendments at issue do not violate the constitutional essence of the respondents' security of tenure, and so do not contravene the principle of judicial independence.

A. *The Scope of Judicial Independence*

18 Judicial independence has been recognized as "the lifeblood of constitutionalism in democratic societies": see *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 70, *per* Dickson C.J. It requires objective conditions that ensure the judiciary's freedom to act without interference from any other entity. The principle finds explicit constitutional reference in ss. 96 to 100 of the *Constitution Act, 1867* and s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*. The application of these provisions is limited: the former to judges of superior courts, and the latter to courts and tribunals that determine the guilt of those charged with criminal offences: see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Provincial Court Judges Reference*"), at para. 84, *per* Lamer C.J. The respondents do not fall into either of these categories. Nonetheless, as this Court has recognized, the principle of judicial independence extends beyond the limited scope of the above provisions.

19 Judicial independence has been a cornerstone of the United Kingdom's constitutional structure back to the *Act of Settlement* of 1700, 12 & 13 Will. 3, c. 2. See the comments of Lord Lane, cited in *Beauregard*, *supra*, at p. 71:

> Few constitutional precepts are more generally accepted there in England, the land which boasts no written constitution, than the necessity for the judiciary to be secure from undue influence and autonomous within its own field ("Judicial Independence and the Increasing Executive Role in Judicial Administration", in S. Shetreet and J. Deschênes (eds.), *Judicial Independence: The Contemporary Debate* (1985), at p. 525).

fonctions judiciaires. Cependant, je conclus que les modifications en cause ne portent pas atteinte à l'inamovibilité dont les intimés doivent bénéficier en vertu de la Constitution et ne contreviennent donc pas au principe de l'indépendance judiciaire.

A. *La portée de l'indépendance judiciaire*

L'indépendance judiciaire a été reconnue comme étant « l'élément vital du caractère constitutionnel des sociétés démocratiques » : voir *Beauregard c. Canada*, [1986] 2 R.C.S. 56, p. 70, le juge en chef Dickson. Elle requiert des conditions objectives garantissant au pouvoir judiciaire une liberté d'agir sans ingérence de la part de quelque autre entité. Le principe est mentionné expressément aux art. 96 à 100 de la *Loi constitutionnelle de 1867* et à l'al. 11*d*) de la *Charte canadienne des droits et libertés*. L'application de ces dispositions est limitée : dans le premier cas, les articles en question s'appliquent aux juges des cours supérieures, et dans le deuxième cas, l'alinéa mentionné s'applique aux tribunaux qui se prononcent sur la culpabilité de personnes accusées d'une infraction criminelle : voir le *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3 (« *Renvoi relatif aux juges de la Cour provinciale* »), par. 84, le juge en chef Lamer. Les intimés ne font partie d'aucune de ces catégories. Néanmoins, comme notre Cour l'a reconnu, la portée du principe de l'indépendance judiciaire excède celle des dispositions susmentionnées.

L'indépendance judiciaire est un principe fondamental du régime constitutionnel du Royaume-Uni depuis l'*Act of Settlement* de 1700, 12 & 13 Will. 3, ch. 2. Voir les commentaires de lord Lane, reproduits dans l'arrêt *Beauregard*, précité, p. 71 :

> [TRADUCTION] Peu de préceptes constitutionnels sont plus généralement acceptés en Angleterre, le pays qui se glorifie de n'avoir aucune constitution écrite, que la nécessité pour le pouvoir judiciaire d'être à l'abri de toute influence indue et d'être autonome dans son propre domaine de compétence (« Judicial Independence and the Increasing Executive Role in Judicial Administration », dans S. Shetreet et J. Deschênes (éd.), *Judicial Independence : The Contemporary Debate* (1985), à la p. 525).

The preamble to the *Constitution Act, 1867* provides for Canada to have "a Constitution similar in Principle to that of the United Kingdom". These words, by their adoption of the basic principles of the United Kingdom's Constitution, serve as textual affirmation of an unwritten principle of judicial independence in Canada. Lamer C.J. concluded as follows in *Provincial Court Judges Reference*, *supra*, at para. 109:

> . . . it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.

The preamble acknowledges judicial independence to be one of the pillars upon which our constitutional democracy rests.

Historically, the principle of judicial independence was confined to the superior courts. As a result of the expansion of judicial duties beyond that realm, it is now accepted that all courts fall within the principle's embrace. See *Provincial Court Judges Reference*, *supra*, at para. 106:

> . . . our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.

The scope of the unwritten principle of independence must be interpreted in accordance with its underlying purposes. In this appeal, its extension to the office held by the respondents depends on whether they exercise judicial functions that relate to the bases upon which the principle is founded.

The historical rationale for independence was to ensure that judges, as the arbiters of disputes, are at complete liberty to decide individual cases on their merits without interference: see *Beauregard*, *supra*, at p. 69. The integrity of judicial decision making depends on an adjudicative process that is untainted by outside pressures. This gives rise to the individual dimension of judicial independence, that is,

Le préambule de la *Loi constitutionnelle de 1867* dote le Canada d'« une constitution reposant sur les mêmes principes que celle du Royaume-Uni ». Du fait qu'ils évoquent l'adoption des principes fondamentaux de la Constitution du Royaume-Uni, ces mots confirment par écrit un principe non écrit d'indépendance judiciaire au Canada. Le juge en chef Lamer a tiré la conclusion suivante dans le *Renvoi relatif aux juges de la Cour provinciale*, précité, par. 109 :

> . . . c'est dans le préambule, qui constitue le portail de l'édifice constitutionnel, que se trouve la véritable source de notre engagement envers ce principe fondamental.

Le préambule reconnaît que l'indépendance judiciaire est l'un des piliers de notre démocratie constitutionnelle.

20 Autrefois, le principe de l'indépendance judiciaire s'appliquait uniquement aux cours supérieures. Depuis que les fonctions judiciaires ne sont plus l'apanage exclusif de ces cours, il est maintenant accepté que ce principe s'applique à tous les tribunaux judiciaires. Voir le *Renvoi relatif aux juges de la Cour provinciale*, précité, par. 106 :

> . . . notre Constitution a évolué avec le temps. Tout comme notre compréhension des droits et des libertés a progressé, à tel point qu'ils ont été expressément constitutionnalisés par l'édiction de la *Loi constitutionnelle de 1982*, l'indépendance de la magistrature est devenue un principe qui vise maintenant tous les tribunaux, et non seulement les cours supérieures du pays.

Le principe non écrit de l'indépendance judiciaire doit être interprété conformément aux objets qui le sous-tendent. En l'espèce, l'indépendance judiciaire ne s'appliquera à la charge des intimés que s'il est déterminé qu'ils exercent des fonctions judiciaires liées aux fondements de ce principe.

21 La raison d'être de l'indépendance judiciaire a toujours été de garantir que les juges, en tant qu'arbitres de différends, soient complètement libres de trancher chaque affaire au fond sans ingérence de la part de qui que ce soit : voir *Beauregard*, précité, p. 69. L'intégrité du processus décisionnel judiciaire n'est assurée que si la prise des décisions n'est assujettie à aucune pression extérieure. D'où l'aspect

the need to ensure that a particular judge is free to decide upon a case without influence from others.

22 In modern times, it has been recognized that the basis for judicial independence extends far beyond the need for impartiality in individual cases. The judiciary occupies an indispensable role in upholding the integrity of our constitutional structure: see *Provincial Court Judges Reference*, *supra*, at para. 108. In Canada, like other federal states, courts adjudicate on disputes between the federal and provincial governments, and serve to safeguard the constitutional distribution of powers. Courts also ensure that the power of the state is exercised in accordance with the rule of law and the provisions of our Constitution. In this capacity, courts act as a shield against unwarranted deprivations by the state of the rights and freedoms of individuals. Dickson C.J. described this role in *Beauregard*, *supra*, at p. 70:

> [Courts act as] protector of the Constitution and the fundamental values embodied in it — rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important.

This constitutional mandate gives rise to the principle's institutional dimension: the need to maintain the independence of a court or tribunal as a whole from the executive and legislative branches of government.

23 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*

individuel de l'indépendance judiciaire, c'est-à-dire la nécessité de veiller à ce que le juge soit libre de trancher une affaire sans influence extérieure.

De nos jours, on reconnaît que le besoin d'impartialité dans chaque cas est loin d'être le seul impératif justifiant l'indépendance judiciaire. Le pouvoir judiciaire joue un rôle indispensable pour ce qui est de préserver la structure fondamentale de notre Constitution : voir le *Renvoi relatif aux juges de la Cour provinciale*, précité, par. 108. Au Canada, comme dans les autres États fédéraux, les tribunaux judiciaires tranchent les différends opposant le gouvernement fédéral et les gouvernements provinciaux et veillent au respect du partage constitutionnel des compétences. Ces mêmes tribunaux veillent également à ce que l'exercice du pouvoir étatique respecte la primauté du droit et les dispositions de notre Constitution. À ce titre, ils servent de bouclier contre les atteintes injustifiées de l'État aux droits et libertés des citoyens. Le juge en chef Dickson a décrit ainsi ce rôle dans l'arrêt *Beauregard*, précité, p. 70 :

> [Les tribunaux judiciaires jouent le rôle de] protecteur de la constitution et des valeurs fondamentales qui y sont enchâssées — la primauté du droit, la justice fondamentale, l'égalité, la préservation du processus démocratique, pour n'en nommer peut-être que les plus importantes.

Ce mandat constitutionnel est à l'origine de l'aspect institutionnel du principe : la nécessité de maintenir l'indépendance d'un tribunal judiciaire ou administratif dans son ensemble vis-à-vis des organes exécutif et législatif du gouvernement.

Par conséquent, en raison de son rôle d'arbitre des différends et de gardien de la Constitution, le pouvoir judiciaire doit être complètement indépendant. Un motif séparé, mais connexe, justifiant l'indépendance judiciaire est la nécessité de maintenir la confiance du public dans l'administration de la justice. Pour que règne la confiance dans notre système de justice, il faut s'assurer que les citoyens aient toujours une saine perception d'indépendance judiciaire. Sans cette perception d'indépendance, le pouvoir judiciaire ne peut pas « prétendre à la légitimité, ni commander le respect et l'acceptation qui lui sont essentiels » : voir *Mackin c.*

Gonthier J. The principle requires the judiciary to be independent both in fact and perception.

Nouveau-Brunswick (Ministre des Finances), [2002] 1 R.C.S. 405, 2002 CSC 13, par. 38, le juge Gonthier. Le principe exige que le pouvoir judiciaire soit non seulement effectivement indépendant, mais encore perçu comme étant indépendant.

In light of these bases of judicial independence — impartiality in adjudication, preservation of our constitutional order, and public confidence in the administration of justice — it is clear that the principle extends its protection to the judicial office held by the respondents. Alberta's non-sitting justices of the peace exercised judicial functions directly related to the enforcement of law in the court system. They served on the front line of the criminal justice process, and performed numerous judicial functions that significantly affected the rights and liberties of individuals. Of singular importance was their jurisdiction over bail hearings. Justices of the peace are included in the definition of "justice" under s. 2 of the *Criminal Code*, R.S.C. 1985, c. C-46, and the respondents were thereby authorized to determine judicial interim release pursuant to s. 515 of the *Code*. Decisions on judicial interim release impact upon the right to security of the person under s. 7 of the *Charter* and the right not to be denied reasonable bail without just cause under s. 11(*e*). Professor Friedland commented upon the importance of bail hearings in *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (1965), at p. 172:

24

À la lumière de ces raisons d'être de l'indépendance judiciaire — l'impartialité dans la prise de décisions et le maintien de notre ordre constitutionnel et de la confiance du public dans l'administration de la justice — il est clair que la protection offerte par le principe s'applique également à la charge judiciaire occupée par les intimés. Les juges de paix albertains non siégeant exerçaient des fonctions judiciaires directement liées à l'application de la loi au sein du système judiciaire. Ils étaient sur la ligne de feu du processus de justice criminelle et exerçaient maintes fonctions judiciaires ayant une incidence importante sur les droits et libertés des citoyens. Leur compétence en matière d'enquêtes sur cautionnement revêtait une importance particulière. Les juges de paix étant visés par la définition de l'expression « juge de paix » figurant à l'art. 2 du *Code criminel*, L.R.C. 1985, ch. C-46, les intimés étaient, de ce fait, autorisés à se prononcer sur des mises en liberté provisoire, conformément à l'art. 515 du *Code*. Les décisions en matière de mise en liberté provisoire ont une incidence sur le droit à la sécurité de la personne et sur le droit de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable, garantis respectivement par l'art. 7 et l'al. 11*e*) de la *Charte*. Le professeur Friedland a commenté ainsi l'importance des enquêtes sur cautionnement dans *Detention before Trial : A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (1965), p. 172 :

> The period before trial is too important to be left to guess-work and caprice. At stake in the process is the value of individual liberty. Custody during the period before trial not only affects the mental, social, and physical life of the accused and his family, but also may have a substantial impact on the result of the trial itself. The law should abhor any unnecessary deprivation of liberty and positive steps should be taken to ensure that detention before trial is kept to a minimum.

> [TRADUCTION] La période précédant le procès est trop importante pour être livrée à la conjecture et à l'arbitraire. C'est la valeur accordée à la liberté individuelle qui est alors en jeu. La détention avant le procès touche non seulement aux aspects moral, social et physique de la vie de l'accusé et de sa famille, mais peut également avoir une incidence considérable sur l'issue du procès lui-même. Le droit devrait avoir en horreur toute privation inutile de liberté, et des mesures concrètes devraient être prises pour faire en sorte que la détention avant le procès soit réduite au minimum.

The respondents were required to exercise significant judicial discretion in adjudicating on these matters.

25 The respondents also had the authority to issue search warrants, which impact upon the right to be secure from unreasonable search and seizure under s. 8 of the *Charter*. Sopinka J. described the effect of search warrants on the right to privacy in *Baron v. Canada*, [1993] 1 S.C.R. 416, at pp. 444-45:

> Physical search of private premises . . . is the greatest intrusion of privacy short of a violation of bodily integrity. . . .
>
> Warrants for the search of any premises constitute a significant intrusion on the privacy of an individual that is both upsetting and disruptive.

In that case, the Court concluded at p. 439 that the issuance of search warrants constitutionally required discretion to be exercised by a judicial officer who remains independent from the state and its agents.

26 Each of the above judicial responsibilities makes clear that the respondents played an important role in assisting the provincial and superior courts in fulfilling the judiciary's constitutional mandate. The following conclusion of Professor Mewett on Ontario's justices of the peace is equally applicable to the respondents (Mewett Report, at p. 39):

> . . . the Justice of the Peace is the very person who stands between the individual and the arbitrary exercise of power by the state or its officials. It is essential that an independent person be the one to determine whether process should issue, whether a search warrant should be granted, whether and on what terms an accused should be released on bail and so on. This is a fundamental principle . . . [that] must be zealously preserved.

It is obvious the respondents were constitutionally required to be independent in the exercise of their duties.

Les intimés devaient exercer un pouvoir discrétionnaire judiciaire important en rendant des décisions à cet égard.

Les intimés étaient également habilités à décerner des mandats de perquisition, qui ont une incidence sur le droit à la protection contre les fouilles, les perquisitions et les saisies abusives, garanti par l'art. 8 de la *Charte*. Dans l'arrêt *Baron c. Canada*, [1993] 1 R.C.S. 416, p. 444-445, le juge Sopinka a décrit ainsi l'effet des mandats de perquisition sur le droit à la protection de la vie privée :

> La perquisition dans des locaux privés [. . .] constitue la plus grave atteinte à la vie privée, abstraction faite de l'atteinte à l'intégrité physique . . .
>
> Les mandats de perquisition constituent une atteinte importante à la vie privée d'un particulier qui est à la fois contrariante et perturbatrice.

À la page 439 de cet arrêt, la Cour a conclu que, pour être conforme à la Constitution, la délivrance d'un mandat de perquisition devait relever de l'exercice d'un pouvoir discrétionnaire par un officier de justice indépendant de l'État et de ses mandataires.

Il ressort clairement de chacune des fonctions judiciaires susmentionnées que les intimés aidaient grandement les cours provinciales et supérieures à remplir le mandat constitutionnel confié au pouvoir judiciaire. La conclusion suivante du professeur Mewett concernant les juges de paix ontariens s'applique également aux intimés (rapport Mewett, p. 39) :

> [TRADUCTION] . . . le juge de paix est la personne qui s'interpose entre le citoyen et l'exercice arbitraire de pouvoir par l'État ou ses fonctionnaires. Il est essentiel que ce soit une personne indépendante qui décide s'il y a lieu de délivrer l'acte de procédure, de décerner un mandat de perquisition ou de mettre un accusé en liberté sous caution et, le cas échéant, à quelles conditions, et ainsi de suite. Il s'agit d'un principe fondamental [. . . qui] doit être jalousement préservé.

Il est évident que l'indépendance des intimés dans l'exercice de leurs fonctions était une exigence constitutionnelle.

This review leads to the substance of judicial independence and to whether the legislation at issue contravenes this principle.

B. *The Essential Conditions of Independence*

As stated, judicial independence encompasses both an individual and institutional dimension. The former relates to the independence of a particular judge, and the latter to the independence of the court to which the judge is a member. Each of these dimensions depends on objective conditions or guarantees that ensure the judiciary's freedom from influence or any interference by others: see *Valente*, *supra*, at p. 685. The requisite guarantees are security of tenure, financial security and administrative independence: see *Provincial Court Judges Reference*, *supra*, at para. 115.

The principal question in this case is whether the Legislature's removal of the respondents from office contravened their security of tenure. In assessing this issue, it must be considered that the conditions of independence are intended to protect the interests of the public. Judicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice: see *Provincial Court Judges Reference*, *supra*, at para. 9. The principle exists for the benefit of the judged, not the judges. If the conditions of independence are not "interpreted in light of the public interests they were intended to serve, there is a danger that their application will wind up hurting rather than enhancing public confidence in the courts": see *Mackin*, *supra*, at para. 116, *per* Binnie J., in his dissent.

The manner in which the essential conditions of independence may be satisfied varies in accordance with the nature of the court or tribunal and the interests at stake. See *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 83, *per* Lamer C.J., and *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, at para. 65, where the Court advocated a contextual approach to judicial independence:

Cet examen nous amène au contenu de l'indépendance judiciaire et à la question de savoir si la mesure législative en cause contrevient à ce principe. 27

B. *Les conditions essentielles de l'indépendance*

Comme nous l'avons vu, l'indépendance judiciaire comporte à la fois un aspect individuel et un aspect institutionnel. Le premier aspect concerne l'indépendance du juge lui-même, et le deuxième, l'indépendance du tribunal judiciaire où il siège. Chacun de ces aspects est tributaire de l'existence de conditions ou garanties objectives destinées à soustraire le pouvoir judiciaire à toute influence ou à toute intervention extérieure : voir *Valente*, précité, p. 685. Les garanties nécessaires sont l'inamovibilité, la sécurité financière et l'indépendance administrative : voir le *Renvoi relatif aux juges de la Cour provinciale*, précité, par. 115. 28

La principale question qui se pose en l'espèce est de savoir si la destitution des intimés par la législature portait atteinte à leur inamovibilité. En examinant cette question, il faut considérer que les conditions d'indépendance sont censées protéger les intérêts du public. L'indépendance judiciaire est non pas une fin en soi, mais un moyen de préserver notre ordre constitutionnel et de maintenir la confiance du public dans l'administration de la justice : voir le *Renvoi relatif aux juges de la Cour provinciale*, précité, par. 9. Ce principe existe au profit de la personne jugée et non des juges. Si les conditions d'indépendance ne sont pas « interprété[e]s en fonction des intérêts d'ordre public qu'[elles] visent à servir, il y a danger que leur application compromette la confiance du public dans les tribunaux, au lieu de l'accroître » : voir l'arrêt *Mackin*, précité, par. 116, le juge Binnie dissident. 29

La manière de remplir les conditions essentielles de l'indépendance varie selon la nature du tribunal judiciaire ou administratif et les intérêts en jeu. Voir les arrêts *Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3, par. 83, le juge en chef Lamer, et *Therrien (Re)*, [2001] 2 R.C.S. 3, 2001 CSC 35, par. 65, où la Cour a préconisé une approche contextuelle en matière d'indépendance judiciaire : 30

. . . although it may be desirable, it is not reasonable to apply the most elaborate and rigorous conditions of judicial independence as constitutional requirements, since s. 11(*d*) of the *Canadian Charter* may have to be applied to a variety of tribunals. These essential conditions should instead respect that diversity and be construed flexibly. Accordingly, there should be no uniform standard imposed or specific legislative formula dictated as supposedly prevailing. It will be sufficient if the essence of these conditions is respected . . . .

31 The level of security of tenure that is constitutionally required will depend upon the specific context of the court or tribunal. Superior court judges are removable only by a joint address of the House of Commons and the Senate, as stipulated by s. 99 of the *Constitution Act, 1867*. This level of tenure reflects the historical and modern position of superior courts as the core of Canada's judicial structure and as the central guardians of the rule of law. Less rigorous conditions apply in the context of provincial courts, which are creatures of statute, but which nonetheless perform significant constitutional tasks. See *Mackin*, *supra*, at para. 52:

. . . the provincial judiciary has important constitutional functions to perform, especially in terms of what it may do: ensure respect for the primacy of the Constitution under s. 52 of the *Constitution Act, 1982*; provide relief for violations of the *Charter* under s. 24; apply ss. 2 and 7 to 14 of the *Charter*; ensure compliance with the division of powers within Confederation under ss. 91 and 92 of the *Constitution Act, 1867*; and render decisions concerning the rights of the aboriginal peoples protected by s. 35(1) of the *Constitution Act, 1982*.

While the respondents have important duties, their jurisdiction is considerably more limited than that of provincial court judges. Their role in upholding the Constitution is narrower in scope. As a result, less stringent conditions are necessary in order to satisfy their security of tenure.

32 The ultimate question in each case is whether a reasonable and informed person, viewing the relevant statutory provisions in their full historical

. . . bien que ce puisse être souhaitable, il n'est pas raisonnable de poser comme exigences constitutionnelles les conditions les plus rigoureuses et élaborées de l'indépendance judiciaire parce que l'al. 11*d*) de la *Charte canadienne* est susceptible de s'appliquer à une grande diversité de tribunaux. Ces conditions essentielles devront plutôt respecter cette diversité et être interprétées de façon souple. Ainsi, il ne saurait être question d'imposer une norme uniforme ou de dicter une formule législative particulière qui devrait prévaloir. Il suffira que l'essence de ces conditions soit respectée . . .

Le degré d'inamovibilité constitutionnellement requis dépend du contexte particulier du tribunal judiciaire ou administratif. Les juges des cours supérieures ne peuvent être destitués que sur adresse conjointe de la Chambre des communes et du Sénat, comme le prévoit l'art. 99 de la *Loi constitutionnelle de 1867*. Ce degré d'inamovibilité reflète la position traditionnelle et contemporaine que les cours supérieures occupent en leur qualité de composante fondamentale de la structure judiciaire canadienne et de principales gardiennes de la primauté du droit. Des conditions moins rigoureuses s'appliquent dans le cas des cours provinciales, qui sont constituées par des lois, mais qui accomplissent néanmoins des tâches constitutionnelles importantes. Voir l'arrêt *Mackin*, précité, par. 52 :

. . . la magistrature provinciale est investie d'importantes fonctions constitutionnelles, notamment en ce qu'elle est habilitée à faire : respecter la primauté de la Constitution en application de l'art. 52 de la *Loi constitutionnelle de 1982*; accorder réparation pour violation de la *Charte*, en vertu de l'art. 24; appliquer les art. 2, et 7 à 14 de la *Charte*; veiller au respect du partage des pouvoirs au sein de la fédération en vertu des art. 91 et 92 de la *Loi constitutionnelle de 1867*; et rendre des décisions relatives aux droits des peuples autochtones protégés par le par. 35(1) de la *Loi constitutionnelle de 1982*.

Bien que les intimés soient investis de fonctions importantes, leur compétence est beaucoup plus limitée que celle des juges des cours provinciales. Leur rôle de protecteur de la Constitution a une portée plus restreinte. Par conséquent, des conditions moins rigoureuses sont nécessaires pour respecter leur inamovibilité.

Dans chaque cas, il faut se demander, en définitive, si en examinant les dispositions législatives pertinentes dans leur contexte historique complet,

context, would conclude that the court or tribunal is independent: *Valente*, *supra*, at p. 689. The perception of independence will be upheld if the essence of each condition of independence is met. The essence of security of tenure is that members of a tribunal be free from arbitrary or discretionary removal from office. See *Valente*, *supra*, at p. 698:

> The essence of security of tenure for purposes of s. 11(*d*) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.

In my view, a removal from office that is reasonably intended to further the interests that underlie the principle of judicial independence is not arbitrary. Those interests, as noted above, are public confidence in the administration of justice, and the maintenance of a strong and independent judiciary that is able to uphold the rule of law and the values of our Constitution. If the removal from office is necessary in the promotion of these interests, then it cannot be considered arbitrary, and would not undermine the perception of independence in the mind of a reasonable and informed person.

This Court has previously held that a legislative structure that permitted the removal of a judicial officer without cause by the Executive will generally be considered arbitrary: see *Valente*, *supra*, at p. 698; *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 285; and *Matsqui*, *supra*, at para. 101. That issue does not arise in this appeal. Neither party submitted that the legislative guarantees against Executive interference were insufficient.

In this case, the question is whether the removal of the respondents from office by the Legislature is arbitrary. With respect to the contrary view of the Court of Appeal, the requirement of cause cannot be rigidly applied in this context without consideration of the purpose of judicial independence. If the removal of the respondents from office reflects a good faith and considered decision of the Legislature intended to advance the public interests that judicial independence is meant to protect, then

une personne raisonnable et renseignée conclurait que le tribunal judiciaire ou administratif en question est indépendant : *Valente*, précité, p. 689. Il y a perception d'indépendance lorsque chaque condition est remplie pour l'essentiel. L'inamovibilité vise essentiellement à empêcher que les membres d'un tribunal fassent l'objet d'une destitution arbitraire ou discrétionnaire. Voir l'arrêt *Valente*, précité, p. 698 :

> L'essence de l'inamovibilité pour les fins de l'al. 11*d*), que ce soit jusqu'à l'âge de la retraite, pour une durée fixe, ou pour une charge *ad hoc*, est que la charge soit à l'abri de toute intervention discrétionnaire ou arbitraire de la part de l'exécutif ou de l'autorité responsable des nominations.

33 À mon avis, la destitution raisonnablement conçue pour servir les intérêts qui sous-tendent le principe de l'indépendance judiciaire n'est pas arbitraire. Comme nous l'avons vu, ces intérêts sont la confiance du public dans l'administration de la justice et le maintien d'un pouvoir judiciaire fort et indépendant capable de faire respecter la primauté du droit et les valeurs consacrées par notre Constitution. La destitution nécessaire pour servir ces intérêts ne peut pas être qualifiée d'arbitraire et ne mine pas la perception d'indépendance qu'aurait une personne raisonnable et renseignée.

34 Notre Cour a déjà statué qu'un régime législatif qui permet à l'exécutif de destituer sans motif suffisant un officier de justice est généralement jugé arbitraire : voir *Valente*, précité, p. 698; *R. c. Généreux*, [1992] 1 R.C.S. 259, p. 285; *Matsqui*, précité, par. 101. Cette question ne se pose pas dans le présent pourvoi. Aucune des parties n'a plaidé l'insuffisance des garanties législatives contre l'ingérence de l'exécutif.

35 En l'espèce, il s'agit de savoir si la destitution des intimés par la législature est arbitraire. En ce qui concerne l'opinion contraire exprimée par la Cour d'appel, on ne saurait, dans le présent contexte, appliquer rigoureusement l'exigence d'un motif suffisant sans tenir compte de l'objet de l'indépendance judiciaire. Si la destitution des intimés reflète une décision que la législature a prise de bonne foi et de façon réfléchie dans le but de promouvoir les intérêts du public que l'indépendance judiciaire est

the prevention of this removal will serve only to frustrate these interests.

36 Tenure cannot be viewed as an absolute. If an absolute, necessary reforms would be almost impossible. Conversely, to accept the need for reform in required circumstances is to acknowledge that individual persons may be affected. A legislated change resulting in a removal from office undertaken upon the advice of an independent Judicial Council is justified if it is necessary to accommodate significant reforms that are considered integral to public confidence in the administration of justice. Legislative action of this kind is neither arbitrary nor discretionary. In contrast, removal without cause by the Executive could not be justified on this basis, and would almost certainly be arbitrary.

37 In light of the circumstances that led to the present reforms, it is evident that a reasonable and informed person would perceive the amendments to strengthen, rather than diminish, the independence and qualifications of Alberta's justices of the peace. It is evident that the Legislature concluded that the positive impact of the reforms on the interests that underlie judicial independence outweighs any negative impact of the respondents' removal from office. Their removal was necessary to give effect to those reforms. As such, the respondents' removal cannot be said to be arbitrary, and does not violate the principle of judicial independence.

38 This conclusion is reached on several considerations. First, it is uncontested that the provisions at issue were enacted to serve the public good. There is no suggestion that the amendments were a disguised attempt to remove any particular justices of the peace from office. To the contrary, the particular qualifications were set by an independent Judicial Council. The reforms were designed to alleviate institutional impediments to the independence and qualifications of justices of the peace. In *Valente*, *supra*, this Court determined that the involvement of a provincial Judicial Council in tenure issues went a considerable distance to secure judicial independence

censée protéger, alors le fait d'empêcher cette destitution ne contribue qu'à contrecarrer ces intérêts.

L'inamovibilité ne saurait être considérée comme absolue. Si elle était absolue, il serait quasi impossible de mettre en œuvre des réformes nécessaires. À l'inverse, reconnaître le besoin de réforme lorsque cela est indiqué revient à reconnaître que des particuliers peuvent être touchés. Une modification apportée par voie législative, qui entraîne une destitution sur avis d'un conseil de la magistrature indépendant, est justifiée si elle est nécessaire pour mettre en œuvre d'importantes réformes jugées essentielles au maintien de la confiance du public dans l'administration de la justice. Une telle mesure législative n'est ni arbitraire ni discrétionnaire. Par contre, une destitution sans motif suffisant ordonnée par l'exécutif ne saurait être justifiée par ce motif et serait presque certainement arbitraire.

Eu égard aux circonstances à l'origine des réformes en cause dans la présente affaire, il est évident qu'une personne raisonnable et renseignée considérerait que les modifications renforcent l'indépendance des juges de paix albertains et relèvent leurs qualifications, au lieu de les diminuer. Il est évident que la législature a conclu que l'incidence positive des réformes sur les intérêts qui sous-tendent l'indépendance judiciaire l'emporte sur l'incidence négative de la destitution des intimés. Leur destitution était nécessaire à la mise en œuvre de ces réformes. Par conséquent, elle ne saurait être qualifiée d'arbitraire et ne contrevient pas au principe de l'indépendance judiciaire.

Plusieurs considérations mènent à cette conclusion. Premièrement, on ne conteste pas que les dispositions en cause ont été adoptées dans l'intérêt du public. Rien n'indique que les modifications constituaient une tentative déguisée de destituer des juges de paix en particulier. Au contraire, les qualifications requises étaient fixées par un conseil de la magistrature indépendant. Les réformes avaient pour but de pallier les obstacles institutionnels à l'indépendance et aux qualifications des juges de paix. Dans l'arrêt *Valente*, précité, p. 703-704, la Cour a statué que le rôle joué en matière d'inamovibilité par un conseil de la magistrature

which, in turn, removed any reasonably held concerns that this was an arbitrary or discretionary measure: pp. 703-4. The Legislature's good faith removes the possibility of a chilling effect on presiding justices of the peace under the new regime.

Second, the need to improve both the independence and competence of Alberta's justices of the peace was amply demonstrated by the recommendations of the independent commissions mentioned above. As the chambers judge observed, "the proposed changes have great merit. The need for change has been demonstrated several times over" (para. 54). The substance of the legislation reflected the recommendations of the various reports, and aligns closely with the conclusions of the Manitoba Report (1991), the most recent Canadian study available.

The Manitoba Report suggested a classification of the office into three categories, with the duties of justices of the peace in each category stipulated by statute or regulations (p. 52). It recommended that qualifications for office be left to an independent committee chaired by the Chief Judge of the Provincial Court, and that individuals with inherent conflicts of interest be barred from office (p. 59). Finally, it suggested that in order to implement the reforms in a timely fashion, incumbents that failed to meet the new qualifications be removed from office, but in a manner that ensured the least possible disruption to their career (p. 76).

Alberta's legislative amendments follow all of these recommendations. Each change is clearly designed to improve the independence and qualifications of Alberta's justices of the peace, with consideration given to the disruption of the careers of those removed from previous duties.

(1) Reclassification of Duties

Alberta's amendments divide justices of the peace into the three categories of sitting, presiding,

provincial avait contribué de façon importante à assurer l'indépendance judiciaire qui, à son tour, dissipait toute crainte raisonnable que la mesure en cause ait été arbitraire ou discrétionnaire. La bonne foi de la législature élimine tout risque d'effet paralysant sur les juges de paix qui président en vertu du nouveau régime.

39 Deuxièmement, les recommandations des commissions indépendantes susmentionnées ont amplement démontré la nécessité d'accroître l'indépendance et la compétence des juges de paix albertains. Comme le juge en chambre l'a noté, [TRADUCTION] « les changements proposés sont très bien fondés. Le besoin de changement a été démontré à plusieurs reprises » (par. 54). La mesure législative reflète, pour l'essentiel, les recommandations des divers rapports et suit de près les conclusions du rapport manitobain (1991) qui est l'étude canadienne la plus récente en la matière.

40 Le rapport manitobain proposait que la charge soit divisée en trois catégories, les fonctions des juges de paix de chaque catégorie devant être édictées par voie législative ou réglementaire (p. 52). Il recommandait que les qualifications requises pour occuper la charge en question soient fixées par un comité indépendant présidé par le juge en chef de la Cour provinciale, et qu'il soit interdit aux personnes en situation de conflit d'intérêts inhérent d'occuper cette charge (p. 59). Finalement, il était recommandé que, pour assurer la mise en œuvre en temps utile des réformes, les titulaires ne satisfaisant pas aux nouvelles qualifications requises soient destitués, mais de façon à bouleverser le moins possible leur carrière (p. 76).

41 Les modifications législatives apportées par l'Alberta suivent toutes ces recommandations. Chaque modification est clairement destinée à accroître l'indépendance des juges de paix albertains et à relever leurs qualifications, tout en tenant compte du bouleversement causé à la carrière des personnes destituées de leurs fonctions.

(1) Reclassification des fonctions

42 Les modifications apportées en Alberta répartissent les juges de paix en trois catégories, à savoir

and non-presiding justices. This permits a precise delineation by statute and regulations of the jurisdiction of each office. In the past, the jurisdiction of each non-sitting justice of the peace was determined by administrative directive in the form of "letters of authority" from the Chief Judge of the Provincial Court. As a result of the varying qualifications of the non-sitting justices, and the different duties required of them, the system was unworkable. Since there were no eligibility requirements for office, there was little assurance that justices were qualified for the particular duties assigned to them. The amendments allow for the qualifications of each justice to be appropriately tailored to the scope of his or her duties.

43 As well, prior to the amendments there was a danger that the perception of independence would be fettered by the significant administrative discretion vested in the supervisory role of the Chief Judge. See the Manitoba Report, at p. 51:

> Limitation by administrative directive also carries the disadvantage that it may be perceived as a means to carry out a back-door disciplinary process, a perception that should be eliminated by statutory limits which can be regulated and administered publicly.

The clarification of the scope of each officer's jurisdiction reduces this administrative discretion and alleviates the danger that the perception of independence would be undermined in this regard.

(2) Removal of Conflicts of Interest

44 The amendments bar persons with inherent conflicts of interest from appointment to office as sitting or presiding justices of the peace: s. 2.1(5). These persons include government employees, law enforcement officers, prosecutors, and prison wardens. At the time of the amendments, several hundred non-sitting justices of the peace were employees of the Department of Justice. The employment of judicial officers by the executive branch of government was a significant taint on the perception

les juges de paix siégeant, les juges de paix présidant et les juges de paix non présidant. Cette mesure permet de définir exactement — par voie législative ou réglementaire — la compétence rattachée à chaque charge. Auparavant, la compétence de chaque juge de paix non siégeant était définie au moyen d'une directive administrative sous forme de [TRADUCTION] « lettres d'habilitation » (*letters of authority*) du juge en chef de la Cour provinciale. En raison de la diversité des qualifications et des fonctions des juges de paix non siégeant, le système posait des problèmes insurmontables. Étant donné qu'il n'existait aucune condition d'admissibilité à la charge, il était loin d'être assuré que les juges de paix étaient qualifiés pour exercer les fonctions particulières qui leur étaient assignées. Les modifications permettent de bien adapter les qualifications de chaque juge de paix aux fonctions de sa charge.

De même, avant les modifications, la perception d'indépendance risquait d'être compromise en raison de l'important pouvoir discrétionnaire administratif rattaché au rôle de surveillance du juge en chef. Voir le rapport manitobain, p. 51 :

> [TRADUCTION] La restriction par voie de directive administrative est également désavantageuse en ce sens qu'elle risque d'être perçue comme un moyen détourné de mettre en œuvre un processus disciplinaire, perception qui devrait être éliminée par des restrictions légales pouvant être régies et appliquées publiquement.

La clarification de l'étendue de la compétence de chaque juge de paix contribue à réduire ce pouvoir discrétionnaire administratif et le risque que la perception d'indépendance soit minée à cet égard.

(2) Élimination des conflits d'intérêts

Les modifications empêchent de nommer juge de paix siégeant ou juge de paix présidant les personnes en situation de conflit d'intérêts (par. 2.1(5)). Ces personnes sont notamment les employés du gouvernement, les personnes chargées d'appliquer la loi, les procureurs et les gardiens de prison. À l'époque où les modifications ont été apportées, plusieurs centaines de juges de paix non siégeant étaient des employés du ministère de la Justice. L'embauche d'officiers de justice par le pouvoir exécutif avait

of the office's independence. Their removal from judicial office alleviates that.

(3) Qualifications Set by an Independent Judicial Council

Historically, there was a widespread belief that appointment to office was solely on political grounds. The McRuer Commission (1968) described the situation in Ontario as a "mockery of judicial office [that is] bound to depreciate respect for law and order in the community" (p. 518). It is hoped that patronage in the appointment process has been at least lessened if not eradicated since the time of that report. Unquestionably, the perception that appointment to judicial office is political in nature undermines public confidence in the administration of justice.

One step towards ameliorating this perception was to require that candidates for office meet qualifications decided upon by an independent committee that is divorced from political influence. In this appeal the Alberta amendments stipulated that no person may be appointed as a sitting or presiding justice of the peace unless he or she meets qualifications determined by the Judicial Council: s. 2.1(1). The setting of qualifications for office by this independent committee counters the perception of patronage in the appointment process.

The delegation of this task to an independent Judicial Council also ensures that appropriate qualifications are set by a body that is familiar with the duties demanded of justices of the peace and the level of education and training required to discharge those duties. The Manitoba Report observed at p. 58:

> . . . we are of the opinion that the Committee itself should determine the level of educational preparation to be required. This is especially appropriate, given that those charged with the training and supervision of justices of the peace are represented on the Committee.

pour effet de compromettre sérieusement la perception d'indépendance relative à leur charge. Le fait de destituer ces personnes de leur charge d'officier de justice permet de pallier cet effet.

(3) Qualifications fixées par un conseil de la magistrature indépendant

45 On a longtemps cru que les nominations en question reposaient uniquement sur des motifs politiques. La commission McRuer (1968) a qualifié la situation en Ontario de [TRADUCTION] « simulacre de charge judiciaire [qui ne peut] que dévaloriser le respect de la loi et de l'ordre dans la collectivité » (p. 518). Il est à espérer que, à défaut d'avoir été éliminé, le favoritisme dans le processus de nomination a au moins été réduit depuis ce rapport. Il est incontestable que la perception selon laquelle la nomination à une charge judiciaire est de nature politique mine la confiance du public dans l'administration de la justice.

46 Une mesure destinée à améliorer cette perception consistait à exiger que les candidats et candidates aient les qualifications fixées par un comité indépendant échappant à toute influence politique. Dans le présent pourvoi, les modifications apportées en Alberta prévoyaient que seule la personne ayant les qualifications fixées par le conseil de la magistrature pouvait être nommée juge de paix siégeant ou juge de paix présidant (par. 2.1(1)). L'établissement, par ce comité indépendant, des qualifications requises pour occuper la charge remédie à la perception de favoritisme dans le processus de nomination.

47 La délégation de cette tâche à un conseil de la magistrature indépendant garantit également que les qualifications pertinentes sont fixées par un organisme qui connaît bien les fonctions des juges de paix et le niveau d'instruction et de formation nécessaire pour les exercer. Le rapport manitobain fait remarquer ceci, à la p. 58 :

> [TRADUCTION] . . . nous sommes d'avis que le comité lui-même devrait fixer le niveau d'instruction requis. Cela est particulièrement pertinent, étant donné que les responsables de la formation et de la surveillance des juges de paix sont représentés au comité.

The Judicial Council unanimously agreed that a minimum requirement for appointment is membership in good standing of the Law Society of Alberta with at least five years related experience at the bar.

Le conseil de la magistrature a convenu à l'unanimité que, pour être nommé, il fallait au moins être membre en règle du barreau de l'Alberta et avoir au moins cinq ans d'expérience pertinente à titre d'avocat.

48 These eligibility criteria are reasonable in light of the judicial functions of sitting and presiding justices of the peace and their significant impact on the rights and liberties of individuals. The Doob Report noted that 84 percent of justices of the peace surveyed in Ontario and British Columbia thought "it would be helpful to justices to have some formal training in law before being appointed" (p. 64). It is a sensible conclusion that minimum requirements of education and experience for justices of the peace will tend to improve the quality of legal decisions. Increased training also reduces the reliance of individual officers on the advice of others, thereby increasing their independence in decision making.

Ces critères d'admissibilité sont raisonnables compte tenu des fonctions judiciaires des juges de paix siégeant et des juges de paix présidant et de l'incidence importante qu'elles ont sur les droits et libertés des particuliers. Le rapport Doob a révélé que 84 pour 100 des juges de paix interrogés en Ontario et en Colombie-Britannique pensaient [TRADUCTION] « qu'il serait utile que les juges de paix nommés aient quelque formation en droit » (p. 64). Il est raisonnable de conclure que les exigences minimales en matière d'instruction et d'expérience des juges de paix tendront à améliorer la qualité des décisions judiciaires. En étant mieux formé, le juge de paix cherchera moins à consulter d'autres personnes, ce qui aura pour effet d'accroître son indépendance sur le plan décisionnel.

(4) Application of the Reforms to the Respondents

(4) Application des réformes aux intimés

49 The respondents do not dispute the merits of the above reforms. They argue, however, that the amendments should apply only to new appointments to office. I disagree. As many of the reports observed, once it is established that the office is in need of significant structural reform, a requirement of "grandfathering" incumbents serves only to delay that reform. See the Manitoba Report, at pp. 75-76:

Les intimés ne contestent pas le bien-fondé des réformes susmentionnées. Cependant, ils font valoir que les modifications ne devraient s'appliquer qu'aux nouvelles nominations. Je ne suis pas de cet avis. Comme un bon nombre des rapports l'ont souligné, dès qu'il est établi que la charge a besoin d'une réforme structurelle importante, l'établissement d'une disposition maintenant les « droits acquis » des titulaires de la charge ne contribue qu'à retarder la mise en œuvre de cette réforme. Voir le rapport manitobain, p. 75-76 :

> Because justices of the peace and magistrates may hold office for many years, a solution which did not affect those presently appointed would have no appreciable impact for a very long time.

> [TRADUCTION] Étant donné que les juges de paix et les magistrats peuvent rester en fonction pendant de nombreuses années, une solution qui ne s'appliquerait pas à ceux qui sont déjà nommés n'aurait aucune incidence appréciable pendant longtemps.

Reforms in Ontario, Saskatchewan, and the Northwest Territories did not include provisions to grandfather incumbents. In this appeal, the requirement of removal only for cause would mandate that, in addition to the respondents, the 190 fee justices and 242 staff justices would hold office until

Les réformes adoptées en Ontario, en Saskatchewan et dans les Territoires du Nord-Ouest ne comportaient aucune disposition maintenant les droits acquis des titulaires de la charge. En l'espèce, l'exigence que la destitution soit fondée sur un motif suffisant commanderait que, outre les intimés, les

retirement. This would preclude any meaningful implementation of reforms for many years. Such delay, in the face of a demonstrated need for change, does not serve the interests of the public.

Moreover, public confidence in the administration of justice could be harmed by retaining those individuals who do not meet the qualifications for eligibility that an independent Judicial Council, with intimate knowledge of the duties of office, have determined to be the minimum necessary. Regardless of whether the respondents are in fact qualified for office, their failure to meet these minimum educational criteria could undermine the perception of their qualifications in the minds of the individuals who come before them.

Finally, the manner in which the reforms were implemented lessened as much as possible the legislation's adverse impact upon the respondents. The respondents were offered appointment as non-presiding justices of the peace. This position comprises the administrative functions that they had performed as non-sitting justices of the peace. Although the position lacks security of tenure, it entitles the respondents to receive the equivalent pay and benefits as they did in their previous office.

(5) Conclusion

In light of these factors, I conclude that a reasonable and informed person would perceive the legislative amendments to strengthen the qualifications and independence of Alberta's justices of the peace. The reforms are the result of the Legislature's considered and thorough judgment that changes to the office are necessary to serve the public good by advancing the underlying interests of judicial independence. They strengthen the ability of justices of the peace to uphold the Constitution and adjudicate disputes, and improve public confidence in the administration of justice. The removal of the respondents from their positions is not arbitrary or discretionary, and does

190 juges de paix payés sur honoraires et les 242 juges de paix salariés restent en fonction jusqu'à leur retraite. Il s'ensuivrait que toute mise en œuvre significative des réformes serait impossible pendant plusieurs années. Compte tenu du besoin démontré de changement, un tel délai ne sert pas les intérêts du public.

50 De plus, le maintien en poste de personnes ne satisfaisant pas aux conditions minimales d'admissibilité fixées par un conseil de la magistrature indépendant, qui a une connaissance approfondie des fonctions de la charge, pourrait avoir pour effet d'ébranler la confiance du public dans l'administration de la justice. Indépendamment de la question de savoir si les intimés sont effectivement qualifiés pour occuper leur charge, leur défaut de satisfaire aux conditions minimales en matière d'instruction pourrait miner la perception qu'ont de leurs qualifications les personnes qui comparaissent devant eux.

51 Enfin, la manière dont les réformes ont été mises en œuvre a réduit au minimum l'incidence négative de la mesure législative sur les intimés. Ceux-ci se sont vu offrir une charge de juge de paix non présidant, laquelle charge comporte les fonctions administratives qu'ils exerçaient en leur qualité de juges de paix non siégeant. Bien que ses titulaires ne bénéficient pas de l'inamovibilité, la charge de juge de paix non présidant permet aux intimés de recevoir la même rémunération et les mêmes avantages que leur procurait leur charge antérieure.

(5) Conclusion

52 Compte tenu de ces facteurs, je conclus qu'une personne raisonnable et renseignée considérerait que les modifications législatives renforcent l'indépendance des juges de paix albertains et relèvent leurs qualifications. Les réformes sont le fruit de la décision mûrement réfléchie de la législature, selon laquelle il est nécessaire, dans l'intérêt du public, de modifier la charge par la promotion des intérêts qui sous-tendent l'indépendance judiciaire. Elles renforcent la capacité des juges de paix de défendre la Constitution et de trancher des différends, et elles augmentent la confiance du public dans l'administration de la justice. La destitution des intimés n'est

not undermine the reasonable and informed person's perception of independence.

53 I respectfully disagree with the conclusion reached by the courts below. In my view, s. 2.4(8) does not contravene the principle of judicial independence as it applies to the respondents.

C. *Section 1 of the Charter*

54 In light of the conclusion that s. 11(*d*) of the *Charter* is not engaged in this case, it is unnecessary to consider whether the Act is justified under s. 1.

VI. Disposition

55 Accordingly, I would allow the appeal without costs in this Court and, in light of the unique circumstances of this case, would not interfere with the costs awarded in the courts below.

56 The constitutional questions are answered as follows:

Answer to question 1: No.

Answer to question 2: It is unnecessary to answer this question.

Appeal allowed.

Solicitor for the appellant: Alberta Department of Justice, Edmonton.

Solicitors for the respondents: Code Hunter, Calgary.

Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

ni arbitraire ni discrétionnaire, et ne mine pas la perception d'indépendance qu'aurait une personne raisonnable et renseignée.

En toute déférence, je ne suis pas d'accord avec la conclusion des cours d'instance inférieure. J'estime que le par. 2.4(8) ne contrevient pas au principe de l'indépendance judiciaire applicable aux intimés.

C. *L'article premier de la Charte*

Compte tenu de la conclusion que l'al. 11*d*) de la *Charte* n'est pas en jeu en l'espèce, il n'est pas nécessaire de se demander si la Loi est justifiée au regard de l'article premier.

VI. Dispositif

En conséquence je suis d'avis d'accueillir le pourvoi sans dépens dans notre Cour et, compte tenu des circonstances exceptionnelles de la présente affaire, je suis d'avis de ne pas modifier les dépens accordés par les cours d'instance inférieure.

Les réponses données aux questions constitutionnelles sont les suivantes :

Réponse à la première question : Non.

Réponse à la deuxième question : Il n'est pas nécessaire de répondre à cette question.

Pourvoi accueilli.

Procureur de l'appelante : Ministère de la Justice de l'Alberta, Edmonton.

Procureurs des intimés : Code Hunter, Calgary.

Procureur de l'intervenant le procureur général du Canada : Sous-procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Québec : Ministère de la Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of the Attorney General, Victoria.

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitors for the intervener the Association of Justices of the Peace of Ontario: Blake, Cassels & Graydon, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Ministère du Procureur général, Victoria.

Procureur de l'intervenant le procureur général de la Saskatchewan : Sous-procureur général de la Saskatchewan, Regina.

Procureurs de l'intervenante Association of Justices of the Peace of Ontario : Blake, Cassels & Graydon, Toronto.

Anita Endean, as representative plaintiff *Appellant*

v.

Her Majesty The Queen in Right of the Province of British Columbia and Attorney General of Canada *Respondents*

- and -

Dianna Louise Parsons, deceased, by her Estate Administrator, William John Forsyth, Michael Herbert Cruickshanks, David Tull, Martin Henry Griffen, Anna Kardish, Elsie Kotyk, Executrix of the Estate of Harry Kotyk, deceased, Elsie Kotyk, personally, and Fund Counsel for Ontario *Appellants*

v.

Her Majesty The Queen in Right of Ontario, Attorney General of Canada, Canadian Red Cross Society, Her Majesty The Queen in Right of Alberta, Her Majesty The Queen in Right of Saskatchewan, Her Majesty The Queen in Right of Manitoba, Her Majesty The Queen in Right of New Brunswick, Her Majesty The Queen in Right of Prince Edward Island, Her Majesty The Queen in Right of Nova Scotia, Her Majesty The Queen in Right of Newfoundland and Labrador, Government of the Northwest Territories, Government of Nunavut and Government of the Yukon Territory *Respondents*

and

Attorney General of Quebec *Intervener*

and

Anita Endean, en sa qualité de représentante des demandeurs *Appelante*

c.

Sa Majesté la Reine du chef de la province de la Colombie-Britannique et procureur général du Canada *Intimés*

- et -

Dianna Louise Parsons, décédée, par l'administrateur de sa succession, William John Forsyth, Michael Herbert Cruickshanks, David Tull, Martin Henry Griffen, Anna Kardish, Elsie Kotyk, exécutrice de la succession de Harry Kotyk, décédé, Elsie Kotyk, personnellement, et Conseiller juridique du Fonds pour l'Ontario *Appelants*

c.

Sa Majesté la Reine du chef de l'Ontario, procureur général du Canada, Société canadienne de la Croix-Rouge, Sa Majesté la Reine du chef de l'Alberta, Sa Majesté la Reine du chef de la Saskatchewan, Sa Majesté la Reine du chef du Manitoba, Sa Majesté la Reine du chef du Nouveau-Brunswick, Sa Majesté la Reine du chef de l'Île-du-Prince-Édouard, Sa Majesté la Reine du chef de la Nouvelle-Écosse, Sa Majesté la Reine du chef de Terre-Neuve-et-Labrador, Gouvernement des Territoires du Nord-Ouest, Gouvernement du Nunavut et Gouvernement du Territoire du Yukon *Intimés*

et

Procureure générale du Québec *Intervenante*

et

Her Majesty The Queen in Right of Ontario *Appellant on cross-appeal*

v.

Dianna Louise Parsons, deceased, by her Estate Administrator, William John Forsyth, Michael Herbert Cruickshanks, David Tull, Martin Henry Griffen, Anna Kardish, Elsie Kotyk, Executrix of the Estate of Harry Kotyk, deceased, Elsie Kotyk, personally, Attorney General of Canada and Canadian Red Cross Society *Respondents on cross-appeal*

Indexed as: Endean *v.* British Columbia

2016 SCC 42

File Nos.: 35843, 36456.

2016: May 19; 2016: October 20.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURTS OF APPEAL FOR BRITISH COLUMBIA AND ONTARIO

Courts — Jurisdiction — Class actions — Hearings outside superior court's home province — Superior court judges in three provinces supervising implementation of pan-national class action settlement — Motions relating to settlement brought before supervisory judges — Class counsel proposing that supervisory judges sit together in fourth province to hear motions — Parties agreeing that judges have discretionary power to sit together outside their home provinces, but disagreeing on source of power and conditions under which it may be exercised — Whether source of authority is statutory or an aspect of inherent powers of superior court — Whether video link to open courtroom in judges' home jurisdiction is condition for exercise of authority — Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 12 — Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 12.

Sa Majesté la Reine du chef de l'Ontario *Appelante au pourvoi incident*

c.

Dianna Louise Parsons, décédée, par l'administrateur de sa succession, William John Forsyth, Michael Herbert Cruickshanks, David Tull, Martin Henry Griffen, Anna Kardish, Elsie Kotyk, exécutrice de la succession de Harry Kotyk, décédé, Elsie Kotyk, personnellement, procureur général du Canada et Société canadienne de la Croix-Rouge *Intimés au pourvoi incident*

Répertorié : Endean *c.* Colombie-Britannique

2016 CSC 42

N[os] du greffe : 35843, 36456.

2016 : 19 mai; 2016 : 20 octobre.

Présents : La juge en chef McLachlin et les juges Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté et Brown.

EN APPEL DES COURS D'APPEL DE LA COLOMBIE-BRITANNIQUE ET DE L'ONTARIO

Tribunaux — Compétence — Recours collectifs — Audiences de cours supérieures tenues à l'extérieur de leur province de rattachement — Juges de la cour supérieure de trois provinces chargés de superviser la mise en œuvre d'une convention pancanadienne de règlement de recours collectifs — Juges superviseurs saisis de requêtes relatives à la convention de règlement — Conseillers juridiques proposant que les juges superviseurs siègent ensemble dans une quatrième province pour trancher les requêtes — Accord des parties sur le fait que les juges ont le pouvoir discrétionnaire de siéger ensemble à l'extérieur de leur province de rattachement, mais non sur la source et les modalités d'exercice de ce pouvoir — S'agit-il d'un pouvoir d'origine législative ou d'un volet de la compétence inhérente des cours supérieures? — L'exercice de ce pouvoir nécessite-t-il un lien vidéo entre la salle d'audience où se trouve le juge et une salle d'audience accessible au public dans la province de rattachement du juge? — Loi de 1992 sur les recours collectifs, L.O. 1992, c. 6, art. 12 — Class Proceedings Act, R.S.B.C. 1996, c. 50, art. 12.

The superior courts of British Columbia, Quebec and Ontario certified concurrent class action proceedings on behalf of individuals infected with hepatitis C by the Canadian blood supply between 1986 and 1990. The British Columbia and Quebec class actions included residents of those provinces, while the Ontario class action included all other persons in Canada. The parties reached a pan-Canadian settlement agreement in 1999, which assigned a supervisory role to the British Columbia, Quebec and Ontario superior courts and provided that decisions of those courts only took effect if they were materially identical.

In 2012, class counsel filed motions before the supervisory judges relating to the settlement agreement and proposed that the motions be heard by the three judges sitting together in one location. British Columbia, Quebec and Ontario opposed the proposal on the basis that the judges did not have the jurisdiction to conduct hearings outside their home province. Motions for directions were brought in each jurisdiction to resolve the objection. All three motions judges concluded that it was permissible for the superior court judges to sit in a province other than their respective home province with their judicial counterparts to hear the settlement agreement motions. Only Ontario and British Columbia appealed. The Ontario Court of Appeal agreed with the motions judge that the basis for the power to conduct a hearing outside the province was the superior court's inherent jurisdiction, but concluded that a video link was required between the out-of-province courtroom and an Ontario courtroom. The British Columbia Court of Appeal found that the common law prohibited superior court judges from sitting outside the province, but that it was permissible for a judge who was not physically present in the province to conduct a hearing taking place in the province by telephone, video conference or other communication medium.

The representative plaintiffs appeal to this Court and Ontario cross-appeals. The parties now agree that the superior court judges have a discretionary power to sit together outside their home provinces to hear a motion without oral evidence in the context of a pan-Canadian settlement agreement. However, there is no agreement

Les cours supérieures de la Colombie-Britannique, du Québec et de l'Ontario ont autorisé l'introduction de recours collectifs concomitants au nom de personnes ayant été infectées par l'hépatite C par suite de transfusions sanguines reçues au Canada entre 1986 et 1990. Les recours collectifs intentés en Colombie-Britannique et au Québec touchaient des résidents de ces provinces, tandis que celui intenté en Ontario concernait tous les autres Canadiens visés. En 1999, les parties ont conclu une convention de règlement pancanadienne qui attribuait un rôle de supervision aux cours supérieures de la Colombie-Britannique, du Québec et de l'Ontario, et qui prévoyait que les décisions de ces tribunaux n'entraient en vigueur que s'il n'existait pas de différences importantes entre elles.

En 2012, les conseillers juridiques agissant dans le cadre des recours collectifs ont saisi les juges superviseurs de requêtes relatives à la convention de règlement et ont proposé qu'elles soient instruites par les trois juges siégeant à un seul endroit. La Colombie-Britannique, le Québec et l'Ontario ont contesté la proposition au motif que les juges n'étaient pas compétents pour tenir une audience à l'extérieur de leur province de rattachement. Des requêtes visant à obtenir des directives ont été présentées dans chaque province afin que cette objection soit tranchée. Les trois juges saisis des requêtes ont conclu que les juges des cours supérieures pouvaient siéger avec leurs homologues dans une province autre que leur province respective de rattachement pour instruire les requêtes portant sur la convention de règlement. Seuls l'Ontario et la Colombie-Britannique ont fait appel de cette décision. La Cour d'appel de l'Ontario a souscrit à la décision du juge des requêtes suivant laquelle le pouvoir de tenir une audience à l'extérieur de la province est fondé sur la compétence inhérente d'une cour supérieure, mais elle a conclu qu'il est nécessaire d'établir un lien vidéo entre la salle d'audience située à l'extérieur de la province et une salle d'audience située en Ontario. La Cour d'appel de la Colombie-Britannique a conclu que la common law interdit aux juges des cours supérieures de siéger à l'extérieur de la province, mais qu'un juge qui n'est pas physiquement présent dans la province peut présider une audience se déroulant dans la province par téléphone, par vidéoconférence ou par tout autre moyen de communication.

Les représentants des demandeurs se pourvoient devant la Cour et l'Ontario forme un pourvoi incident. Les parties sont maintenant d'accord pour dire que les juges de la cour supérieure ont le pouvoir discrétionnaire de siéger ensemble à l'extérieur de leur province de rattachement respective pour instruire, sans preuve orale, une

concerning the source of this power and the conditions under which it may be exercised.

Held: The appeals should be allowed and the cross-appeal should be dismissed.

Per McLachlin C.J. and Abella, Cromwell, Moldaver, Gascon, Côté and Brown JJ.: In pan-national class action proceedings over which the superior court has subject-matter and personal jurisdiction, a judge of that court has the discretion to hold a hearing outside his or her territory in conjunction with other judges managing related class actions, provided that the judge will not have to resort to the court's coercive powers in order to convene or conduct the hearing and the hearing is not contrary to the law of the place in which it will be held.

To determine the source of their discretionary power to sit outside their home jurisdiction, courts ought to look first to their statutory powers before considering their inherent jurisdiction. Given the broad and loosely defined nature of the inherent powers of superior courts, they should be exercised sparingly and with caution. In Ontario and British Columbia, superior court judges have the discretionary statutory power under s. 12 of the Ontario *Class Proceedings Act, 1992* and s. 12 of the British Columbia *Class Proceedings Act* (the "Acts") to sit outside their home provinces. A broad interpretation of these statutory powers, which confirms and reflects the inherent authority of judges to control procedure, helps to fulfil the purpose of class actions and to ensure that procedural innovations in aid of access to justice will not be stymied by unduly technical or time-bound understandings of the scope of the class action judge's authority. There are no constitutional, statutory or common law limitations that restrict the scope of the broad and general language of these provisions and that prevent a judge from sitting outside his or her province for the purposes in issue in these cases.

Section 12 of the Acts should be understood as both confirming and reflecting the inherent jurisdiction of the superior courts to govern their own processes. Thus, in common law jurisdictions where comparable provisions do not exist, the analysis of the courts' inherent jurisdiction would lead to the same result, subject to any limitations on

requête portant sur une convention de règlement pancanadienne. Elles ne s'entendent toutefois pas sur la source et les éventuelles modalités d'exercice de ce pouvoir.

Arrêts : Les pourvois sont accueillis et le pourvoi incident est rejeté.

La juge en chef McLachlin et les juges Abella, Cromwell, Moldaver, Gascon, Côté et Brown : Dans le cadre de recours collectifs pancanadiens sur lesquels une cour supérieure a compétence *ratione materiæ* et *ratione personæ*, un juge de cette cour a le pouvoir discrétionnaire de tenir une audience à l'extérieur de sa province de rattachement conjointement avec d'autres juges chargés de gérer des recours collectifs connexes, à condition de ne pas avoir à recourir aux pouvoirs de contrainte de la cour pour convoquer ou mener l'audience et à condition que l'audience ne soit pas contraire aux lois de la province où elle se déroule.

Pour déterminer la source de leur pouvoir discrétionnaire de siéger à l'extérieur de leur province de rattachement, les tribunaux devraient en premier lieu s'enquérir des pouvoirs que la loi leur confère avant d'examiner leur compétence inhérente. Compte tenu de son caractère général et de sa définition formulée en termes vagues, la compétence inhérente des cours supérieures doit être exercée avec circonspection. En Ontario et en Colombie-Britannique, les juges des cours supérieures ont — en vertu respectivement de l'art. 12 de la *Loi de 1992 sur les recours collectifs* et de l'art. 12 de la *Class Proceedings Act* (les « Lois ») — le pouvoir discrétionnaire de siéger à l'extérieur de leur province de rattachement. Une interprétation large de ces pouvoirs conférés par la loi, qui confirme et reflète le pouvoir inhérent qu'ont les juges de contrôler la procédure, contribue à réaliser l'objectif des recours collectifs et à garantir que l'on ne vienne pas, en raison d'une vision de la portée des pouvoirs des juges présidant les recours collectifs qui serait trop technique ou trop circonscrite dans le temps, nuire à des innovations procédurales censées faciliter l'accès à la justice. Aucune limite fixée par la Constitution, par une loi ou par la common law ne restreint la portée du libellé large et général de ces dispositions ni n'empêche un juge de siéger à l'extérieur de sa province de rattachement pour les fins dont il est question en l'espèce.

Les articles 12 des Lois devraient être interprétés comme confirmant et reflétant le pouvoir inhérent des cours supérieures de gérer leur propre procédure. Ainsi, dans les provinces de common law où il n'existe pas de dispositions comparables, l'analyse de la compétence inhérente des cours conduirait à la même conclusion, sous

inherent jurisdiction there applicable, such as constraints imposed by the Constitution, by any statutory provisions or by common law rules. Absent some clear limitation, the inherent jurisdiction of the superior courts extends to permitting the court to hold the sort of hearing in issue here.

A video link between the out-of-province courtroom where the hearing takes place and a courtroom in the judge's home province is not a condition for a judge to be able to sit outside his or her home province. Neither the Acts nor the inherent jurisdiction of the court imposes such a requirement. The open court principle is not violated when a superior court judge exercises his or her discretion to sit outside his or her home province without a video link to the home jurisdiction.

The court's discretion to hold a hearing outside its territory must be exercised in the interests of the administration of justice. The court should also be guided by the following broad considerations: whether sitting in another province will impinge or could be seen as impinging on the sovereignty of that province; whether there are benefits or costs to the proposed out-of-province proceeding; and whether any terms should be imposed, such as conditions as to the payment of extraordinary costs or use of a video link to the court's home jurisdiction.

Per Karakatsanis and Wagner JJ.: There is agreement that the superior court judges in these cases have discretionary statutory authority under s. 12 of the Acts to sit outside of their home provinces, and that a video link is not mandatory in an extraprovincial hearing.

The open court principle encompasses more than a singular requirement that justice not be carried out in secrecy. It fosters public confidence in the court system and furthers public understanding of the administration of justice. In addition, the open court principle protects the media's right to access courts and the circumstances necessary for the media to fulfil their role as surrogates for the public. A judge sitting extraprovincially should be prepared to consider how to give effect to the educational and community-centric aspects of the open court principle. In particular, courts should strive to make class actions procedure visible and understandable to class members and the community where the proceedings

réserve de toute restriction applicable à la compétence inhérente, par exemple des contraintes fixées par la Constitution, par des dispositions législatives ou par des règles de la common law. À défaut de restriction explicite, les cours supérieures peuvent, en vertu de leur compétence inhérente, tenir le type d'audiences dont il est question en l'espèce.

L'existence d'un lien vidéo entre la salle de cour située à l'extérieur de la province où se déroule l'audience et une salle d'audience se trouvant dans la province de rattachement du juge n'est pas requise pour qu'un juge puisse siéger à l'extérieur de cette dernière. Ni les Lois ni la compétence inhérente des cours supérieures n'imposent une telle condition. Le principe de la publicité des débats est respecté lorsqu'un juge d'une cour supérieure exerce son pouvoir discrétionnaire de siéger à l'extérieur de sa province sans qu'un lien vidéo soit établi avec cette dernière.

Le pouvoir discrétionnaire de la cour de tenir une audience à l'extérieur de sa province de rattachement doit être exercé dans l'intérêt de l'administration de la justice. La cour devrait également prendre en considération les facteurs généraux suivants : si le fait de siéger dans une autre province portera atteinte ou pourrait être considéré comme portant atteinte à la souveraineté de cette province, les avantages et les coûts de la tenue de l'audience projetée à l'extérieur de la province, et s'il y a lieu d'imposer des conditions, par exemple le remboursement des frais extraordinaires ou le recours à un lien vidéo avec la province de rattachement de la cour.

Les juges Karakatsanis et Wagner : Il y a accord quant au fait que les juges des cours supérieures dans les présents dossiers ont le pouvoir légal discrétionnaire en vertu des art. 12 des Lois de siéger en dehors de leur province de rattachement et qu'il n'est pas obligatoire d'établir un lien vidéo dans le contexte d'une audience tenue hors province.

Le principe de la publicité des débats judiciaires englobe davantage que la seule exigence selon laquelle la justice ne doit pas être rendue secrètement. Il favorise la confiance du public à l'égard du système judiciaire et accroît sa compréhension de l'administration de la justice. En outre, le principe de la publicité des débats protège le droit des médias d'avoir accès aux salles d'audience et les circonstances nécessaires pour que les médias puissent jouer leur rôle de suppléants du public. Un juge qui préside une audience tenue hors province doit être prêt à examiner comment donner effet au volet éducatif du principe de la publicité des débats judiciaires ainsi qu'à celui qui veut que la communauté soit au cœur de

were initiated. While the court should not presumptively order that a video link back to the home provinces be set up where the court sits extraprovincially, members of the public, the media, or counsel can request that a video link or other means be used to enhance the accessibility of the hearing. If such a request is made, or the judge considers it appropriate, a video link or other means to enhance accessibility should be ordered, subject to any countervailing considerations.

cet enjeu. Plus particulièrement, les tribunaux doivent aspirer à rendre les recours collectifs visibles et compréhensibles pour les membres des groupes visés par de tels recours ainsi que pour la communauté où ces derniers ont été intentés. Même si les tribunaux ne devraient pas présumer devoir ordonner la mise en place d'un lien vidéo avec les provinces de rattachement lorsque les juges siègent hors province, les membres du public, les médias ou les avocats peuvent demander qu'un tel lien ou qu'un autre moyen de communication soit utilisé pour accroître l'accessibilité à l'audience. Si une telle demande est présentée — ou si le juge estime qu'il est de mise d'établir un lien vidéo ou d'utiliser un autre moyen de communication —, sous réserve de considérations qui feraient contrepoids, elle devrait généralement être accueillie.

Cases Cited

By Cromwell J.

Referred to: *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572, 337 O.A.C. 315; *Fantl v. Transamerica Life Canada*, 2009 ONCA 377, 95 O.R. (3d) 767; *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130; *R. v. Rose*, [1998] 3 S.C.R. 262; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Re Southam Inc. and The Queen (No. 1)* (1983), 41 O.R. (2d) 113; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19; *Scott v. Scott*, [1913] A.C. 417; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326.

By Wagner J.

Referred to: *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949; *Richmond Newspapers, Inc. v. Virginia*, 448

Jurisprudence

Citée par le juge Cromwell

Arrêts mentionnés : *Ontario c. Criminal Lawyers' Association of Ontario*, 2013 CSC 43, [2013] 3 R.C.S. 3; *R. c. Caron*, 2011 CSC 5, [2011] 1 R.C.S. 78; *MacMillan Bloedel Ltd. c. Simpson*, [1995] 4 R.C.S. 725; *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; *Western Canadian Shopping Centres Inc. c. Dutton*, 2001 CSC 46, [2001] 2 R.C.S. 534; *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158; *Amyotrophic Lateral Sclerosis Society of Essex County c. Windsor (City)*, 2015 ONCA 572, 337 O.A.C. 315; *Fantl c. Transamerica Life Canada*, 2009 ONCA 377, 95 O.R. (3d) 767; *Ontario New Home Warranty Program c. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130; *R. c. Rose*, [1998] 3 R.C.S. 262; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Re Southam Inc. and The Queen (No. 1)* (1983), 41 O.R. (2d) 113; *Vancouver Sun (Re)*, 2004 CSC 43, [2004] 2 R.C.S. 332; *Personne désignée c. Vancouver Sun*, 2007 CSC 43, [2007] 3 R.C.S. 253; *Société Radio-Canada c. Canada (Procureur général)*, 2011 CSC 2, [2011] 1 R.C.S. 19; *Scott c. Scott*, [1913] A.C. 417; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326.

Citée par le juge Wagner

Arrêts mentionnés : *Société Radio-Canada c. Canada (Procureur général)*, 2011 CSC 2, [2011] 1 R.C.S. 19; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Personne désignée c. Vancouver Sun*, 2007 CSC 43, [2007] 3 R.C.S. 253; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *AIC Limitée c. Fischer*, 2013 CSC 69, [2013] 3 R.C.S. 949; *Richmond Newspapers, Inc. c. Virginia*,

U.S. 555 (1980); *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442.

Statutes and Regulations Cited

Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 12.
Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 12.
Code of Civil Procedure, CQLR, c. C-25, art. 1045.
Code of Civil Procedure, CQLR, c. C-25.01, art. 11.
Constitution Act, 1867, s. 92(14).
Court of Queen's Bench Act, C.C.S.M., c. C280, s. 76(1).
Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 11(2), 15(1), 135.
Federal Courts Rules, SOR/98-106, r. 29.
Judicature Act, S.P.E.I. 2008, c. 20, s. 61.
Nova Scotia Civil Procedure Rules, r. 86.05(4).
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 1.08.
Rules of Court, N.B. Reg. 82-73, rr. 37.08, 38.08.
Supreme Court Act, R.S.B.C. 1996, c. 443, s. 3(1).
Supreme Court Civil Rules, B.C. Reg. 168/2009, rr. 22-1(5), 23-5(4).

Authors Cited

Alberta Law Reform Institute. Final Report No. 85. *Class Actions*. Edmonton: The Institute, 2000.
Black, Vaughan, and Stephen G. A. Pitel. "Out of Bounds: Can a Court Sit Outside Its Home Jurisdiction?" (2013), 41 *Adv. Q.* 503.
British Columbia. Legislative Assembly. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, No. 20, 4th Sess., 35th Parl., June 6, 1995, pp. 15070, 15072 and 15075-76.
British Columbia. Legislative Assembly. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, No. 23, 4th Sess., 35th Parl., June 8, 1995, pp. 15231-32.
British Columbia. Ministry of Attorney General. *Consultation Document: Class Action Legislation for British Columbia*. Victoria: The Ministry, 1994.
Côté, Pierre-André, in collaboration with Stéphane Beaulac and Mathieu Devinat. *The Interpretation of Legislation in Canada*, 4th ed. Toronto: Carswell, 2011.
Cunliffe, Emma. "Open Justice: Concepts and Judicial Approaches" (2012), 40 *Fed. L. Rev.* 385.
Halsbury's Laws of England, vol. 24, 5th ed. London: LexisNexis, 2010.

448 U.S. 555 (1980); *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442.

Lois et règlements cités

Class Proceedings Act, R.S.B.C. 1996, c. 50, art. 12.
Code de procédure civile, RLRQ, c. C-25, art. 1045.
Code de procédure civile, RLRQ, c. C-25.01, art. 11.
Judicature Act, S.P.E.I. 2008, c. 20, art. 61.
Loi constitutionnelle de 1867, art. 92(14).
Loi de 1992 sur les recours collectifs, L.O. 1992, c. 6, art. 12.
Loi sur la Cour du Banc de la Reine, C.P.L.M., c. C280, art. 76(1).
Loi sur les tribunaux judiciaires, L.R.O. 1990, c. C.43, art. 11(2), 15(1), 135.
Nova Scotia Civil Procedure Rules, règle 86.05(4).
Règles de procédure civile, R.R.O. 1990, Règl. 194, règle 1.08.
Règles de procédure, Règl. du N.-B. 82-73, règles 37.08, 38.08.
Règles des Cours fédérales, DORS/98-106, règle 29.
Supreme Court Act, R.S.B.C. 1996, c. 443, art. 3(1).
Supreme Court Civil Rules, B.C. Reg. 168/2009, règles 22-1(5), 23-5(4).

Doctrine et autres documents cités

Alberta Law Reform Institute. Final Report No. 85, *Class Actions*, Edmonton, The Institute, 2000.
Black, Vaughan, and Stephen G. A. Pitel. « Out of Bounds : Can a Court Sit Outside Its Home Jurisdiction? » (2013), 41 *Adv. Q.* 503.
Colombie-Britannique. Assemblée législative. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, No. 20, 4th Sess., 35th Parl., June 6, 1995, pp. 15070, 15072 and 15075-76.
Colombie-Britannique. Assemblée législative. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, No. 23, 4th Sess., 35th Parl., June 8, 1995, pp. 15231-32.
Colombie-Britannique. Ministry of Attorney General. *Consultation Document : Class Action Legislation for British Columbia*, Victoria, The Ministry, 1994.
Conférence pour l'harmonisation des lois au Canada. *Loi uniforme sur les recours collectifs* (1996) (en ligne : http://www.ulcc.ca/fr/lois-uniformes-nouvelle-structure/lois-uniformes-courantes/83-josetta-1-fr-fr/lois-uniformes/loi-sur-les-recours-collectifs/1398-loi-uniforme-sur-les-recours-collectifs-1996).

Jackson, Georgina R., and Janis Sarra. "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*. Toronto: Thomson Carswell, 2008, 41.

Jacob, I. H. "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23.

Macdonald, Roderick A. "Access to Justice in Canada Today: Scope, Scale and Ambitions", in Julia Bass, W. A. Bogart and Frederick H. Zemans, eds., *Access to Justice for a New Century — The Way Forward*. Toronto: Law Society of Upper Canada, 2005, 19.

Ontario. Attorney General's Advisory Committee on Class Action Reform. *Report of the Attorney General's Advisory Committee on Class Action Reform*. Toronto: The Committee, 1990.

Ontario. Law Reform Commission. *Report on Class Actions*, vol. II. Toronto: Ministry of the Attorney General, 1982.

Ontario. Legislative Assembly. *Official Report of Debates (Hansard)*, 1st Sess., 35th Parl., November 18, 1991 (online: www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=1991-11-18&Parl=35&Sess=1&locale=en).

Ontario. Legislative Assembly. *Official Report of Debates (Hansard)*, 2nd Sess., 34th Parl., June 12, 1990 (online: www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=1990-06-12&Parl=35&Sess=1&locale=en).

Resnik, Judith. "The Democracy in Courts: Jeremy Bentham, 'Publicity', and the Privatization of Process in the Twenty-First Century" (2013), 10 *NoFo* 77.

Uniform Law Conference of Canada. *Uniform Class Proceedings Act* (1996) (online: http://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/82-josetta-1-en-gb/uniform-actsa/class-proceedings-act/1395-uniform-class-proceedings-act-1996).

Warren, Marilyn. "Open Justice in the Technological Age" (2014), 40 *Monash U.L. Rev.* 45.

APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Tysoe and Goepel JJ.A.), 2014 BCCA 61, 59 B.C.L.R. (5th) 113, 352 B.C.A.C. 7, 601 W.A.C. 7, 49 C.P.C. (7th) 316, [2014] 5 W.W.R. 481, [2014] B.C.J. No. 254 (QL), 2014 CarswellBC 363 (WL Can.), setting aside a decision of Bauman C.J.B.C., 2013 BCSC 1074, [2013] B.C.J. No. 1304 (QL), 2013 CarswellBC 1828 (WL Can.). Appeal allowed.

Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4e éd., Montréal, Thémis, 2009.

Cunliffe, Emma. « Open Justice : Concepts and Judicial Approaches » (2012), 40 *Fed. L. Rev.* 385.

Halsbury's Laws of England, vol. 24, 5th ed., London, LexisNexis, 2010.

Jackson, Georgina R., and Janis Sarra. « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*, Toronto, Thomson Carswell, 2008, 41.

Jacob, I. H. « The Inherent Jurisdiction of the Court » (1970), 23 *Curr. Legal Probs.* 23.

Macdonald, Roderick A. « L'accès à la justice aujourd'hui au Canada — étendue, envergure et ambitions », dans Julia Bass, W. A. Bogart et Frederick H. Zemans, dir., *L'accès à la justice pour le nouveau siècle : les voies du progrès*, Toronto, Barreau du Haut-Canada, 2005, 23.

Ontario. Assemblée législative. *Journal des débats (Hansard)*, 1re sess., 35e lég., 18 novembre 1991 (en ligne : www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=1991-11-18&Parl=35&Sess=1&locale=fr).

Ontario. Assemblée législative. *Journal des débats (Hansard)*, 2e sess., 34e lég., 12 juin 1990 (en ligne : www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=1990-06-12&Parl=35&Sess=1&locale=fr).

Ontario. Attorney General's Advisory Committee on Class Action Reform. *Report of the Attorney General's Advisory Committee on Class Action Reform*, Toronto, The Committee, 1990.

Ontario. Commission de réforme du droit. *Report on Class Actions*, vol. II, Toronto, ministère du Procureur général, 1982.

Resnik, Judith. « The Democracy in Courts : Jeremy Bentham, "Publicity", and the Privatization of Process in the Twenty-First Century » (2013), 10 *NoFo* 77.

Warren, Marilyn. « Open Justice in the Technological Age » (2014), 40 *Monash U.L. Rev.* 45.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Saunders, Tysoe et Goepel), 2014 BCCA 61, 59 B.C.L.R. (5th) 113, 352 B.C.A.C. 7, 601 W.A.C. 7, 49 C.P.C. (7th) 316, [2014] 5 W.W.R. 481, [2014] B.C.J. No. 254 (QL), 2014 CarswellBC 363 (WL Can.), qui a infirmé une décision du juge en chef Bauman, 2013 BCSC 1074, [2013] B.C.J. No. 1304 (QL), 2013 CarswellBC 1828 (WL Can.). Pourvoi accueilli.

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Juriansz, LaForme and Lauwers JJ.A.), 2015 ONCA 158, 125 O.R. (3d) 168, 331 O.A.C. 71, 381 D.L.R. (4th) 667, 64 C.P.C. (7th) 227, [2015] O.J. No. 1257 (QL), 2015 CarswellOnt 3336 (WL Can.), setting aside in part a decision of Winkler C.J.O., 2013 ONSC 3053, 363 D.L.R. (4th) 352, 43 C.P.C. (7th) 412, [2013] O.J. No. 2343 (QL), 2013 CarswellOnt 6659 (WL Can.). Appeal allowed and cross-appeal dismissed.

Sharon D. Matthews, *Q.C.*, *J. J. Camp*, *Q.C.*, and *Michael Sobkin*, for the appellant Anita Endean, as representative plaintiff.

Keith Evans and *Katherine Webber*, for the respondent Her Majesty The Queen in Right of the Province of British Columbia.

Robert J. Frater, *Q.C.*, and *Kathryn Hucal*, for the respondent/respondent on cross-appeal the Attorney General of Canada.

Paul J. Pape and *Shantona Chaudhury*, for the appellants/respondents on cross-appeal Dianna Louise Parsons et al.

John E. Callaghan and *Alex Zavaglia*, for the appellant the Fund Counsel for Ontario.

Josh Hunter, *Brent Kettles* and *Lynne McArdle*, for the respondent/appellant on cross-appeal Her Majesty The Queen in Right of Ontario.

No one appeared for the respondent/respondent on cross-appeal the Canadian Red Cross Society.

Caroline Zayid, *H. Michael Rosenberg* and *Adam Goldenberg*, for the respondents Her Majesty The Queen in Right of Alberta et al.

Written submissions only by *Dana Pescarus*, *Carole Soucy* and *Manon Des Ormeaux*, for the intervener.

POURVOI PRINCIPAL et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Ontario (les juges Juriansz, LaForme et Lauwers), 2015 ONCA 158, 125 O.R. (3d) 168, 331 O.A.C. 71, 381 D.L.R. (4th) 667, 64 C.P.C. (7th) 227, [2015] O.J. No. 1257 (QL), 2015 CarswellOnt 3336 (WL Can.), qui a infirmé en partie une décision du juge en chef Winkler, 2013 ONSC 3053, 363 D.L.R. (4th) 352, 43 C.P.C. (7th) 412, [2013] O.J. No. 2343 (QL), 2013 CarswellOnt 6659 (WL Can.). Pourvoi principal accueilli et pourvoi incident rejeté.

Sharon D. Matthews, *c.r.*, *J. J. Camp*, *c.r.*, et *Michael Sobkin*, pour l'appelante Anita Endean, en sa qualité de représentante des demandeurs.

Keith Evans et *Katherine Webber*, pour l'intimée Sa Majesté la Reine du chef de la province de la Colombie-Britannique.

Robert J. Frater, *c.r.*, et *Kathryn Hucal*, pour l'intimé/intimé au pourvoi incident le procureur général du Canada.

Paul J. Pape et *Shantona Chaudhury*, pour les appelants/intimés au pourvoi incident Dianna Louise Parsons et autres.

John E. Callaghan et *Alex Zavaglia*, pour l'appelant le Conseiller juridique du Fonds pour l'Ontario.

Josh Hunter, *Brent Kettles* et *Lynne McArdle*, pour l'intimée/appelante au pourvoi incident Sa Majesté la Reine du chef de l'Ontario.

Personne n'a comparu pour l'intimée/intimée au pourvoi incident la Société canadienne de la Croix-Rouge.

Caroline Zayid, *H. Michael Rosenberg* et *Adam Goldenberg*, pour les intimés Sa Majesté la Reine du chef de l'Alberta et autres.

Argumentation écrite seulement par *Dana Pescarus*, *Carole Soucy* et *Manon Des Ormeaux*, pour l'intervenante.

The judgment of McLachlin C.J. and Abella, Cromwell, Moldaver, Gascon, Côté and Brown JJ. was delivered by

CROMWELL J. —

I. Introduction and Issues

[1] Class actions are an important procedural tool designed to help improve access to justice. They are meant to provide a fair and expeditious resolution of the plaintiffs' claims and, to ensure that they do, class action judges have broad and flexible procedural powers. The limits of those powers are tested by these appeals.

[2] At issue is the power of superior court judges who are implementing a pan-national class action settlement to sit outside their home provinces to hear and decide a motion relating to it.

[3] While all parties agree that judges may do this under certain conditions, there is disagreement about two related issues:

1. What is the source of authority for the judge to sit outside his or her home jurisdiction: Is it statutory or an aspect of the inherent powers of a superior court?

2. Is a video link to an open courtroom in the judge's home jurisdiction a condition for the exercise of this authority?

[4] In my opinion, superior court judges in Ontario and British Columbia have the discretionary statutory power under s. 12 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, and s. 12 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "Acts"), to sit outside their home provinces, and a video link to an open courtroom in the judge's home jurisdiction is

Version française du jugement de la juge en chef McLachlin et des juges Abella, Cromwell, Moldaver, Gascon, Côté et Brown rendu par

LE JUGE CROMWELL —

I. Introduction et questions en litige

[1] Le recours collectif est un important outil procédural conçu pour accroître l'accès à la justice. Il est censé offrir une procédure permettant de trancher les litiges avec équité et célérité. À cette fin, les juges qui instruisent ce type de recours disposent de pouvoirs à la fois vastes et souples en matière de procédure. Les présents pourvois amènent la Cour à se pencher sur les limites de ces pouvoirs.

[2] Il s'agit ici de savoir si les juges des cours supérieures chargés de mettre en œuvre des conventions pancanadiennes de règlement de recours collectifs ont le pouvoir de siéger à l'extérieur de leur province de rattachement pour trancher les requêtes s'y rapportant.

[3] Bien que toutes les parties s'entendent pour dire que les juges peuvent exercer ce pouvoir à certaines conditions, elles sont en désaccord sur les deux questions connexes suivantes :

1. Quelle est la source du pouvoir permettant aux juges de siéger à l'extérieur de leur province de rattachement : s'agit-il d'un pouvoir d'origine législative ou d'un volet de la compétence inhérente des cours supérieures?

2. Est-il nécessaire, pour pouvoir exercer ce pouvoir, qu'il y ait un lien vidéo entre la salle d'audience où se trouve le juge et une salle d'audience accessible au public dans la province de rattachement du juge?

[4] À mon avis, les juges des cours supérieures ont, en Ontario et en Colombie-Britannique — en vertu respectivement de l'art. 12 de la *Loi de 1992 sur les recours collectifs*, L.O. 1992, c. 6, et de l'art. 12 de la *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (les « Lois ») — le pouvoir discrétionnaire de siéger à l'extérieur de leur province de rattachement,

(a) *Common Law and Constitutional Barriers*

[43] The British Columbia Court of Appeal found that English common law, which, in its view, prohibited judges in England from sitting outside England, was received into British Columbia as of November 1858 and prevented British Columbia judges from sitting outside their province. The court also found that using inherent jurisdiction to support out-of-province hearings would be inconsistent with and contrary to the common law and ancient usage. Further, while the common law was subject to modification, the Court of Appeal concluded that any major revisions of the common law rule prohibiting judges from sitting outside their territorial jurisdiction was better left to the legislature.

[44] The British Columbia appellant, Anita Endean, as representative plaintiff, submits that the Court of Appeal was wrong to find a common law limit on the court's inherent power. Ms. Endean submits that this old English rule was not received into British Columbia law and, in any event, should not be followed.

[45] When one looks at the common law relating to courts sitting outside their jurisdiction, one finds that the jurisprudence is sparse and the precise ambit of any limitation is unclear. However, I accept that there is, as V. Black and S. G. A. Pitel have put it, a "deep-seated sense" in the common law that courts conduct their business within their geographical boundaries: "Out of Bounds: Can a Court Sit Outside Its Home Jurisdiction?" (2013), 41 *Adv. Q.* 503, at p. 503; see also pp. 509-10.

[46] A number of considerations support this "deep-seated sense", including concerns about the sovereignty of the jurisdiction in which the hearing is held and concerns about the territorial limits of the

a) *Obstacles découlant de la common law ou de la Constitution*

[43] La Cour d'appel de la Colombie-Britannique a conclu que la common law anglaise — qui, à son avis, interdit aux juges anglais de siéger à l'extérieur de l'Angleterre — a été admise en Colombie-Britannique en novembre 1858 et qu'elle empêche les juges de la Colombie-Britannique de siéger à l'extérieur de leur province. La Cour d'appel a également jugé qu'il serait contraire à la common law et à un usage séculaire d'utiliser la compétence inhérente des cours supérieures pour soutenir leur droit de tenir des audiences hors province. Enfin, tout en reconnaissant que la common law pouvait être modifiée, la Cour d'appel a conclu qu'il était préférable de laisser au législateur le soin de réviser les règles de common law interdisant aux juges de siéger à l'extérieur de leur ressort.

[44] Selon Anita Endean, appelante de la Colombie-Britannique agissant en sa qualité de représentante des demandeurs, la Cour d'appel a eu tort de conclure que la common law restreint la compétence inhérente de la cour. M^me^ Endean affirme que cette ancienne règle anglaise n'a pas été admise dans le droit applicable en Colombie-Britannique et que, en tout état de cause, elle ne devrait pas être suivie.

[45] Lorsqu'on examine les règles de common law relatives aux cours dont les juges siègent à l'extérieur de leur ressort, on constate que la jurisprudence sur le sujet est peu abondante et que la portée précise des restrictions qui peuvent exister est incertaine. J'admets cependant, pour reprendre la formule de V. Black et de S. G. A. Pitel qu'il existe, en common law, une [TRADUCTION] « notion bien ancrée » selon laquelle les tribunaux doivent exercer leurs activités à l'intérieur des limites géographiques de leur ressort : « Out of Bounds : Can a Court Sit Outside Its Home Jurisdiction? » (2013), 41 *Adv. Q.* 503, p. 503; voir aussi p. 509-510.

[46] Plusieurs facteurs appuient cette « notion bien ancrée ». Il existe notamment certaines préoccupations quant à la protection de la souveraineté de la province ou du territoire où se déroulerait

coercive powers of the judge conducting the hearing. But the type of court hearing in issue in these cases does not give rise to the concerns which support any broader principle against out-of-province sittings. In particular, judges in cases like these will not be called on to exercise any coercive powers, as they would be adjudicating on a paper record. And there is no suggestion that the proposed hearing would be inconsistent with the law of the place in which it would be held. There is thus no threat either to the authority or dignity of the superior court or to the sovereignty of the jurisdiction in which the hearing would be held.

[47] Moreover, it is open to the Court to modify the common law if necessary to make it clear that it does not preclude such hearings.

[48] Permitting these hearings does not give rise to the concerns about sovereignty, dignity of the courts or extraterritorial exercise of coercive powers. It is also a practical alternative that serves the underlying purposes of class proceedings. To take too dogmatic a stand on this point, as Winkler C.J.O. noted, risks leaving the common law unsuited "to modern realities of increasingly complex litigation involving parties and subject matters that transcend provincial borders": para. 25.

[49] Further, the narrow circumstances of these appeals do not raise a concern that the judiciary is trenching on powers reserved to the legislature. What is proposed here is not the sort of major procedural innovation that arguably ought to be left to the legislature. On the contrary, the legislatures have, through s. 12 of the Acts, encouraged courts to make full use of their power to regulate the process in the interests of making it fair and expeditious. Allowing courts to hold the type of hearing in issue here furthers the legislative intention

l'audience, et d'autres quant à la portée territoriale des pouvoirs de contrainte du juge qui présiderait l'audience. Cela dit, le type d'audiences dont il est question en l'espèce ne justifie pas les craintes évoquées au soutien d'un principe plus large contre les audiences hors province. En effet, plus particulièrement, dans ce type de causes, les juges ne sont pas appelés à exercer leurs pouvoirs de contrainte puisqu'ils jugent l'affaire sur dossier. Nul ne prétend par ailleurs que l'audience proposée serait incompatible avec les lois de la province où elle se tiendrait. Il n'y a donc aucune menace à l'autorité ou à la dignité de la cour supérieure, pas plus qu'à la souveraineté de la province dans laquelle l'audience aurait lieu.

[47] De plus, la Cour peut toujours modifier la common law au besoin pour bien préciser qu'elle n'empêche pas de telles audiences.

[48] Ainsi, le fait de permettre la tenue de telles audiences ne soulève pas de préoccupations quant à la souveraineté ou à la dignité des tribunaux ou quant à l'exercice extraterritorial de pouvoirs de contrainte. C'est par ailleurs une solution pratique qui contribue à réaliser les objectifs sous-jacents des recours collectifs. Comme le juge en chef Winkler l'a noté, en adoptant une position trop dogmatique à ce sujet, on risquerait de faire perdurer une situation où la common law serait mal adaptée [TRADUCTION] « aux réalités modernes où des procès de plus en plus complexes font intervenir des parties et des questions qui transcendent les frontières provinciales » : par. 25.

[49] De plus, les circonstances particulières des présents pourvois ne font pas craindre que l'organe judiciaire empiète sur des pouvoirs réservés au législateur. En effet, la mesure proposée en l'espèce n'a rien à voir avec le type d'innovation procédurale majeure dont on pourrait prétendre qu'il reviendrait au législateur d'adopter. Au contraire, le législateur, grâce aux art. 12 des Lois, a incité les tribunaux à utiliser pleinement leurs pouvoirs de gestion du déroulement de l'instance pour en favoriser l'équité et la célérité. Or, permettre aux

evident in this scheme; far from usurping legislative authority, this approach uses the authority broadly conferred by the legislature to further its objectives.

tribunaux de tenir le genre d'audiences dont il est question en l'espèce sert l'intention du législateur qui ressort à l'évidence de l'économie des lois en question; loin d'usurper des pouvoirs législatifs, cette démarche puise plutôt à même les vastes pouvoirs conférés par le législateur pour favoriser l'atteinte de ses objectifs.

[50] The Attorney General of Ontario suggests that any interpretation of s. 12 of the *Class Proceedings Act, 1992* must respect the "presumption against extraterritoriality" (R.F., at para. 53), an interpretative presumption that "[t]he legislature is presumed to intend the territorial limits of its jurisdiction to coincide with that of the statute's operation" and "[u]nless implicitly or explicitly provided otherwise, the legislature is presumed to enact for persons, property, juridical acts and events within the territorial boundaries of its jurisdiction": P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 212. The Attorney General notes that such a concern would arise if s. 12 were interpreted to allow an order to have a true extraterritorial effect, such as a coercive order taking effect outside Ontario or British Columbia.

[50] Suivant le procureur général de l'Ontario, toute interprétation de l'art. 12 de la *Loi de 1992 sur les recours collectifs* doit respecter le [TRADUCTION] « principe de la territorialité des lois » (m.i., par. 53), selon lequel on « prête[ra] en principe au législateur la volonté de faire coïncider les limites spatiales de l'effet de ses lois avec les frontières du territoire soumis à sa compétence » et, « [e]n l'absence de disposition contraire, expresse ou implicite, on présumera que l'auteur d'un texte législatif entend qu'il s'applique aux personnes, aux biens, aux actes ou aux faits qui se situent à l'intérieur des limites du territoire soumis à sa compétence » : P.-A. Côté, en collaboration avec S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), p. 230. Le procureur général fait observer que cette question se poserait si l'on interprétait les art. 12 de manière à donner à une ordonnance judiciaire une véritable portée extraterritoriale, en permettant par exemple à une ordonnance coercitive de s'appliquer à l'extérieur de l'Ontario ou de la Colombie-Britannique.

[51] I do not rely on s. 12 of the Acts as providing for the exercise of coercive powers outside the court's home province. Interpreting s. 12 as allowing the type of hearing at issue in these cases therefore does not engage the presumption against extraterritoriality since this application of the provisions does not give rise to any impermissible extraterritorial effect.

[51] Or, une interprétation de ces dispositions qui permettrait de tenir le genre d'audiences dont il est question en l'espèce ne fait pas intervenir le principe de la territorialité des lois, puisque l'application des dispositions en cause n'a aucune portée extraterritoriale interdite.

[52] Finally, in my opinion, no constitutional impediment has been identified to the limited authority of a superior court to sit outside its jurisdiction that we are addressing in this case.

[52] J'estime enfin qu'on n'a signalé aucun empêchement d'ordre constitutionnel au pouvoir limité dont il est question ici d'une cour supérieure de siéger à l'extérieur de son ressort.

Federal Court  Cour fédérale

Date: 20240213

Docket: T-1274-23

Citation: 2024 FC 242

Ottawa, Ontario, February 13, 2024

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

YAVAR HAMEED

Applicant

and

PRIME MINISTER AND MINISTER OF JUSTICE

Respondents

JUDGMENT AND REASONS

Table of Contents

I. Letter from Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated May 3, 2023

[1] At its core, this matter concerns the following letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated, May 3, 2023 (English translation of Exhibit KKK of the Applicant's Record, Volume 1, as set out in Schedule A of this Judgment and Reasons):

> The Right Honourable Justin Trudeau
>
> Dear Prime Minister:
>
> As Chief Justice of Canada and Chairperson for the Canadian Judicial Council, I must express my deep concern with regard to the significant number of vacancies within Federal Judicial Affairs and the government's inability to fill these positions in a timely manner.
>
> The current situation is untenable, and I fear that this will result in a crisis for our justice system, which is already facing many challenges. Access to justice and the health of our democratic institutions are at risk.
>
> As you undoubtedly know, there are currently 85 vacancies within Federal Judicial Affairs across the country. Some courts have had to deal with a 10 to 15% vacancy rate for years now. It is also not uncommon for positions to remain vacant for several months, if not years, in some cases. As a concrete example, over half of the positions at the Manitoba Court of Appeal are currently vacant. Key chief justice and associate chief justice positions are also being filled at a very slow pace. In fact, there have recently been considerable delays in appointments to chief justice positions in a number of provinces, including Alberta, Ontario and Prince Edward Island. The chief justice of Manitoba position has been vacant for six months now, and the associate chief justice positions in the Court of King's Bench for Saskatchewan and the Superior Court of Quebec have been vacant for over a year. No clear explanation justifies these delays.
>
> It should be noted that the difficulties brought on by the judge shortage are exacerbating an already critical situation within several courts—namely a serious lack of resources due to chronic

underfunding by the provinces and territories. However, while several factors explain the crisis currently facing our justice system, the appointment of judges in due course is a solution within reach that could help quickly and effectively improve the situation. Given this obvious fact and the critical situation we are faced with, the government's inertia regarding vacancies and the absence of satisfactory explanations for these delays are disconcerting. The slow pace of appointments is all the more difficult to understand since most judicial vacancies are predictable, especially those resulting from retirements for which judges usually provide several months' notice. In this context, these delays in appointments send a message that this is simply not a priority for the government.

On behalf of the Canadian Judicial Council, I can attest to the fact that chief justices and associate chief justices across the country are satisfied with the quality of recent appointments and are thrilled with the addition of new judge positions in recent budgets. We also recognize that your government has made efforts to establish a more independent, transparent and impartial appointment process for federally appointed judges. It would be unfortunate if the failure to improve the pace of federal judicial appointments across the country were to ultimately discredit this process.

I recently had the opportunity to meet with the Minister of Justice and discuss this matter with him. The Chief Justices also have very good relationships with the Minister and his office, and we are confident that he is willing to make every effort to remedy the problems I have outlined.

Despite all these efforts, it is imperative for the Prime Minister's Office to give this issue the importance it deserves and for appointments to be made in a timely manner. It is essential that the vacant positions within the judiciary be filled diligently to ensure that judicial branch functions properly. In the past, the Canadian Judicial Council has urged governments to make judicial appointments more quickly. This time, we have serious concerns that without concrete efforts to remedy the situation, we will soon reach a point of no return in several jurisdictions. The consequences will make headlines and have serious repercussions on our democracy and on all Canadians. This situation requires your immediate attention.

The positions that have been left vacant are having significant impacts on the administration of justice, the operations of our courts and the health of our judges. Canadian Judicial Council

members recently took it upon themselves to provide a more comprehensive overview of the difficulties faced by their respective courts. The findings are appalling.

Despite all our judges' professionalism and dedication, the staffing shortage inevitably results in additional delays in hearing cases and rendering judgments. Chief justices have indicated that, because judges are overburdened, delays in setting cases are unavoidable and hearings need to be postponed or adjourned. What's more, even when cases are heard, judgments are slow to be rendered because judges need to spend more time sitting, leaving them less time to deliberate. The analysis framework in *R. V. Jordan*, 2016 SCC 27, with respect to the accused's right to be tried within a reasonable time pursuant to the *Canadian Charter of Rights and Freedoms*, also plays an important role in that regard. It provides that, before superior courts, criminal charges must be tried within 30 months, save in exceptional circumstances. If a trial has not ended within that timeframe, a stay of proceedings may be ordered. Many chief justices say that as part of their efforts to respect the timelines prescribed by Jordan, they are currently forced to choose the criminal matters that "deserve" to be heard most. Despite their best efforts, stays of proceedings are pronounced against individuals accused of serious crimes, such as sexual assault or murder, because of delays that are due, in part or in whole, to a shortage of judges. For example, the Court of King's Bench of Alberta has reported that over 22% of ongoing criminal cases are passing the 30-month deadline and that 91% of those cases involve serious and violent crimes. Furthermore, the necessary urgency in processing criminal cases means the courts' role in civil cases is being neglected. The justice system is consequently at risk of being perceived as useless for civil matters. These types of situations represent a failure of our justice system and are likely to fuel public cynicism and undermine their trust in our democratic institutions.

These ongoing vacancies also have a serious impact on judges themselves. Faced with a chronic work overload and increased stress, judges are increasingly going on medical leave, which has a domino effect on their colleagues, who then must carry an additional workload. It is also becoming difficult for judges of certain courts to find the necessary time to complete training, including training that is considered mandatory. This situation does not bode well for ensuring a healthy and thriving judiciary. If current issues persist, it could also become difficult to attract high-quality candidates for judge positions.

This is already the case in British Columbia.

Richard Wagner

II. Summary and conclusions

[2] This is the Applicant's request for judicial resolution of a dispute between himself and the Chief Justice of Canada and Canadian Judicial Council on the one hand, and the Prime Minister and Minister of Justice on the other.

[3] By the foregoing letter, the Chief Justice of Canada and Canadian Judicial Council requested the Prime Minister to fill a very large number of vacant Superior Court and Federal Courts judicial positions across Canada.

[4] The requested number of vacancies have not been filled. While appointments were made over the last 8 months, during the same period new vacancies have been created by resignation or otherwise. This significant and unacceptably large number of vacancies remains essentially unchanged. The facts are there were 79 vacancies when this application was filed in June 2023, and 75 vacancies as of February 1, 2024 according to the Federal Commissioner of Judicial Affair's website [FCJA]: https://www.fja-cmf.gc.ca/appointments-nominations/judges-juges-eng.aspx.

[5] Neither the Prime Minister and two successive Ministers of Justice have remedied this critical situation in the 9 months since the request by our Chief Justice of Canada and Canadian Judicial Council.

[6] With the greatest respect, the Court finds the Prime Minister and Minister of Justice are simply treading water. They have failed to take the actions requested by the Chief Justice of Canada and the Canadian Judicial Council. And with the greatest respect, they have also failed all those who rely on them for the timely exercise of their powers in relation to filling these vacancies. Also failed are all those who have unsuccessfully sought timely justice in the Superior Courts and Federal Courts across Canada.

[7] As a consequence, a point not contested, the Court finds the Prime Minister and Minister of Justice have refused the request made by the Chief Justice of Canada and Canadian Judicial Council.

[8] The Respondents offered no justification for their decision to refuse the request to fill these judicial vacancies.

[9] As a matter of well-established convention, also not disputed, the Prime Minister and Minister of Justice have effective and exclusive control over, and in the Court's view, they have the concomitant responsibility to appoint judges to the Superior Courts across Canada, and the Federal Courts. It is not doubted that no such appointments may be made without their advice and consent.

[10] Notably, the advice and consent of the Respondents must be directed to either the Governor General (by the Minister of Justice in the case of provincial Superior Court judges, or by the Prime Minister in the case of relevant Chief Justices), or to the Governor in Council (by

the Minister of Justice in the case of judges of the Federal Courts or by the Prime Minister in the case of relevant Chief Justices): see *Democracy Watch v Canada (Attorney General)*, 2023 FC 31 [*Democracy Watch*] [per Southcott J].

[11] The level of vacancies is now, as the letter describes and which is not contested, at both a crisis and critical level. Other words used by the Chief Justice of Canada and Canadian Judicial Council to describe the impact of the ongoing failure to fill vacancies include “appalling” and “untenable.”

[12] The Court is given no explanation or justification by the Respondents of this untenable situation. Notably, the Respondents filed no evidence to dispute what I accept as expert opinions of both the Chief Justice of Canada and the Canadian Judicial Council. Their unequalled individual and collective experience, knowledge and expertise in relation to the state of the federally appointed judicial vacancies across Canada was not questioned in any way.

[13] In these circumstances, the Court finds no reason to discount or disregard the evidence and submissions of the Chief Justice of Canada and Canadian Judicial Council to the Respondents. I find the responsibilities of the Prime Minister and Minister of Justice to meaningfully engage their powers with respect to filling the critical and untenable level of judicial vacancies across our federal judiciary may not be ignored.

[14] With the greatest respect, this Court faced with these assessments by such credible entities, accepts the views of the Chief Justice of Canada and the Canadian Judicial Council as set out in their letter to the Prime Minister.

[15] On this basis the Court has no hesitation in concluding the current level of vacancies is untenable, and at a minimum, requires the judicial response afforded in the following Judgment.

[16] The Court comes to this conclusion because the same constitutional convention giving the Respondents advice-giving responsibility respecting federal judicial appointments obviously entails their responsibility to fill judicial vacancies in a timely manner, that is, within a reasonable time. It would be absurd to suggest the “rule of law”, essential to the proper function of the nation and enshrined in the preamble to the *Constitution Act, 1982,* exists at the whim of the executive government. The rule of law may not be critically and negatively impacted simply by what the Court finds the Respondents’ unjustified and persistent failure to advise the Governor General and or Governor in Council to fill this critical and unacceptably high level of judicial vacancies.

[17] How long should it take to fill a sufficient number of vacancies? In the Court’s view the answer is plain and obvious: these vacancies must be materially reduced within a reasonable time to a reasonable level.

[18] What is a reasonable or sufficient level of vacancies? The Court was provided with no reason the number of vacancies may not be reduced to the mid-40s: there were only 46 vacancies in the Spring of 2016, for example.

[19] That said, the number of vacancies in an ideal world should be very low, and it seems to me this is a matter to be determined by Parliament. In some cases it may be that all relevant vacancies must be filled, as where serious crimes are not prosecuted in a timely way such that victims, the public and accused are denied justice. That may not be possible in other cases, but as noted, no evidence was provided by the Respondents. This is a matter in respect of which the Respondents should obviously engage with the Chief Justice of Canada and relevant Chief Justices / Associate Chief Justices and in respect of which the Canadian Judicial Council, having come this far, should provide (as perhaps it has) specific guidance.

[20] By way of remedy, the Court may, and in this case will recognize and declare the constitutional convention that judicial vacancies on the provincial Superior Courts and Federal Courts must be filled within a reasonable time. The Court will make this declaration in its expectation that the number of vacant positions will be materially reduced to the mid-40s being the number of federal vacancies in Spring of 2016. In this manner, the Court expects the crisis and critical situation to be resolved.

[21] Specifically, the Court's declaration is:

> 1. All federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice. In the case of appointment of

> Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet.
>
> 2. Appointments to fill judicial vacancies under section 96 of the *Constitution Act, 1867* and section 5.2 of the *Federal Courts Act* must be made within a reasonable time of the vacancy.
>
> 3. Appointments to fill current judicial vacancies are required for the reasons set out in the letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated May 3, 2023 set out in paragraph 1 and Schedule A to these Reasons for Judgment.
>
> 4. The Court makes Declarations 2 and 3 above in its expectation that the number of said judicial vacancies will be materially reduced in a reasonable time such that the total number of judicial vacancies returns to the mid-40s, that is, to the number of federal judicial vacancies in the Spring of 2016; in this manner the Court expects the untenable and appalling crisis, and critical judicial vacancy situation found by this Court as identified by the Chief Justice and Canadian Judicial Council will be resolved.

[22] I encourage the parties, and or the Chief Justice of Canada and or the Canadian Judicial Council to seek further direction and relief from this Court in the event this Court's Judgment is not satisfied or in issue.

[23] I now turn to a number of legal issues raised by the parties, at the conclusion of which the Court's Judgment will issue.

III. The Application

[24] The Applicant applies for a writ of *mandamus* pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*] to compel the Prime Minister and the Minister of Justice [Respondents] to appoint judges to fill vacancies in the superior courts across

Canada including the Federal Courts. By law, these appointments are to be filled either by the Governor General pursuant to section 96 of the *Constitution Act, 1867*, 30 & 31 Vict, c 3, reprinted in RSC 1985 [*Constitution Act, 1867*] in respect of Provincial Superior Court judges, or by the Governor in Council pursuant to section 5.2 of the *Federal Courts Act* in respect of judges of the Federal Court and Federal Court of Appeal [Federal Courts].

[25] The Applicant asks that such vacancies be filled i.e., that appointments be made within certain timelines, namely within the later of three months of the date of this Court's Order, or within nine months of their having become aware the positions would be vacated, and does so by analogy to practices developed by this Court in immigration cases.

[26] In the alternative, the Applicant asks the Court to declare that:

> a. The Prime Minister and Minister of Justice are in violation of their duties to appoint judges to the vacancies in the superior courts under section 96 of the *Constitution Act, 1867*, and section 5. 2 of the *Federal Courts Act*; and
>
> b. A reasonable interpretation of the requirement to appoint judges in section 96 of the *Constitution Act, 1867*, and section 5.2 of the *Federal Courts Act* is that, absent exceptional circumstances, the appointments shall be made within nine months of the date of the applicable Minister becomes aware that a position will be vacated, or three months after a position is vacated, whichever is later.

[27] It is noteworthy that while the Prime Minister and Minister of Justice are named parties against whom relief is sought, the Applicant (who confirmed his position at the hearing) does not name either the Governor General or the Governor in Council as parties, notwithstanding it is

they who by the *Constitution Act, 1867* or *Federal Courts Act* respectively hold the legal power to make these appointments.

[28] While the Applicant filed evidence in support of his Application, including of course the letter from the Chief Justice of Canada and Canadian Judicial Council, the Respondents filed no evidence disputing the same. Indeed, the Respondents filed no evidence at all.

[29] Instead, the Respondents raise and wholly rely on a number of procedural and technical objections, none of which - and with the greatest respect - the Court accepts.

IV. The Applicant

[30] The Applicant is a human rights lawyer in Ottawa. Called to the bar of Ontario 22 years ago, the Applicant regularly litigates in the Federal Court, the Ontario Superior Court of Justice, and Ontario's Court of Appeal. None of this is in dispute.

[31] In his affidavit, the Applicant states (and it is not disputed) that over the past several years he has experienced significant delays in litigation proceedings in the Superior Courts on behalf of vulnerable clients. In addition to this general information, which I accept, the Applicant provides concrete evidence of delay in the form of uncontested correspondence to him from the Ottawa Superior Court of Justice Trial Coordinator concerning a case of his that was adjourned in which the Trial Coordinator attributed the delay to the fact "[T]he court is experiencing a lack of judicial resources as of late." I accept this because the note to that effect is exhibited and is undisputed.

V. Applicant's facts on federal judicial vacancies are accepted

[32] The Applicant also set out the following material facts which the Court accepts.

[33] As of the filing of this Application in June 2023, there were 79 superior court vacancies (including those in the Federal Courts) across Canada. This represents almost 7 percent of the total federally appointed judiciary.

[34] 79 vacancies represents a very significant increase from the Spring of 2016 at which time there were only 46 vacancies.

[35] It is also the case that many vacancies are of very great duration.

[36] These facts are also illustrated in the following tables produced and deposed to by the Applicant, the accuracy of which was not seriously disputed. The Court accepts this table into evidence:

Table 1: Vacancies

Court	Retiree or Act creating vacant position	Date position became vacant	Days vacant as of July 11, 2023	Exhibit
FC	*BIA, 2018*	21-Jun-18	1846	
FC	*BIA, 2019*	21-Jun-19	1481	
FC	*BIA, 2019*	21-Jun-19	1481	
FC	*BIA, 2019*	21-Jun-19	1481	
ONSC	*BIA, 2021*	29-Jun-21	742	

ONSC	*BIA, 2021*	29-Jun-21	742	
ONSC	*BIA, 2021*	29-Jun-21	742	
ONSC	*BIA, 2021*	29-Jun-21	742	
ONSC	*BIA, 2021*	29-Jun-21	742	
FCA	*BIA, 2021*	29-Jun-21	742	
TCC	*BIA, 2021*	29-Jun-21	742	
BCCA	David Franklin Tysoe	01-Jan-22	556	**F**
ABKB	Donna L. Shelley	02-Jan-22	555	**G**
ABKB	Alan D. Macleod	13-Jan-22	544	**H**
ABKB	Kristine Eidsvik	07-Feb-22	519	**I**
BCSC	Robert Jenkins	15-Jun-22	391	**J**
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
BCSC	*BIA, 2022*	23-Jun-22	383	
BCSC	*BIA, 2022*	23-Jun-22	383	
BCSC	*BIA, 2022*	23-Jun-22	383	
SKKB	*BIA, 2022*	23-Jun-22	383	
SKKB	*BIA, 2022*	23-Jun-22	383	
SKKB	*BIA, 2022*	23-Jun-22	383	
ABKB	*BIA, 2022*	23-Jun-22	383	

ABKB	*BIA, 2022*	23-Jun-22	383	
NUCJ	*BIA, 2022*	23-Jun-22	383	
FCA	*BIA, 2022*	23-Jun-22	383	
TCC	*BIA, 2022*	23-Jun-22	383	
BCSC	Grace Choi	14-Jul-22	362	**K**
ABCA	Catherine Anne Fraser	30-Jul-22	346	**L**
BCCA	Richard B. T. Goepel	24-Aug-22	321	**M**
BCSC	Barry Davies	04-Sept-22	310	**K**
BCSC	William Grist	06-Sept-22	308	**K**
BCSC	Elaine Adair	31-Dec-22	192	**N**
BCSC	Arne Silverman	31-Dec-22	192	**N**
BCSC	James Williams	18-Jan-23	174	**N**
QCCA	France Thibault	26-Apr-23	76	**O**
ABCA	Marina Paperny	29-Apr-23	73	**P**
BCSC	George Macintosh	30-Apr-23	72	**Q**
ABCA	Barbara Veldhuis	01-May-23	71	**P**

[37] The Applicant also deposed to a table illustrating how quickly vacancies have been filled in the recent past. Again, the accuracy of this table was not seriously challenged. The Court accepts this table:

Table 2: Vacancies filled in less than 90 days

Appointee	Court	Date position Vacant	Date Appointed	Days Vacant	Exhibit
Philip W. Osborne	NLSC	Aug 4, 2021	Aug 6, 2021	2	**R**
Monica Biringer	TCC	Aug 4, 2021	Aug 6, 2021	2	**S**
Lisa Silver	ABKB	April 21, 2023	April 24, 2023	3	**T**

Allison Kuntz	ABKB	April 21, 2023	April 24, 2023	3	**T**
Kent J. Teskey	ABKB	April 21, 2023	April 24, 2023	3	**T**
Suzanne Stevenson	ONSC	Jan 30, 2020	Feb 3, 2020	4	**U**
Colin D. Clackson	SKKB	Dec 1, 2020	Dec 11, 2020	10	**V**
Robert W. Armstrong	ABKB	Jan 12, 2021	Feb 8, 2021	27	**W**
Lauren Blake	BCSC	Mar 31, 2021	Apr 27, 2021	27	**X**
Mark L. Edwards	ONSC	Jan 1, 2021	Feb 8, 2021	38	**Y**
Sherry L. Kachur	ABKB	Apr 26, 2020	June 3, 2020	38	**Z**
Marylène Pilote	NBKB	Dec 31, 2020	Feb 8, 2021	39	**AA**
Michael A. Marion	ABKB	Mar 4, 2022	Apr 20, 2022	47	**BB**
Jonathan M. Coady	PESC	May 3, 2022	June 21, 2022	49	**CC**
Karen Wenckebach	YKSC	Sept 30, 2020	Nov 19, 2020	50	**DD**
Leonard Marchand	BCCA	Feb 1, 2021	Mar 24, 2021	51	**EE**
Peter Kalichman	QCCA	Mar 1, 2021	Apr 27, 2021	57	**FF**
Meghan McCreary	SKCA	Apr 2, 2022	June 6, 2022	65	**GG**
Leonard Ricchetti	ONSC	Jan 31, 2020	Apr 6, 2020	66	**HH**
J. Ross Macfarlane	ONSC	Dec 15, 2022	Feb 20, 2023	67	**II**
Denise LeBlanc	NBKB	Mar 31, 2022	June 6, 2022	67	**JJ**
Lobat Sadrehashemi	FC	Jan 29, 2021	Apr 6, 2021	67	**KK**
Sophie Lavallée	QCCA	July 25, 2020	Oct 1, 2020	68	**LL**
Julie Bergeron	ONSC	Mar 28, 2022	June 6, 2022	70	**MM**
Nancy M. Carruthers	ABKB	Feb 7, 2022	Apr 20, 2022	72	**BB**
Diane Rowe	NSSC	Mar 1, 2020	May 14, 2020	74	**NN**
Eleanor J. Funk	ABKB	May 23, 2021	Aug 6, 2021	75	**OO**
Calum U.C. MacLeod	ONSC	Dec 30, 2019	Mar 16, 2020	77	**PP**

Charles C Chang	ONSC	Apr 4, 2022	June 27, 2022	84	**QQ**
Lorne Sossin	ONCA	Sept 2, 2020	Nov 26, 2020	85	**RR**
Spencer Nicholson	ONSC	June 15, 2020	Sept 8, 2020	85	**SS**
Jana Steele	ONSC	Feb 25, 2020	May 22, 2020	87	**TT**

[38] The Applicant also produced and deposed to a table illustrating how quickly various Chief Justice and Associate Chief Justice vacancies have been filled recently. This table is also accepted:

Table 3: Chief Justice and Associate Chief Justice Appointments

Appointee	Position	Vacant Date	Appointed Date	Days Vacant	Exhibit
Marc Richard	CJ NB	Apr 27, 2018	May 4, 2018	7	**UU**
Faye E. McWatt	ACJ ONSC	Nov 10, 2020	Dec 21, 2020	41	**VV**
Deborah K. Smith	ACJ NSSC	Apr 30, 2019	June 24, 2019	55	**WW**
Malcolm Rowe	SCC	Sept 1, 2016	Oct 28, 2016	57	**XX**
Manon Savard	CJ QC	Apr 8, 2020	June 11, 2020	64	**YY**
Suzanne Duncan	CJ YK	July 25, 2020	Oct 1, 2020	68	**ZZ**
Shannon Smallwood	CJ NT	July 11, 2022	Sept 22, 2022	73	**AAA**
Michael J. Wood	CJ NS	Feb 1, 2019	Apr 17, 2019	75	**BBB**
Tracey K. DeWare	CJ NBKB	Mar 20, 2019	June 4, 2019	76	**CCC**

[39] Finally, the Applicant attests to three instances of public judicial retirement notice announcements, which this table is also accepted:

Table 4: Public Retirement Notices

Retiree	Court	Notice Date	Vacant Date	Days Notice to Public	Exhibit

Robert J. Bauman	BCCA	Jan 10, 2023	Oct 1, 2023	264	**DDD**
Robert G. Richards	SKCA	Mar 17, 2023	Aug 31, 2023	167	**EEE**
Marc Noël	FCA	Mar 29, 2023	Aug 1, 2023	125	**FFF**

[40] The Respondents also objected to this evidence. However, I accept it for the reasons outlined below, including the fact these tables are based on publicly available information which information itself was not objected to by the Respondents. I also accept this evidence because it is confirmed in some material respects by the Chief Justice of Canada and Canadian Judicial Council's letter dated May 3, 2023.

VI. The Court accepts the facts and opinions of the Chief Justice of Canada and Canadian Judicial Council

[41] With great respect, and for the reasons set out, I accept the facts and opinions expressed by the Chief Justice of Canada and the Canadian Judicial Council in terms of the facts and consequences of delays in appointing judicial vacancies.

[42] The Court does so because, to begin with, the Canadian Judicial Council is composed of 44 members and includes all federally appointed Chief Justices and Associate Chief Justices of all provincial Superior Courts and the Federal Courts across Canada. The Chief Justice of Canada is the Chair of the Canadian Judicial Council on whose behalf the Chief Justice also wrote. These Chief Justices and Associate Chief Justices are responsible for managing the proper flow of criminal and civil cases within their respective courts.

[43] Notably, the Respondents raise no doubts concerning and do not dispute that these Chief Justices and Associate Chief Justices have unequalled knowledge of the critical situation and crisis in respect of which they wrote.

[44] Therefore, as the Chief Justice of Canada and Canadian Judicial Council wrote, I accept that some courts have had to deal with a 10 to 15% vacancy rate for years. I also accept it is not uncommon for positions to remain vacant for several months, if not years, in some cases:

> As you undoubtedly know, there are currently 85 vacancies within Federal Judicial Affairs across the country. Some courts have had to deal with a 10 to 15% vacancy rate for years now. It is also not uncommon for positions to remain vacant for several months, if not years, in some cases. As a concrete example, over half of the positions at the Manitoba Court of Appeal are currently vacant. Key chief justice and associate chief justice positions are also being filled at a very slow pace. In fact, there have recently been considerable delays in appointments to chief justice positions in a number of provinces, including Alberta, Ontario and Prince Edward Island. The chief justice of Manitoba position has been vacant for six months now, and the associate chief justice positions in the Court of King's Bench for Saskatchewan and the Superior Court of Quebec have been vacant for over a year. No clear explanation justifies these delays.

[45] The Chief Justice and Canadian Judicial Council wrote, it is not contradicted and I again accept, that delays in filling vacancies inevitably causes delays in prosecuting and determining serious violent crimes, such as sexual assault and murder, and other criminal and civil cases. In this connection, as an example, the Court of King's Bench of Alberta has reported that over 22% of ongoing criminal cases are passing the 30-month deadline and that 91% of those cases involve serious and violent crimes. Furthermore, the necessary urgency in processing criminal cases means the courts' role in civil cases is being neglected:

> Despite all our judges' professionalism and dedication, the staffing shortage inevitably results in additional delays in hearing cases and rendering judgments. Chief justices have indicated that, because judges are overburdened, delays in setting cases are unavoidable and hearings need to be postponed or adjourned. What's more, even when cases are heard, judgments are slow to be rendered because judges need to spend more time sitting, leaving them less time to deliberate. The analysis framework in *R. v. Jordan*, 2016 SCC 27, with respect to the accused's right to be tried within a reasonable time pursuant to the *Canadian Charter of Rights and Freedoms*, also plays an important role in that regard. It provides that, before superior courts, criminal charges must be tried within 30 months, save in exceptional circumstances. If a trial has not ended within that timeframe, a stay of proceedings may be ordered. Many chief justices say that as part of their efforts to respect the timelines prescribed by Jordan, they are currently forced to choose the criminal matters that "deserve" to be heard most. Despite their best efforts, stays of proceedings are pronounced against individuals accused of serious crimes, such as sexual assault or murder, because of delays that are due, in part or in whole, to a shortage of judges. For example, the Court of King's Bench of Alberta has reported that over 22% of ongoing criminal cases are passing the 30-month deadline and that 91% of those cases involve serious and violent crimes. Furthermore, the necessary urgency in processing criminal cases means the courts' role in civil cases is being neglected. The justice system is consequently at risk of being perceived as useless for civil matters. These types of situations represent a failure of our justice system and are likely to fuel public cynicism and undermine their trust in our democratic institutions.

[46] In terms of the exacerbating consequences of delays ("government's inertia") in filling judicial vacancies on the critical situation of Canada's Superior Court and Federal Courts systems, the Chief Justice of Canada and Canadian Judicial Council wrote, and I accept that the slow pace of appointments is all the more difficult to understand since most judicial vacancies are predictable, especially those resulting from retirements for which judges usually provide several months' notice. In this context, these delays in appointments send a message that this is simply not a priority for the government:

> It should be noted that the difficulties brought on by the judge shortage are exacerbating an already critical situation within several courts—namely a serious lack of resources due to chronic underfunding by the provinces and territories. However, while several factors explain the crisis currently facing our justice system, the appointment of judges in due course is a solution within reach that could help quickly and effectively improve the situation. Given this obvious fact and the critical situation we are faced with, the government's inertia regarding vacancies and the absence of satisfactory explanations for these delays are disconcerting. The slow pace of appointments is all the more difficult to understand since most judicial vacancies are predictable, especially those resulting from retirements for which judges usually provide several months' notice. In this context, these delays in appointments send a message that this is simply not a priority for the government.

[47] The Court is compelled to note Canadians access to justice without delay is and has been enshrined in various constitutional and quasi-constitutional documents since the *Magna Carta (Great Charter of Liberties)* of 1215 which promised: “To no one will we sell, to no one will we refuse or delay, right or justice.” See *Magna Carta*, article 40, *Select Documents of English Constitutional History*, London: MacMillan & Co., London 1918. With respect, I conclude the inevitable and untenable delayed justice caused by the executive government of Canada goes to the very heart of this 800-year-old promise and unacceptably denies access to justice without delay.

[48] In this connection I add that in the Canadian criminal context, section 11(b) of the *Canadian Charter of Rights and Freedoms* [*Charter*] guarantees “any person charged with an offence has the right to be tried within a reasonable time.” This was commented upon in detail in *R v Jordan*, 2016 SCC 27 where the Supreme Court of Canada applied section 11(b) of the *Charter* to set presumptive time limits for trials. The consequences of delay and not being tried

within a reasonable time are discussed by Moldaver, Karakatsanis and Brown JJ for the majority at paragraphs 19-26:

> [19] As we have said, the right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice. It finds expression in the familiar maxim: "Justice delayed is justice denied." An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole.
>
> [20] Trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial. Liberty is engaged because a timely trial means an accused person will spend as little time as possible held in pre-trial custody or living in the community under release conditions. Security of the person is impacted because a long-delayed trial means prolonging the stress, anxiety, and stigma an accused may suffer. Fair trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence.
>
> [21] At the same time, we recognize that some accused persons who are in fact guilty of their charges are content to see their trials delayed for as long as possible. Indeed, there are incentives for them to remain passive in the face of delay. Accused persons may seek to avoid responsibility for their crimes by embracing delay, in the hope that the case against them will fall apart or they will obtain a stay of proceedings. This operates to the detriment of the public and of the system of justice as a whole. Section 11(b) was not intended to be a sword to frustrate the ends of justice (*Morin*, at pp. 801-2).
>
> [22] Of course, the interests protected by s. 11(b) extend beyond those of accused persons. Timely trials impact other people who play a role in and are affected by criminal trials, as well as the public's confidence in the administration of justice.
>
> [23] Victims of crime and their families may be devastated by criminal acts and therefore have a special interest in timely trials (*R. v. Askov*, 1990 CanLII 45 (SCC), [1990] 2 S.C.R. 1199, at pp. 1220-21). Delay aggravates victims' suffering, preventing them from moving on with their lives.

> [24] Timely trials allow victims and witnesses to make the best possible contribution to the trial, and minimize the "worry and frustration [they experience] until they have given their testimony" (*Askov*, at p. 1220). Repeated delays interrupt their personal, employment or business activities, creating inconvenience that may present a disincentive to their participation.
>
> [25] Last but certainly not least, timely trials are important to maintaining overall public confidence in the administration of justice. As McLachlin J. (as she then was) put it in *Morin*, "delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice" (p. 810). Crime is of serious concern to all members of the community. Unreasonable delay leaves the innocent in limbo and the guilty unpunished, thereby offending the community's sense of justice (see *Askov*, at p. 1220). Failure "to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures" (p. 1221).
>
> [26] Extended delays undermine public confidence in the system. And public confidence is essential to the survival of the system itself, as "a fair and balanced criminal justice system simply cannot exist without the support of the community" (*Askov*, at p. 1221).

[49] In terms of the significant ("appalling") negative impacts delayed vacancies create for the federally appointed judiciary, the Chief Justice of Canada and Canadian Judicial Council conclude and the Court accepts it is imperative for the Prime Minister and his office to give this issue the importance it deserves, and for appointments to be made in a timely manner. They say it is essential that the vacant positions within the federal judiciary be filled diligently to ensure the judicial branch functions properly. In the past, the Canadian Judicial Council has urged governments to make judicial appointments more quickly. This time, the Chief Justice of Canada and Canadian Judicial Council have serious concerns that without concrete efforts to remedy the situation, Canada's federal judiciary will soon reach a point of no return in several jurisdictions.

The consequences will make headlines and have serious repercussions on our democracy and on all Canadians:

> Despite all these efforts, it is imperative for the Prime Minister's Office to give this issue the importance it deserves and for appointments to be made in a timely manner. It is essential that the vacant positions within the judiciary be filled diligently to ensure that judicial branch functions properly. In the past, the Canadian Judicial Council has urged governments to make judicial appointments more quickly. This time, we have serious concerns that without concrete efforts to remedy the situation, we will soon reach a point of no return in several jurisdictions. The consequences will make headlines and have serious repercussions on our democracy and on all Canadians. This situation requires your immediate attention.
>
> The positions that have been left vacant are having significant impacts on the administration of justice, the operations of our courts and the health of our judges. Canadian Judicial Council members recently took it upon themselves to provide a more comprehensive overview of the difficulties faced by their respective courts. The findings are appalling.
>
> These ongoing vacancies also have a serious impact on judges themselves. Faced with a chronic work overload and increased stress, judges are increasingly going on medical leave, which has a domino effect on their colleagues, who then must carry an additional workload. It is also becoming difficult for judges of certain courts to find the necessary time to complete training, including training that is considered mandatory. This situation does not bode well for ensuring a healthy and thriving judiciary. If current issues persist, it could also become difficult to attract high-quality candidates for judge positions.
>
> This is already the case in British Columbia.

[50] In terms of the (“untenable”) consequences for access to justice and the health of democratic institutions, the Chief Justice or Canada and Canadian Judicial Council wrote and the Court accepts appointments need to be made in a timely manner because the current situation is untenable, and they both fear that this will result in a crisis for our justice system, which is

already facing many challenges. The Court accepts their evidence that access to justice and the health of our democratic institutions are at risk, that the justice system is consequently at risk of being perceived as useless for civil matters, and that the types of situations represent a failure of our justice system and are likely to fuel public cynicism and undermine trust in our democratic institutions. They conclude and I accept that the current situation is untenable:

> The current situation is untenable, and I fear that this will result in a crisis for our justice system, which is already facing many challenges. Access to justice and the health of our democratic institutions are at risk.
>
> Furthermore, the necessary urgency in processing criminal cases means the courts' role in civil cases is being neglected. The justice system is consequently at risk of being perceived as useless for civil matters. These types of situations represent a failure of our justice system and are likely to fuel public cynicism and undermine their trust in our democratic institutions.
>
> In this context, these delays in appointments send a message that this is simply not a priority for the government.

[51] The Chief Justice of Canada and Canadian Judicial Council also found the vacancy crisis is having a “serious” impact on judges themselves, on their health in terms of medical leave, and on their training. The situation does not bode well for ensuring a healthy and thriving judiciary. If current issues persist, it could also become difficult to attract high-quality candidates for judicial positions, all of which conclusions this Court respectfully accepts:

> These ongoing vacancies also have a serious impact on judges themselves. Faced with a chronic work overload and increased stress, judges are increasingly going on medical leave, which has a domino effect on their colleagues, who then must carry an additional workload. It is also becoming difficult for judges of certain courts to find the necessary time to complete training, including training that is considered mandatory. This situation does not bode well for ensuring a healthy and thriving judiciary. If current issues persist, it could also become difficult to attract high-

> quality candidates for judge positions. This is already the case in British Columbia.

[52] Neither Respondent gave any explanation or reason to justify this crisis situation, either to the Chief Justice of Canada or the Canadian Judicial Council, or to this Court. The Chief Justice of Canada and Canadian Judicial Council wrote and I have to agree that "[N]o clear explanation justifies these delays."

[53] Notably also, the Respondents did not object to any of the assessments in the letter. This Court has no hesitation in accepting the expert assessments by the Chief Justice of Canada and Canadian Judicial Council that the slow pace of appointments is all the more difficult to understand since most judicial vacancies are predictable, especially those resulting from retirements for which judges usually provide several months' notice:

> The slow pace of appointments is all the more difficult to understand since most judicial vacancies are predictable, especially those resulting from retirements for which judges usually provide several months' notice. In this context, these delays in appointments send a message that this is simply not a priority for the government.

VII. Demands made to the Respondents

[54] In addition to the letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of May 3, 2023, which and with respect I consider a request for these purposes, on June 16, 2023, Applicant's counsel sent a letter to Canada's Minister of Justice, with the subject line "vacant judicial appointments" stating he echoes the request of the Chief Justice of Canada and respectfully requests to fill these vacancies in a timely manner.

[55] On June 17, 2023, the Applicant's lawyer sent the same letter, but addressed to the Prime Minister again echoing the request of the Chief Justice of Canada and the Canadian Judicial Council and respectfully requests the Prime Minister fill these vacancies in a timely manner.

[56] The Applicant received no response to either letter. And, in any event, as already seen, the number of vacancies has not gone down as requested by the Chief Justice of Canada and Canadian Judicial Council; in fact, according to the FCJA, the number superior count vacancies is 75 as of February 1, 2024, which is almost identical to the 79 vacancies when this application was commenced in June 2023.

[57] In this connection and in the Court's respectful view, reports on the public website of the FCJA may be accepted for the truth thereof, it being a highly professional and completely impartial and credible federal source of data in relation to federal judicial vacancies and appointments across Canada. See: *Barakat v Andraos,* 2023 ONSC 582 where Justice Trimble at paragraph 24 reviews the jurisprudence on judicial notice and government websites (most of which is of this Court). This Court agrees with and adopts their conclusions and applies them to the FCJA:

> A court may take judicial notice of facts can come from government and NGO websites provided that the government or organization has a reputation for credibility (see: *Araya v. Nevsun Resources Ltd*, 2017 BCCA 401 at par 24, *Mahjoub v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1503 at paras. 72–75, *Buri v. Canada (Minister of Citizenship and Immigration), 2001 FCT 1358, [2001] F.C.J. No. 1867* (Fed T.D.) at para. 22 and *Kazi v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 178, [2002] F.C.J. No. 223 (Fed. T.D.) at paras. 28, 30).

VIII. Issues

[58] The Applicant raises the following issues:

1. Should the Court order *mandamus*?
2. Should the Court order a declaration?

[59] The Respondents raise the following issues:

1. As a preliminary matter, whether the Applicant's affidavit evidence is admissible and relevant;
2. Whether the Federal Court has jurisdiction over the subject matter of the application;
3. Whether the Applicant has private interest standing or should be granted public interest standing to adjudicate the issues raised in the application;
4. Whether the requirements of *mandamus* have been met; and
5. Whether the Court should grant the Applicant's alternative request for declaratory relief.

IX. Relevant statutory provisions

[60] The following sections of the *Constitution Act, 1867* are relevant:

Exclusive Powers of Provincial Legislatures	**Pouvoirs exclusifs des législatures provinciales**
Subjects of exclusive Provincial Legislation	**Sujets soumis au contrôle exclusif de la législation provinciale**
92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,	**92** Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :

[…]	[…]
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.	**14.** L'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux;
[…]	[…]
VII. Judicature	**VII. Judicature**
Appointment of Judges	**Nomination des juges**
96 The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.	**96** Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.
[…]	[…]
Salaries, etc., of Judges	**Salaires, etc. des juges**
100 The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.	**100** Les salaires, allocations et pensions des juges des cours supérieures, de district et de comté (sauf les cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick) et des cours de l'Amirauté, lorsque les juges de ces dernières sont alors salariés, seront fixés et payés par le parlement du Canada.
General Court of Appeal, etc.	**Cour générale d'appel, etc.**

101 The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.	**101** Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.
[Emphasis added]	[Je souligne]

[61] The following sections of the *Federal Courts Act* and *Interpretation Act*, RSC 1985, c I 21 are relevant:

Federal Courts Act	***Loi sur les Cours fédérales***
Appointment of judges	**Nomination des juges**
5.2 The judges of the Federal Court of Appeal and the Federal Court are to be appointed by the Governor in Council by letters patent under the Great Seal.	**5.2** La nomination des juges de la Cour d'appel fédérale et de la Cour fédérale se fait par lettres patentes du gouverneur en conseil revêtues du grand sceau.
[…]	[…]
Extraordinary remedies, federal tribunals	**Recours extraordinaires : offices fédéraux**
18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	**18 (1)** Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against	**a)** décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement

any federal board, commission or other tribunal; and

[…]

déclaratoire contre tout office fédéral;

[…]

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut:

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

[…]

[Emphasis added]

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

[…]

[Je souligne]

Interpretation Act

Loi d'interprétation

Definitions

Définitions

General definitions

35 (1) In every enactment,

Définitions d'application générale

35 (1) Les définitions qui suivent s'appliquent à tous les textes.

[…]	[…]
Governor General in Council or Governor in Council means the Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada; (gouverneur en conseil ou gouverneur général en conseil)	gouverneur en conseil ou gouverneur général en conseil Le gouverneur général du Canada agissant sur l'avis ou sur l'avis et avec le consentement du Conseil privé de la Reine pour le Canada ou conjointement avec celui-ci. (Governor General in Council or Governor in Council)

X. Submissions and Analysis

A. *Jurisdiction of the Federal Court*

(1) The *ITO* test

[62] The starting point for this assessment is the Supreme Court of Canada's decision in *ITO-International Terminal Operations Ltd v Miida Electronics Inc,* [1986] 1 SCR 752 [*ITO*] at p.767. In *ITO* the Supreme Court sets a three-part test for construing the Federal Court's jurisdiction. In this connection it is worth noting the predecessor of the Federal Courts was set up by the same Act of Parliament that established the Supreme Court of Canada. Such statutes require interpretation in the constitutional setting:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
>
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
>
> 3. The law on which the case is based must be "a law of Canada" as the phrase is used in s.101 of the *Constitution Act, 1867*.

[63] The Applicant submits the Federal Court has jurisdiction to hear this application and grant the relief sought. In this he relies on jurisprudence of this Court, jurisprudence of the Federal Court of Appeal and jurisprudence of the Supreme Court of Canada all of which mandate a broad, fair and liberal approach to this Court's jurisdiction.

[64] The Respondents disagree. They argue the Federal Court lacks jurisdiction to hear and decide this application.

[65] In this respect the Court determines that the leading jurisprudence is *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 [*Liberty Net*] per Bastarache J. In *Liberty Net*, the Supreme Court endorsed a fair and liberal approach to the Federal Court's jurisdiction. Justice Bastarache for the majority at pp. 657 and 658 states:

> These are the historical and constitutional factors which led to the development of the notion of inherent jurisdiction in provincial superior courts, which to a certain extent has been compared and contrasted to the more limited statutory jurisdiction of the Federal Court of Canada. But in my view, there is nothing in this articulation of the essentially remedial concept of inherent jurisdiction which in any way can be used to justify a narrow, rather than a fair and liberal, interpretation of federal statutes granting jurisdiction to the Federal Court. The legitimate proposition that the institutional and constitutional position of provincial superior courts warrants the grant to them of a residual jurisdiction over all federal matters where there is a "gap" in statutory grants of jurisdiction, is entirely different from the proposition that federal statutes should be read to find "gaps" unless the words of the statute explicitly close them. The doctrine of inherent jurisdiction raises no valid reasons, constitutional or otherwise, for jealously protecting the jurisdiction of provincial superior courts as against the Federal Court of Canada.
>
> [Emphasis added]

[66] Notably and central to this Court's conclusion in this regard, is the Supreme Court of Canada's plain rejection of a narrow interpretation of the Federal Court's jurisdiction in favour of a fair and liberal interpretation of statutes granting jurisdiction to the Federal Court set out in *Liberty Net*.

[67] Of interest, the Supreme Court in *Windsor (City) v Canadian Transit Co.*, 2016 SCC 54 [*Windsor*], pointed to by the Respondents, neither addresses nor considers the Supreme Court of Canada's own previous decision in *Liberty Net*.

[68] Upon reflection and due consideration, the Court will follow *Liberty Net* and persuasive post-*Windsor* jurisprudence and approach the determination of Federal Court's jurisdiction in fair and liberal manner, and not narrowly as the Respondents proposed.

[69] To begin this, the Court adopts a fair and liberal approach because it agrees with Justice Mactavish (as she then was) in *Deegan v Canada (Attorney General)*, 2019 FC 960 [*Deegan*]:

> [224] In contrast to the inherent jurisdiction enjoyed by provincial superior courts, the Supreme Court held in *Windsor Bridge* that the Federal Courts have only the jurisdiction that has been conferred on them by statute, and that they are without inherent jurisdiction: at paragraph 33. This of course begs the question: if the Federal Courts' jurisdiction is constrained by the fact that they are statutory courts created under section 101 of the *Constitution Act, 1867*, how is it that the jurisdiction of the Supreme Court of Canada—another statutory court created under section 101 of the *Constitution Act, 1867*—is not similarly constrained?
>
> [225] Indeed, as the Federal Court of Appeal observed in *Lee*, "the Supreme Court and the Federal Courts (through their predecessor, the Exchequer Court) are both statutory courts under section 101 of the *Constitution Act, 1867*, born at the same time from a single joint statute: *Supreme and Exchequer Court Act*, S.C. 1875, c. 11": above, at paragraph 13. The Federal Court of Appeal went on to

> observe in *Lee* that "the Supreme Court and the Federal Courts must be seen as identical twins" in terms of their ability to manage their processes and proceedings, that is, their plenary powers: *Lee*, above, at paragraph 13.
>
> …
>
> [227] The fact is that the Federal Court is neither an inferior court nor an administrative tribunal: *Lee*, above, at paragraph 12; *Bilodeau-Massé*, above, at paragraph 72. It is, rather, a superior court of record having civil and criminal jurisdiction: *Federal Courts Act*, section 4. As a superior court, the Federal Court has plenary jurisdiction to determine any matter of law arising out of its original jurisdiction. This includes constitutional jurisdiction in matters that are properly before the Court.
>
> [Emphasis added]

[70] Justice Mactavish followed *Bilodeau-Massé v Canada (Attorney General)*, 2017 FC 604 [*Bilodeau-Massé*], where Justice Martineau concluded at paragraph 72 that "the grant of jurisdiction under the *Federal Courts Act* should not be interpreted in a narrow fashion." In this respect Justice Martineau adopts the reasoning of the Supreme Court in *Liberty Net* as does this Court:

> [78] As a result, as the Supreme Court noted in *Canadian Liberty Net*, "[i]n a federal system, the doctrine of inherent jurisdiction does not provide a rationale for narrowly reading federal legislation which confers jurisdiction on the Federal Court" (at paragraph 35). Thus, because this involves the Federal Court's general administrative jurisdiction over federal administrative tribunals, "[t]his means that where an issue is clearly related to the control and exercise of powers of an administrative agency, which includes the interim measures to regulate disputes whose final disposition is left to an administrative decision-maker, the Federal Court can be considered to have a plenary jurisdiction" (*Canadian Liberty Net*, at paragraph 36) (my emphasis). If section 44 of the *Federal Courts Act* gives the Federal Court jurisdiction to grant an injunction in enforcing the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, this is all the more reason to argue that in the context of an action against the Crown or an application for judicial review, the inherent or residual jurisdiction of the provincial

> superior courts in matters involving the constitution or *habeas corpus* in no way affects the "plenary jurisdiction" exercised by the Federal Court under sections 17 and 18 of the *Federal Courts Act*.
>
> [Emphasis added]

[71] To the same effect are the reasons of Justice Roussel (as she then was) in *PH v Canada (Attorney General)*, 2020 FC 393 [*PH*] at paragraphs 42 and 43. Justice Roussel declined to follow *Windsor*, holding:

> [42] With the greatest of respect to the Supreme Court of Canada, I do not consider myself bound by these *obiter* comments. The facts in this case differ from those in *Windsor*. That case dealt with the application of a municipal bylaw to a federal undertaking. The applicant was not seeking relief under an Act of Parliament and under a federal right, but was seeking relief under the *Constitution Act, 1867*. In this case, sections 18 and 18.1 of the Act grant this Court the jurisdiction to issue declaratory relief against the Parole Board of Canada. There is no need to interpret this Court's jurisdiction restrictively because this Court is a statutory court rather than a court of inherent jurisdiction. Although it is not a "superior court" within the meaning of section 96 of the *Constitution Act, 1867*, this Court is nevertheless comparable to a superior court when it exercises its general supervisory jurisdiction over federal boards, such as the Parole Board of Canada. Sections 18 and 18.1 of the *Act* do not remove the jurisdiction of provincial superior courts to grant a constitutional declaration against a federal board. However, the *Act* does create concurrent jurisdiction in cases where the Federal Court has been granted jurisdiction by an Act of Parliament (ss 18 and 18.1 of the *Act*) and the *ITO* test is otherwise met, as is the case here.
>
> [43] I do not intend to comment any further on the majority's *obiter* comments in Windsor. I accept and adopt as my own the reasoning of my colleagues who recently found that this Court does indeed have the jurisdiction to issue general declarations of invalidity for the purpose of section 52 of the *Constitution Act, 1982* (*Deegan v Canada (Attorney General)*, 2019 FC 960 at paras 212-240; *Fédération des francophones de la Colombie-Britannique v Canada (Employment and Social Development)*, 2018 FC 530 at paras 55-65; *Bilodeau-Massé v Canada (Attorney General)*, 2017 FC 604 at paras 38-88). I also rely on the statements made by the Federal Court of Appeal in *Lee v Canada*

> *(Correctional Service)*, 2017 FCA 228 regarding the plenary powers of the Federal Courts. As I do not find it useful to repeat their analysis in these reasons, I refer the parties and the reader to the cited portions of those decisions.
>
> [Emphasis added]

[72] As did Justice Roussel (as she then was), I also rely on the determinations of the Federal Court of Appeal in *Lee v Canada (Correctional Service)*, 2017 FCA 228 regarding the plenary powers of the Federal Courts emanating from their constitutional status as courts, as set out at paragraphs 8-12:

> [8] The idea is that the Federal Courts' plenary powers emanate from their constitutional status as courts, not from any particular legislative provision in the *Federal Courts Act*, R.S.C. 1985, c. F-7 or the *Federal Courts Rules*. The Federal Courts are not just ordinary agencies of government but rather part of the judicial branch within the constitutional separation of powers. If courts are to be courts and to fulfil their function as part of the judicial branch, they must have certain plenary powers to manage their processes and proceedings.
>
> [9] Cases decided by the Supreme Court after *Liberty Net* have alluded to these powers—in one case at the level of obiter in a single paragraph, and in another case buried as an afterthought in a endnote: see, respectively *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 19 and *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617. Perhaps because the treatment of the powers is brief, both cases fail to cite *Liberty Net*. But both loosely suggest that the Federal Courts' plenary powers are "necessarily incidental" to statutory powers already granted, rather than powers stemming from the Federal Court's status as courts within the judicial branch.
>
> [10] In fact, in terms of the powers the Federal Courts have, *Cunningham* seems to place the Federal Courts on the same footing as administrative tribunals and other administrative functionaries throughout the government. But Cunningham is not the only word on this point.
>
> [11] Again, there is *Liberty Net.* And in a brief comment in another case, the Supreme Court seems to have recognized the Federal

> Courts as superior courts established under the federal power in the *Constitution Act*, 1867 to create federal courts, not just as mere administrative functionaries: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 136 (not cited in *Cunningham* and *Windsor*); see also the clear text of section 4 of the *Federal Courts Act*.
>
> [12] In my view, the Supreme Court's holdings in *Charkaoui* and *Liberty Net* are unassailable. The Federal Courts cannot be equated to administrative tribunals. As is suggested in *Liberty Net*, the Federal Courts—like the Supreme Court, the provincial courts (both superior and otherwise), the Tax Court and military courts—are fully fledged courts within the judicial branch and, by virtue of this, have all the plenary powers of courts to manage their processes and proceedings.
>
> [Emphasis added]

[73] This Court also agrees with Justice Martineau in *Bilodeau-Massé* that access to justice concerns, the unique fact that the Federal Court is fully bilingual and bijural forum, and that the Federal Court is nationally accessible, strongly militate in favour a fair and liberal approach to the Federal Court's jurisdiction.

[74] Moreover, the case at hand calls for the resolution of a quintessentially federal issue involving purely federal powers, in preference to a multiplicity of parallel proceedings in many different provincial court systems with attendant delays, possible inconsistent decisions, needless duplication overlap, expense and waste of judicial resources. Justice Martineau in *Bilodeau-Massé* states:

> [69] In short, justice is not in competition with itself: access to justice must prevail in every case, which favours a broad construction of the jurisdiction conferred on this Court by the *Federal Courts Act*. In this sense, the Federal Court is part of the solution, and it would be wrong to want to associate it with the problem of the increasing number of jurisdictions. When it created a national court of first instance, Parliament could very well have

> left it to the courts mentioned in section 129 of the *Constitution Act, 1867*, and to the other provincial courts created under subsection 92(14) of the *Constitution Act, 1867*, to exercise their traditional jurisdiction in civil and criminal matters, while making adjustments over time, if necessary, for the purposes of the "laws of Canada". But what characterizes the Federal Court is not only its nature as a national court (trial and appeal). Its composition also ensures national continuity (section 5.3 of the *Federal Courts Act*) and the maintenance of Canadian bijuralism (common law and civil law). However, like section 6 of the *Supreme Court Act*, section 5.4 of the *Federal Courts Act* provides for effective representation of Quebec, with a minimum and large number of judges (at least five judges of the Federal Court of Appeal and at least 10 judges of the Federal Court) who must have been judges of the Court of Appeal or of the Superior Court of Quebec or members of the Bar of Quebec. It is an eloquent legislative demonstration of Parliament's wish to create a pan-Canadian court that is particularly well adapted to Canada's reality and bijuralism.
>
> [Emphasis added]

[75] Further, there is no body of provincial law in dispute. This case relates to the federal power to make federal judicial appointments and an obvious disagreement between our most senior and most experienced judicial office holders including the Chief Justice of Canada and Canadian Judicial Council on the one hand, and the executive government including the Prime Minister and Minister of Justice on the other.

[76] There is no issue of competing jurisdiction. There is no "pretence" of provincial law in this case that exclusively involves the application of federal law in an area of undisputed federal jurisdiction. See *Girouard v Canada (Attorney General)*, 2020 FCA 129, at paragraph 108:

> [108] In stipulating that the Governor General appoints judges of the superior courts and has the authority to remove them (on address of the Senate and House of Commons) and that Parliament fixes and provides their salaries, the *C.A., 1867* clearly ousts provincial jurisdiction on any matters relating to these issues.

[77] And see *Deegan* per Mactavish J.:

> [232] There is, moreover, an existing body of federal law that is essential to the disposition of the case that nourishes the statutory grant of jurisdiction. The Impugned Provisions form part of the federal *Income Tax Act* and the *Implementation Act*, federal legislation implementing an agreement with a foreign state governing the sharing of information under a bilateral tax treaty. It also bears noting that no body of provincial law is implicated in this proceeding, and that the case does not involve competing spheres of jurisdiction. The case thus involves the application of federal law in an area of federal jurisdiction.
>
> [Emphasis added]

(2) First prong of *ITO*

[78] With this guidance, and to recall, prong one of *ITO* requires that "[T]here must be a statutory grant of jurisdiction by the federal Parliament." In my view, sections 18 and 18.1 of the *Federal Courts Act* constitute a statutory grant of jurisdiction by the federal Parliament to this Court to grant declaratory relief against any federal board: this point was expressly decided by the Court in *PH* at paragraphs 38 and 42. I therefore conclude the first prong of *ITO* is met.

[79] In this connection, and while the Respondents accept section 18.1 of the *Federal Courts Act* confers jurisdiction to the Federal Court to grant declaratory relief against any "federal board, commission or other tribunal" they argue it does not apply to the Prime Minister or Minister of Justice.

[80] With respect, I disagree. First of all, this submission does not apply in relation to appointments under section 5.2 of the *Federal Courts Act* given the Supreme Court of Canada's opposite conclusion in *Strickland v Canada (Attorney General)*, 2015 SCC 37:

> [64] At this point, it seems to me that the language of the Act conferring "exclusive original jurisdiction" can be taken as a clear and explicit expression of parliamentary intent. Similarly, as presently advised I see no reason to doubt that the Governor in Council, when exercising "jurisdiction or powers conferred by or under an Act of Parliament" is a "federal board, commission or other tribunal" within the meaning of s. 2 the *Act.*

[81] And I see no reason to accept the Respondents' narrow construction in terms of granting declaratory relief in relation to appointments under section 96 of the *Constitution Act, 1867*. In this connection, I take the same view of the authority conferred on this Court by paragraphs 18(1)(a) and 18.1(3)(a) of the *Federal Courts Act* as that taken to section 44 of the *Federal Courts Act* by the Supreme Court of Canada in *Liberty Net* and by this Court in *Bilodeau-Massé*, namely that "the Federal Court can be considered to have a plenary jurisdiction". This is further confirmed in *Deegan* and *PH*. I am not persuaded to depart from concurrent findings of my colleagues, nor to disagree with the Supreme Court of Canada's determination in *Liberty Net*.

(3) Second and third prongs of *ITO*

[82] The second step in *ITO* is that "[t]here must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction."

[83] The third step in *ITO* is that the law on which the case is based must be "a law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867*.

[84] The Applicant submits that federal law includes federal common law. As outlined below, I agree. In particular, the Applicant argues federal common law includes law surrounding the

modalities of federal judicial appointments, including judicial recognition of constitutional conventions that such appointments may only be made on the advice and consent of Cabinet, and the Prime Minister or Minister of Justice. Again I agree.

[85] The Applicant submits that constitutional conventions may be recognized by courts as laws. But it is also well established that constitutional conventions may not be enforced by the courts.

[86] The Respondents argue that constitutional conventions, while being rules regulating conduct as between constitutional actors (a conclusion the Court accepts), are not laws for the purposes of the second prong of *ITO*. As I understand their argument, it is based on the rule that constitutional conventions may not be enforced by the Courts, from which they conclude constitutional conventions may not support step two of *ITO*.

[87] Through post-hearing submissions, the Court entertained additional arguments on this and related points as to whether federal common law and constitutional conventions may establish this Court's jurisdiction per *ITO* on the issue of filling vacancies on the provincial Superior Courts and Federal Courts.

[88] The Respondents argue the common law cited by the Applicant relates to the interpretation of legal principles governing reviewability of conventional actors and constitutional conventions, falling under the law of justiciability. The Respondents submit and rely on *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989]

2 SCR 49, where Chief Justice Dickson at pp.90-91 said that the law of justiciability involves "a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue…"

[89] The Applicant, in reply on this point, submits he is not relying on the common law of justiciability, but rather the common law regarding the transfer of power and duties from the Governor General to the Prime Minister and the Minister of Justice as a result of constitutional conventions. The Applicant submits this body of common law was created in the context of merits determinations about substantive legal rights, duties, and powers, citing the decisions to be discussed later namely *Acadian Society of New Brunswick v Right Honourable Prime Minister of Canada*, 2022 NBQB 85 [*Acadian Society*], *Conacher v Canada (Prime Minister),* 2010 FCA 131 [*Conacher*], and *Democracy Watch* [per Southcott J].

[90] In post-hearing submissions, the Respondents submit justiciability is common law, but does not have a federal character. The Respondents argue the concept of justiciability flows from the constitutional separation of power, and is inherently neither federal nor provincial. I disagree.

[91] The Applicant submits this is false, relying on *Quebec North Shore Paper v CP Ltd*, [1977] 2 SCR 1054 [*Quebec North Shore Paper*] for the proposition that when common law relates to both a provincial and federal issue, at p.1063, "it is federal law in relation to the Crown in right of Canada, just as it is provincial law in relation to the Crown in right of a Province." The Applicant advances the argument here that when the common law about the transference of

powers and duties by constitutional convention relates to provincial actors, it is provincial common law. When it relates to federal actors, he submits it is federal common law.

[92] I agree with the Applicant in this respect.

[93] Lastly, the Respondents submit that if the Court finds that constitutional conventions are federal common law, they do not constitute an existing body of federal law essential to the disposition of this application, per the second prong of *ITO*. The Respondents submit justiciability is no more essential to the disposition of this application than it is to any other application, and is insufficient to satisfy the second prong of *ITO* given the high threshold on the party asserting the Court's jurisdiction.

[94] The Applicant, again in reply, submits this is incorrect and the Respondents mischaracterize the nature of the common law being relied upon in this case. Further, the Applicant asserts the Respondents argument comparing the federal common law to other applications to determine whether it is more essential to the disposition of this case is not found in the jurisprudence on the application of the *ITO* test.

[95] Lastly, the Applicant submits that just because the legal duty relied on to compel the appointment of provincial Superior Court judges is not created by a federal law, does not mean federal law is not essential to the disposition of the application. Again I agree with the Applicant. The Applicant submits the remedy does not need to be expressly created or conferred by federal law for the Federal Court to have jurisdiction; it is enough that a body of federal law has an

impact on the matter at every turn. For this, the Applicant correctly relies on *Rhine v The Queen*, [1980] 2 SCR 442, where Chief Justice Laskin stated at p. 447:

> At every turn, the Act has its impact on the undertaking so as to make it proper to say that there is here existing and valid federal law to govern the transaction which became the subject of litigation in the Federal Court. It should hardly be necessary to add that "contract" or other legal institutions, such as "tort" cannot be invariably attributed to sole provincial legislative regulation or be deemed to be, as common law, solely matters of provincial law.

[96] Having considered the matter, the Court is not persuaded the lack of enforceability at law renders federal constitutional conventions incapable of being considered federal laws for the purposes of *ITO*.

[97] To begin with, there is no jurisprudence to that effect.

[98] In addition, taking a fair and liberal interpretation to the Federal Court's jurisdiction per *Liberty Net, Lee, Deegan, Bilodeau-Massé* and *PH,* I am persuaded that constitutional conventions in relation to the appointment of federal judges by the Governor General and Governor in Council pursuant to section 96 of the *Constitution Act,1867* and section 5.2 of the *Federal Courts Act* do constitute federal laws essential to the disposition of this case and which nourishes the statutory grant of jurisdiction for the purposes of *ITO*.

[99] Upon review, and with respect, this Court concludes that a "federal law" for the purposes of the second step of *ITO* (and "a law of Canada" for the purposes of the third step, given there is here "clearly an overlap between the second and third" prong per Wilson in *Roberts v Canada*, [1989] 1 SCR 322 [*Roberts*]), includes federal statutes, federal regulations *and* federal common

law. This conclusion is endorsed by Chief Justice Laskin in *Quebec North Shore Paper* at p. 1063. There the Supreme Court unanimously held common law associated with the Crown's position as a litigant [it] is federal law:

> Stress is laid, however, on what the Privy Council said in discussing the application of s. *30(d)* of the *Exchequer Court Act*, the provision giving jurisdiction to the Exchequer Court in civil actions where the Crown is plaintiff or petitioner. I do not take its statement that "sub-s. (d) must be confined to actions ... in relation to some subject matter legislation in regard to which is within the legislative competence of the Dominion" as doing anything more than expressing a limitation on the range of matters in respect of which the Crown in right of Canada may, as plaintiff, bring persons into the Exchequer Court as defendants. It would still be necessary for the Crown to found its action on some law that would be federal law under that limitation. It should be recalled that the law respecting the Crown came into Canada as part of the public or constitutional law of Great Britain, and there can be no pretence that that law is provincial law. In so far as there is a common law associated with the Crown's position as a litigant it is federal law in relation to the Crown in right of Canada, just as it is provincial law in relation to the Crown in right of a Province, and is subject to modification in each case by the competent Parliament or Legislature. Crown law does not enter into the present case.
>
> [Emphasis added]

[100] Furthermore, Chief Justice Laskin in *Quebec North Shore Paper* at pp.1066 states:

> It is also well to note that s. 101 does not speak of the establishment of Courts in respect of matters within federal legislative competence but of Courts "for the better administration of the laws of Canada". The word "administration" is as telling as the plural words "laws", and they carry, in my opinion, the requirement that there be applicable and existing federal law, whether under statute or regulation or common law, as in the case of the Crown, upon which the jurisdiction of the Federal Court can be exercised. Section 23 requires that the claim for relief be one sought under such law.
>
> [Emphasis added]

[101] In *McNamara Construction et al v The Queen*, [1977] 2 SCR 654 at pp.658-659, Chief Justice Laskin again writing for the Supreme Court states:

> In *Quebec North Shore Paper Company v. Canadian Pacific Limited*, (a decision which came after the judgments of the Federal Court of Appeal in the present appeals), this Court held that the quoted provisions of s. 101, make it a prerequisite to the exercise of jurisdiction by the Federal Court that there be existing and applicable federal law which can be invoked to support any proceedings before it. It is not enough that the Parliament of Canada have legislative jurisdiction in respect of some matter which is the subject of litigation in the Federal Court. As this Court indicated in the *Quebec North Shore Paper Company* case, judicial jurisdiction contemplated by s. 101 is not co-extensive with federal legislative jurisdiction. It follows that the mere fact that Parliament has exclusive legislative authority in relation to "the public debt and property" under s. 91(1A) of the *British North America Act* and in relation to "the establishment, maintenance and management of penitentiaries" under s. 91(28), and that the subject matter of the construction contract may fall within either or both of these grants of power, is not enough to support a grant of jurisdiction to the Federal Court to entertain the claim for damages made in these cases.

[102] Then at p. 659, Chief Justice Laskin states: "[i]n the *Quebec North Shore Paper Company* case, this Court observed, referring to this provision, that the Crown in right of Canada in seeking to bring persons in the Exchequer Court as defendants must have founded its action on some existing federal law, whether statute or regulation or common law."

[103] In *Roberts*, Madam Justice Wilson expansively reviewed the issue and concludes that indeed federal law includes federal common law, writing for the Court at pp. 330 and 331:

> While there is clearly an overlap between the second and third elements of the test for Federal Court jurisdiction, the second element, as I understand it, requires a general body of federal law covering the area of the dispute, i.e., in this case the law relating to Indians and Indian interests in reserve lands, and the third element requires that the specific law which will be resolutive of the

> dispute be "a law of Canada" within the meaning of s. 101 of the *Constitution Act, 1867*. No difficulty arises in meeting the third element of the test if the dispute is to be determined on the basis of an existing federal statute. As will be seen, problems can, however, arise if the law of Canada which is relied on is not federal legislation but so-called "federal common law" or if federal law is not exclusively applicable to the issue in dispute.
>
> [Emphasis added]

[104] The Supreme Court of Canada per Wilson J. also concluded at pp. 339-340:

> If Professor Evans is saying in the above-quoted paragraph that only federal legislation can meet the description of a "law of Canada" within the meaning of s. 101, I think he must be wrong since Laskin C.J. clearly includes "common law" as existing federal law inasmuch as he says that the cause of action must be founded "on some existing federal law, whether statute or regulation or common law". Professor Evans may be right that *Quebec North Shore* and *McNamara Construction* deny the existence of a federal body of common law co-extensive with the federal legislature's unexercised legislative jurisdiction over the subject matters assigned to it. However, I think that the existence of "federal common law" in some areas is expressly recognized by Laskin C.J. and the question for us, therefore, is whether the law of aboriginal title is federal common law.
>
> [Emphasis added]

[105] In this context the Court finds that constitutional conventions concerning the appointment of the judiciary of Superior Court and Federal Courts such as already determined by this Court, and for the purposes of both the second and third element of *ITO*, constitute the required "general body of federal law covering the area of the dispute" identified by Wilson J in *Roberts*.

[106] In this connection, our highest Court in *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 [*Repatriation Reference*] at p. 882, confirms courts may determine and recognize the existence of constitutional conventions, as this Court does in the matter before it now.

[107] In addition, while the Supreme Court in *Repatriation Reference* confirms courts have no authority *to enforce* constitutional conventions, it appears to me this rule is irrelevant in the case at hand. I say this because in this case this Court will issue a declaration, but will not order *mandamus*. This Court remains free to *declare* the existence of constitutional conventions.

[108] Therefore this Court's decision to grant declarations in the case at hand fits harmoniously with the *Repatriation Reference*. The following passage from the *Repatriation Reference* confirms both that courts may recognize constitutional conventions and that they may not enforce them:

> Another example of the conflict between law and convention is provided by a fundamental convention already stated above: if after a general election where the opposition obtained the majority at the polls the government refused to resign and clung to office, it would thereby commit a fundamental breach of convention, one so serious indeed that it could be regarded as tantamount to a coup d'état. The remedy in this case would lie with the Governor General or the Lieutenant Governor as the case might be who would be justified in dismissing the ministry and in calling on the opposition to form the government. But should the Crown be slow in taking this course, there is nothing the courts could do about it except at the risk of creating a state of legal discontinuity, that is, a form of revolution.

B. *What federal common law or constitutional conventions apply in this case*

[109] As submitted by the Applicant, I agree some constitutional conventions have the effect of transferring power from the legal holder to another official or institution. In coming to this conclusion I respectfully adopt *Acadian Society* per Chief Justice DeWare, citing with approval the late Professor Peter Hogg's text at paragraph 18:

> [18] The Respondents refer the Court to constitutional scholarship explaining the nature and importance of constitutional conventions as well as their lack of justiciability. Professor Hogg's discussion of convention at 1.10 in Constitutional Law of Canada, 5th edition, where he comments:
>
> > An extraordinary feature of the system of responsible government is that its rules are not legal rules in the sense of being enforceable in the courts. They are conventions only. The exercise of the Crown's prerogative powers is thus regulated by conventions, not laws. Conventions are the topic of the next section of this chapter.
> >
> > 1.10 – Conventions
> >
> > (a) – Definition of conventions
> >
> > Conventions are rules of the constitution that are not enforced by the law courts. Because they are not enforced by the law courts, they are best regarded as non-legal rules, but because they do in fact regulate the working of the constitution, they are an important concern of the constitutional lawyer. What conventions do is to prescribe the way in which legal powers shall be exercised. Some conventions have the effect of transferring effective power from the legal holder to another official or institution.
> >
> > Consider the following examples. (1) The *Constitution Act, 1867*, and many Canadian statutes, confer extensive powers on the Governor General or on the Governor General in Council, but a convention stipulates that the Governor General will exercise those powers only in accordance with the advice of the cabinet or in some cases the Prime Minister. (2) The *Constitution Act, 1867* makes the Queen, or the Governor General, an essential party

> to all federal legislation (s. 17), and it expressly confers upon the Queen and the Governor General the power to withhold the royal assent from a bill that has been enacted by the two Houses of Parliament (s. 55), but a convention stipulates that the royal assent shall never be withheld.
>
> If a convention is disobeyed by an official, then it is common, especially in the United Kingdom, to describe the official's act or omission as "unconstitutional". But this use of the term unconstitutional must be carefully distinguished from the case where a legal rule of the constitution has been disobeyed. Where unconstitutionality springs from a breach of law, the purported act is normally a nullity and there is a remedy available in the courts. But where "unconstitutionality" springs merely from a breach of convention, no breach of the law has occurred and no legal remedy will be available.
>
> [Emphasis added]

[110] The foregoing establishes constitutional convention may effectively transfer effective power from the legal holder to another official or institution. The fact they may not be enforced at law is irrelevant in this case.

(1) Constitutional convention concerning judicial appointment advice-giving roles of the Prime Minister and Minister of Justice

[111] I note in *Conacher* the Federal Court of Appeal indicated courts arguably may consider not only the powers of the Governor General but the advice-giving role of the Prime Minister. That is what the Applicant now asks this Court to do now: to find there has been a transference of the legal powers and duties from the Governor General or Governor General in Council, to the

Prime Minister and Minister of Justice in their advice-giving roles. In this connection, see Stratas J.A. at paragraph 5:

> [5] Various conventions are associated with the Governor General's status, role, powers, and discretions. Some of these conventions, which are open to debate as to their scope, concern the Prime Minister's advice to the Governor General about the dissolution of Parliament and how the Governor General should respond: Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., Vol. 1, loose-leaf (Toronto: Carswell, 2007), at pages 9-29 to 9-33. In our view, given the connection between the Governor General and the Prime Minister in this regard, the preservation of the Governor General's powers and discretions under subsection 56.1(1) arguably may also extend to the Prime Minister's advice-giving role. In any event, it seems to us that if Parliament meant to prevent the Prime Minister from advising the Governor General that Parliament should be dissolved and an election held, Parliament would have used explicit and specific wording to that effect in section 56.1. Parliament did not do so. In saying this, we offer no comment on whether such wording, if enacted, would be constitutional.
>
> [Emphasis added]

[112] In fact, this Court recognized a constitutional convention in relation to the advice-giving role of the Prime Minister and Minister of Justice in relation to appointments of judges under section 96 of the *Constitution Act, 1867*, just as the Federal Court of Appeal indicated it might in *Conacher*. Importantly, this Court recognized a constitutional convention in *Democracy Watch*, a decision of Justice Southcott. In *Democracy Watch*, this Court recognized that the powers of both the Governor General under section 96 of the *Constitution Act, 1867* and the powers of the Governor in Council under section 5.2 of the *Federal Courts Act*, have been transferred as a matter of constitutional convention to the Governor in Council (the federal Cabinet) and Prime Minister and Minister of Justice.

[113] The Court very respectfully adopts the conclusions of my colleague Justice Southcott in *Democracy Watch* at paragraph 9:

> [9] By constitutional convention, when appointing judges to provincial superior courts, the Governor General acts on the advice of the Committee of the Privy Council of Canada. Similarly, the GIC, which appoints judges to the Federal Court, the Federal Court of Appeal, and the Tax Court of Canada, is defined in the *Interpretation Act*, RSC 1985, c I-21, as the Governor General acting on the advice or consent of the Privy Council for Canada. The Privy Council is composed of all the ministers of the Crown, who meet in the body known as Cabinet (see *League for Human Rights of B'Nai Brith Canada v Attorney General (Canada)*, 2010 FCA 307 [*B'Nai Brith*] at para 77). As such, all federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice [Minister]. (In the case of appointment of Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet. For simplicity, these Reasons will refer to the advice to Cabinet being provided by the Minister.)
>
> [Emphasis added]

[114] The Respondents argue this application does not meet the criteria established by the *ITO* test because the Prime Minister and Minister of Justice (the only named Respondents) may give advice (and consent) but are not the legal actors named in either section 96 of the *Constitution Act, 1867* (the Governor General) or the Governor in Council in the case of section 5.2 of the *Federal Courts Act*. The Respondents correctly note they alone are vested the relevant legal powers to fill judicial vacancies.

[115] While I agree the legal jurisdiction and power to fill vacancies lie with the Governor General under section 96 of the *Constitution Act, 1867* and with the Governor in Council under section 5.2 of the *Federal Courts Act*, constitutional conventions place those decisions in practice on Cabinet, the Prime Minister and the Minister of Justice who are named in this

proceeding and whose advice-giving authority has already been confirmed by Southcott J., in *Democracy Watch*.

[116] As will be seen later in these reasons, the failure of the Applicant to name the legal actors is fatal to the Applicant's claim for *mandamus*.

[117] But that is not the end of the matter in terms of the alternative claim for declarations, where the issue becomes whether Justice Southcott's determination of the relevant advice-giving powers may be incorporated into a declaration.

[118] As stated at paragraph 9 of *Democracy Watch*, Justice Southcott concluded and put the convention this way:

> All federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice. In the case of appointment of Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet.

[119] With respect, there is no obstacle in making a declaration to the same effect as Justice Southcott's conclusion. In support, I note the Respondent in *Conacher v Canada (Prime Minister)*, 2009 FC 920 (an application for judicial review before Justice Shore) made related arguments submitting the decision then at hand was for the Governor General to make, and that the Prime Minister and Cabinet's advice was not legally binding on the Governor General. Therefore, the Respondents submit here that the relief sought in this application pursuant to section 18.1 of the *Federal Courts Act* is not available. I disagree.

[120] Indeed, Justice Shore rejected this argument, and was affirmed by the Federal Court of Appeal (*Conacher v Canada (Prime Minister),* 2010 FCA 131) which confirmed that the Federal Court has jurisdiction over direct exercises of Crown prerogative because they emanate from a federal source. At paragraph 68, Justice Shore stated:

> [68] The case of *Black v. Canada (Prime Minister),* above, shows that the Federal Court has jurisdiction over direct exercises of Crown prerogative because they emanate from a federal source. Although some prerogatives are reviewable, the Court must still determine whether a particular prerogative is justiciable. The hallmark of justiciability is whether the exercise of prerogative affects the rights or legitimate expectations of an individual. In the present case, no legal rights or legitimate expectations were affected, other than a claim having been made under the *Charter*, thus, the Prime Minister's advice is not reviewable. That being said, paragraph 18.1(4)(*f*) of the *Federal Courts Act* gives the Court the power to review, if, in fact, a decision maker acted "contrary to law" which is what the applicants imply in regard to section 56.1 of the *Canada Elections Act*.
>
> [Emphasis added]

[121] The Federal Court of Appeal in upholding Justice Shore, per Stratas J.A., determined:

> [5] Various conventions are associated with the Governor General's status, role, powers, and discretions. Some of these conventions, which are open to debate as to their scope, concern the Prime Minister's advice to the Governor General about the dissolution of Parliament and how the Governor General should respond: Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., Vol. 1, loose-leaf (Toronto: Carswell, 2007), at pages 9-29 to 9-33. In our view, given the connection between the Governor General and the Prime Minister in this regard, the preservation of the Governor General's powers and discretions under subsection 56.1(1) arguably may also extend to the Prime Minister's advice-giving role. In any event, it seems to us that if Parliament meant to prevent the Prime Minister from advising the Governor General that Parliament should be dissolved and an election held, Parliament would have used explicit and specific wording to that effect in section 56.1. Parliament did not do so. In saying this, we offer no comment on whether such wording, if enacted, would be constitutional.

[122] With respect therefore, the constitutional conventions identified by Justice Southcott form part of Canada's federal constitutional common law in the sense they are judge-made rules which the courts are entitled and may recognize in the appropriate case through the Court's declaratory power, notwithstanding they are not laws that may been enforced by the courts.

[123] The Court was not pointed to any jurisprudence in which the distinction argued by the Respondents between *recognition* on the one hand, and *enforcement* of constitutional conventions on the other hand, results in the refusal of a declaration outlining the constitutional convention. .

(2) Constitutional convention to fill vacancies within a reasonable time

[124] The Chief Justice of Canada and the Canadian Judicial Council have requested that the vacancy crisis facing Canada's federal judiciary be remedied by filling vacant positions. I have accepted the facts and opinions of the Chief Justice of Canada and Canadian Judicial Council as expert evidence in this proceeding. They make an unanswerable case requiring this Court to take steps to cause the untenably high number of vacancies to be filled.

[125] The letter speaks for itself. It is set out above. The Court has already quoted extensively from it and needs not do so again. Obviously the root of the vacancy crisis is delay by the Governor General and Governor in Council in appointing judges to fill the critical and "appalling" level of federal judicial vacancies. It is apparent to this Court that the central issue is that judicial vacancies are not being filled within a reasonable time. And with respect, the Court is persuaded that the vacancy crisis is caused by delay – (unjustified "government inertia"

according to the letter) – by the Prime Minister and Minister of Justice in giving the required and necessary advice and consent to the Governor General and or Governor in Council to fill these critical vacancies. The Respondents filed no evidence to rebut any of this.

[126] It seems to me given Parliament has determined what it considered an appropriate number of judges required by the Superior Courts, including the Federal Courts, as it has in legislation authorizing that number of appointments, such appointments must be made within a reasonable time of the vacancy. The alternative would allow the current untenable and crisis number of vacancies to remain unacceptably high with the negative consequences set out in the letter, plus the added negative consequence of effectively permitting Canada's executive government to ignore the express will of Parliament.

[127] In response, the Respondents effectively argue they are under no duty to advise the Governor General or Governor in Council to make appointments under either section 96 or 5.2. They say that how long they may decline to deal with the crisis backlog of vacancies is not for the courts but wholly for them. I disagree.

[128] The Respondents' position is not supportable in this case. The Court is satisfied based on the letter of the Chief Justice of Canada and Canadian Judicial Council relied on by the Applicant, and the evidence before the Court, that the backlog of vacancies is legally untenable and must be reduced.

[129] In the Court's view, the acknowledged constitutional convention that it is the exclusive authority of the Respondents to advise in respect of vacancies necessarily implies the related constitutional convention that judicial vacancies must be filled as soon as possible after vacancies arise, except in exceptional circumstances.

[130] In this connection, nothing suggests *Democracy Watch*, which affirmed the existence of the convention, is the last word on the subject. The Court is certainly not persuaded that the framing of the convention in *Democracy Watch* was ever intended to justify the "untenable", "appalling", "crisis" and "critical" vacancy situation now existing in the federal judiciary.

[131] In my view, the Court should now recognize that the relevant constitutional conventions include not only the responsibility to take steps to fill vacancies as soon as possible, but in this appalling and critical situation, to materially reduce the present backlog to what it was as recently as the Spring of 2016, that is to reduce the vacancies to the mid-40s across the federally appointed provincial Superior Courts and Federal Courts.

[132] In addition to declaring the constitutional convention set out above as found by Justice Southcott in *Democracy Watch*, the Court will declare the constitutional convention that appointments to fill vacancies shall be made within a reasonable time, and that the vacancy situation described by the Chief Justice of Canada and Canadian Judicial Council shall be materially reduced to what it was in the Spring of 2016.

[133] In the result, the Court will issue declarations as follows:

> 1. All federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice. In the case of appointment of Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet.
>
> 2. Appointments to fill judicial vacancies under section 96 of the *Constitution Act, 1867* and section 5.2 of the Federal *Courts Act* must be made within a reasonable time of the vacancy.
>
> 3. Appointments to fill current judicial vacancies are required for the reasons set out in the letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated May 3, 2023.
>
> 4. The Court makes Declarations 2 and 3 above in its expectation that the number of the judicial vacancies will be materially reduced in a reasonable time such that the total number of judicial vacancies returns to the mid-40s, that is, to the number of federal judicial vacancies in the Spring of 2016; in this manner the Court expects the untenable and appalling crisis and critical judicial vacancy situation found by this Court as identified by the Chief Justice and Canadian Judicial Council will be resolved.

C. *Admissibility of the Applicant's affidavit evidence*

[134] I will briefly canvass some of the technical and procedural objections raised by the Respondents in the alternative to their jurisdictional arguments.

(1) The Applicant's tables are admissible

[135] I have dealt with this already, but would repeat and add as follows, to confirm what has already been stated and found by the Court.

[136] The Respondents challenge the tables referred to above in the Applicant's affidavit, primarily alleging they contain inadmissible opinion evidence. The Applicant disagrees. In my

respectful view, the tables should and will be accepted as evidence in this proceeding for the following reasons.

[137] In my view, these tables represent the aggregation by the Applicant of bare-bone raw statistical data the Applicant compiled from a great number of documents all of which are publicly available and obtained from federal and provincial websites, as identified and exhibited. The tables are also in the Court's view, useful aids in the analysis of the facts of this case. I see no point in going through the voluminous but uncontested record on which the tables are based simply to satisfy such unwarranted insistence.

[138] Also, the Respondents accept the documents on the basis of which these tables are produced, do not question to application of simple math to the many calendar dates, and point to no inaccuracies. To emphasize neither Respondent challenges the substance of the facts reported in these tables. The Respondents filed no contrary evidence although they had ample time and opportunity to do so. I therefore accept the tables for the facts they set out.

[139] The Court is also of the view the information in these tables is relevant to the Applicant's case in terms of the tests for *mandamus* (although *mandamus* is dismissed) and declaratory relief (which is granted) set out in *Apotex v Canada (Attorney General)*, [1994] 1 FC 742 (FCA), aff'd [1994] 3 SCR 1100 [*Apotex*] and *SA v Metro Vancouver Housing Corp*, 2019 SCC 4 [*Metro Vancouver Housing Corp*]. I respectfully conclude the objections of the Respondents in this respect are unfounded.

[140] I appreciate the onus is on the Applicant to make his case. In my respectful view the Applicant has made his case. Notably, his evidence in this respect is confirmed and corroborated on the national scale by both the Chief Justice of Canada and the Canadian Judicial Council.

[141] To confirm, I accept there were 46 vacancies in the spring of 2016, that there were 79 vacancies by July 1, 2023, that delays in appointing federal judges across Canada average 504 days with a midpoint of 383 days, that 32 Superior Court appointments were made in less than 90 days since 2020, and that the appointment of Chief Justices and Associate Chief Justices since 2016 took an average 57 days. I also accept that appointments in some cases have been made with the benefit of some additional notice in advance of the actual vacancy.

(2) Evidence drawn from the *Budget Implementation Acts* is accepted

[142] I also accept that Parliament has enacted a series of *Budget Implementation Acts* which variously increased the number of positions that might be filled under sections 96 of the *Constitution Act, 1867* and section 5.2 of the *Federal Courts Act*. I am entitled to take judicial notice of Acts of Parliament: see *Canada Evidence Act*, RSC 1985,c C 5, section 17:

> **17** Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the lieutenant governor in council of any province or colony that, or some portion of which, now forms or hereafter may form part of Canada, and of all the Acts of the legislature of any such province or colony, whether enacted before or after the passing of the *Constitution Act, 1867*.

[143] The relevant *Budget Implementation Acts* relied upon by the Applicant in his affidavit are:

a. *Budget Implementation Act, 2018, No. 1*, SC 2018, c 12 ("*BIA, 2018*");

b. *Budget Implementation Act, 2019, No. 1*, SC 2019, c 29 ("*BIA, 2019*");

c. *Budget Implementation Act, 2021, No. 1*, SC 2021, c 23 ("*BIA, 2021*");

d. *Budget Implementation Act, 2022*, No. 1, SC 2022, c 10 ("*BIA, 2022*").

[144] In this connection, the Respondents do not dispute any of the information relied upon by the Applicant drawn from these statutes. I therefore accept the Applicant's evidence in this respect.

(3) Speculation that provinces have not created relevant vacant judicial positions rejected

[145] The Respondents argue vacancies to which appointments may be made by the Governor General (i.e., under section 96 of *Constitution Act, 1867*) may not be filled if the relevant provincial legislature has not created the relevant judicial position that is vacant for the Governor General to fill under section 96 of *Constitution Act, 1867*. No one disagrees with that assertion. I likewise agree no appointments may be made under section 5.2 of the *Federal Courts Act* to the Federal Courts for the Governor in Council to fill unless Parliament has created a judicial position(s) that is (are) vacant.

[146] However, other than stating these undisputed propositions, the Respondents filed no evidence to rebut the submissions of the Applicant or the contents of the letter from the Chief Justice of Canada and Canadian Judicial Council. While the Respondents' argument is valid in

the abstract, I am therefore unable to give it any force in this case. Without a shred of evidence, the Respondents position that the Provinces (or Parliament with respect to the Federal Courts) is or are at fault must fail.

[147] The Respondents also submit much of the Applicant's affidavit should be struck on three main grounds: 1) it contains hearsay; 2) it contains opinion, argument, or legal opinion; and 3) it is not relevant to issues before the Court.

(4) Improper hearsay including letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister

[148] With respect to improper hearsay, the Respondents submit the affidavit includes media articles, reports, and letters that the Applicant did not author himself, that are relied upon for the truth of their contents to establish facts for this application.

[149] Principally, and among other things, the Respondents allege Exhibit KKK should be struck because it was tendered for the truth of its contents. Exhibit KKK is the email exchange between Applicant's counsel and a Radio-Canada/CBC journalist in which counsel requested and the journalist gave the Applicant's counsel a copy of the letter from the Chief Justice of Canada and the Canadian Judicial Council to the Prime Minister referred to throughout these Reasons.

[150] As I understand the Respondents they say the letter may not be considered because it contains impermissible information from a third party and not from the Applicant himself. They say the letter is hearsay.

[151] I disagree. The letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister was widely publicized at the time, and extensively quoted by both English and French media. In my view the letter was not tendered for the truth of its contents, but as proof the Chief Justice of Canada and Canadian Judicial Council made a demand and request that the vacancies be filled and that the demand was worded as it was. I come to the same conclusion for Exhibit HHH from the Federation of Ontario Law Associations.

[152] In addition, the letter itself appears not to be publicly available. However, the record contains additional information confirming the letter was sent and received; both the Chief Justice of Canada and Prime Minister have said it was: see Applicant's Record, Volume 1, Exhibits LLL and MMM.

[153] The unchallenged evidence is that Applicant's counsel requested a copy of the letter from a journalist at Radio Canada/CBC who had written and published a report about the letter. The Radio-Canada/CBC journalist sent the Applicant an email copy of the letter in response to the Applicant's request.

[154] In my view, the copy exhibited in the Court's record meets the test of necessity. The letter was provided by a reputable source in whose business one might expect him to have

received such a letter. I have no reason to doubt the honesty or truthfulness of the journalist. The letter was published widely. The Respondents do not suggest the exhibit is fabricated or unreliable. The letter was not disavowed and was indeed subsequently referenced by both the sender and recipient: see Applicant's Record, Volume 1, Exhibits LLL and MMM.

[155] I find it more likely than not the letter as set out in the journalist's email was sent and received as stated on its face.

[156] The Court reviewed the letter with Counsel for the Respondents at the hearing on several occasions. At no time was it suggested the Chief Justice of Canada was not qualified to write the letter on his behalf or for the Canadian Judicial Council.

[157] No one cast doubt on the qualifications or expertise of the Chief Justice of Canada or Canadian Judicial Council members, individually or collectively, to form the opinions expressed. Indeed, no one suggested the exhibited letter was not sent, its contents were not disputed, and no doubt was cast on the proposition that the letter exhibited what the letter said.

[158] In all the circumstances, the Court concludes the letter is admissible because it is both necessary and reliable as an exception to the hearsay rule: *Telus Communications Inc v Telecommunications Workers Union*, 2005 FCA 262 at paragraphs 25-26; *Cabral v Canada (Citizenship and Immigration)*, 2018 FCA 4 at paragraph 30.

[159] Given the absence of any evidence on this point from the Respondents, the Court accepts and adopts what it finds the credible and evidence-based facts and opinions of the Chief Justice of Canada and Chair of Canada's collective federally-appointed senior most judiciary, and Canadian Judicial Council as expressed in the letter.

(5) Opinion and argument submissions rejected

[160] The Respondents also argue the Applicant's affidavit contains his opinion and the opinion of others that are irrelevant to the issues. In particular, the Respondents seek the following:

> a) Paragraphs 17, 18, 19, 20, 24 and 26 should be struck because they contain opinions and/or are irrelevant.
>
> b) Paragraphs 27, 29, 30, 31, 33, 34, 36 and 37 (as well and Exhibits HHH, III, JJJ, KKK, LLL and MMM attached thereto) shoud be struck because they contain improper hearsay.
>
> c) Paragraphs 38 to 49 should be struck because they contain improper hearsay, argument and opinion.

[161] As stated by Justice Noël at the Federal Court of Appeal in *Duyvenbode v Canada (Attorney General)*, 2009 FCA 120 at paragraph 2, the purpose of an affidavit is "to adduce facts relevant to the dispute without gloss or explanation."

[162] However, by this I do not understand an affidavit which betrays a belief in the facts presented is inadmissible and must be struck in its entirety, particularly where, as here, the central facts are gathered up from a great number of original sources the veracity of which the Respondents do not question, not to mention they are corroborated by our Chief Justice of

Canada and the Canadian Judicial Council. It is, with respect a question of degree. I am not persuaded to strike the entire affidavit.

[163] However, paragraphs 17, 20, 24, 26, 29, and 39-49 of the affidavit summarize in his own words the Applicant's views as to the content of the exhibits relied upon. This is unnecessary and they will be struck.

D. *Mandamus not granted*

[164] I turn now to the relief requested. The Applicant requests an order of *mandamus* compelling the Prime Minister and Minister of Justice to appoint judges to each of the vacancies in the superior courts across Canada by the later of the following two dates:

> a) Three months of the date of the order, or
>
> b) Nine months of having become aware that the position would be vacated.

[165] The Applicant states, it is not disputed and the Court agrees the test for *mandamus* is set out by the Federal Court of Appeal in *Apotex* as follows. Notably, all branches of the test for *mandamus* must be met; failure on one disentitles an applicant to relief:

> 1. There must be a legal duty to act;
>
> 2. The duty must be owed to the applicant;
>
> 3. There must be a clear right to performance of that duty, in particular;
>
> a. The applicant has satisfied all conditions precedent giving rise to the duty; and
>
> b. The was;

i. A prior demand for performance of the duty;

ii. A reasonable time to comply with the demand unless refused outright; and

iii. A subsequent refusal which can be either expressed or implied, e.g. by unreasonable delay;

4. Where the duty sought to be enforced is discretionary, certain additional principles apply;

5. No adequate remedy is available to the applicant;

6. The order sought will have some practical value or effect;

7. The Court finds no equitable bar to the relief sought; and

8. On a balance of convenience, an order of *mandamus* should be issued.

(1) Legal Duty to Act lies with non-parties

[166] The Applicant submits the Respondents have the legal duty to appoint judges pursuant to section 96 of the *Constitution Act, 1867* and section 5.2 of the *Federal Courts Act*.

[167] Under the theory of transference discussed above, it is not disputed and I find the Respondents by constitutional convention have the sole authority to advise and give consent as to who and when the Governor General and or Governor in Council makes appointments to fill federal judicial vacancies.

[168] Because it is a convention, I am not persuaded there is an enforceable legal duty on the named Respondents in this case. The applicable legal duty in this case lies on the Governor General to make appointments in the case of section 96 of the *Constitution Act, 1867*, and the

Governor in Council under section 5.2 of the *Federal Courts Act* as set out by Justice Southcott in *Democracy Watch*.

[169] However the jurisprudence is universal that courts may not compel the Governor General or Governor in Council to follow a constitutional convention. In other words, it appears there is nothing this Court can do to enforce the constitutional convention even if the Governor General were to unconstitutionally reject the advice of Cabinet. This is thoroughly discussed above.

[170] That said, and even accepting as I do that by constitutional convention certain powers of the Governor General and Governor in Council under sections 96 and 5.2 are now effectively transferred to Cabinet, the Minister of Justice and the Prime Minister, it remains the law that the assent of the Governor General and Governor in Council to the advice offered is and remains a statutory legal requirement under section 96 of the *Constitution Act, 1867* and section 5.2 of the *Federal Courts Act*.

[171] The Court has no power to amend the language of either section 96 or section 5.2 to remove the references to the Governor General and or the Governor in Council.

[172] Given the Applicant's decision not to name either the Governor General or the Governor in Council as parties, the Court declines to issue *mandamus* in this case.

[173] The tests for *mandamus* being conjunctive, all must be met. Having failed the first, it is not necessary to consider the remaining test.

[174] Therefore the request for *mandamus* will be dismissed.

E. *Applicant has public interest standing*

[175] The Respondents further alleged the Applicant had no standing to bring this application. The Applicant argued that he meets the tests for both private interest standing and public interests standing.

[176] With respect, the Court finds the Applicant meets the test for public interest standing. It is not necessary to consider the private interest standing test for *mandamus* because, as discussed above, the Court is not granting *mandamus*.

[177] The Applicant deposes and it is not disputed that he is affected by judicial vacancies as counsel representing vulnerable clients:

> 8. Over the past few years, I have experienced significant delays in the litigation proceedings I have brought in superior courts on behalf of vulnerable clients. These delays have harmed my clients, who often do not have the resources to wait years for justice. These delays exacerbate trauma for some clients and create additional pressure for clients to settle legitimate claims for a lesser amount than might be obtained in court because they do not have the financial resources to pay their bills while waiting for a trial date to be set or a judgement to be rendered.
>
> 9. For example, I represented Margaret Godard, a victim of workplace sexual harassment, in a civil action before the Ontario Superior Court of Justice. After many years of pre-trial proceedings, the court confirmed that a trial date was set for the week of October 17, 2022. However, mere days beforehand, on October 13, 2022, the Trial Coordinator informed me that there were no judges available to preside over the matter, so it would have to be cancelled, and the earliest available new hearing date would be December 12, 2022. The email chain containing this correspondence is attached as Exhibit “A”.

[178] The test for public interest standing is set out by the Supreme Court of Canada in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown East Side*]. At paragraph 37, Justice Cromwell for the majority identifies three factors to consider in exercising discretion to grant public interest standing:

> a. There is a serious justiciable issue raised;
>
> b. The plaintiff has a real stake or a genuine interest in it; and
>
> c. In all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.

[179] The Applicant meets all three tests.

[180] The first test is met. The issue is serious and justiciable, and accords with paragraph 73 of *Democracy Watch* where the appropriateness of judicial involvement in a matter was explored with the following questions: the issues are entirely legal, the factual basis not being contested; the issue is not abstract of hypothetical, is not simply a disagreement with a government opinion as indeed the Respondents provided no opinion to justify or explain their decisions, it is appropriate for the courts to engage on this issue as others have not, the issuance of a declaration is expected to have practical effect assuming the Court's Judgment is respected by the Respondents.

[181] I also find the Applicant has a real stake and genuine interest in this issue. He represents clients whose right to access justice in a reasonable time and without unreasonable delay is infringed or denied.

[182] *Downtown Eastside* at paragraph 44 recognizes the third issue entails asking if the manner the proceeding is undertaken is a reasonable and effective means to bring the challenge to court. In *League for Human Rights of B'Nai Brith Canada v Attorney General (Canada)*, 2010 FCA 307, Justice Stratas recognized at paragraph 61 a "concern that an overly restrictive approach to public interest standing would immunize government from certain challenges."

[183] In my respectful view, this Application is a reasonable and effective manner in all the circumstances of bringing this issue before the courts, particularly as it concerns an issue in respect of which the government should not be immunized from challenge. The issue raised is obviously an important one for the Chief Justice of Canada and the Canadian Judicial Council.

[184] Frankly in my discretion this case is one that should be addressed because of its importance not just to the Applicants but to the federally appointed judiciary as a whole, and is of great importance to the Canadian public who need access to the courts and wish to see criminal and civil justice dispensed without unreasonable delay and impediments such as caused by the untenable level of vacancies, as stated by the Chief Justice of Canada and the Canadian Judicial Council, and whose submissions have been accepted by this Court.

[185] See the Court's discussion under Parts V and VI and elsewhere above.

F. *Declaratory Relief*

[186] While *mandamus* will not be granted, in the alternative the Applicant requests declarations that:

> A. the Prime Minister and Minister of Justice are in violation of their duties to appoint judges to the vacancies in the superior courts under s. 96 of the *Constitution Act, 1867*, and s. 5.2 of the *Federal Courts Act*; and
>
> B. A reasonable interpretation of the requirement to appoint judges in s. 96 of the *Constitution Act, 1867*, and s. 5.2 of the *Federal Courts Act* is that, absent exceptional circumstances, the appointments shall be made within nine months of the date the applicable Minister becomes aware that a position will be vacated, or three months after a position is vacated, whichever is later.

(1) Declaratory relief granted

[187] For the reasons outlined above, the Court will not grant the first declaration which seeks the same relief requested by way of *mandamus* which the Court has declined to grant.

[188] Turning to the second declaration sought, the test for granting declaratory relief is stated by the Supreme Court of Canada in *Metro Vancouver Housing Corp* at paragraph 60. Declaratory relief is appropriate where a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought.

[189] In my respectful view, this case meets these requirements but a declaration will not be granted in the terms sought.

[190] First, as extensively considered already, the Court has jurisdiction to hear the matter and to grant the specified relief pursuant to section 18 and 18.1 of the *Federal Courts Act*.

[191] Second, I agree the dispute is real and not theoretical. The Applicant's assertions are in material respects corroborated and confirmed by the Chief Justice of Canada and Canadian Judicial Council, there are approximately 80 judicial vacancies in the provincial Superior Courts and Federal Courts across the country, and unquestionably these vacancies pose serious and critical challenges to the functioning of our courts, access to justice, timely determination of serious criminal cases and civil actions and other consequences as set out in the letter from the Chief Justice of Canada and Canadian Judicial Council.

[192] Indeed, no one can review the words of the Chief Justice of Canada and the Canadian Judicial Council in their letter, understanding nothing has changed in the intervening 9 months, and suggest the dispute between Canada's federally appointed judiciary and the Prime Minister and his Minister of Justice is in any way theoretical.

[193] I have already found per (c) of the test that the party raising the issue has a genuine interest in its resolution and therefore have granted him public interest standing. I also find the Respondents have an interest in opposing the declaration being sought, thus satisfying (d) of the tests for a declaration.

(2) Appointments shall be made within a reasonable time

[194] The Court is not persuaded to accept the timelines proposed by the Applicant within which these "appalling" and unacceptably high vacancies levels should be filled. The situation as outlined by the Chief Justice of Canada and Canadian Judicial Council is clearly critical and untenable and thus most serious, and therefore in the Court's view may not simply be ignored.

[195] Very unfortunately, the Court has no reason to expect the situation will change without judicial intervention. The Respondents filed no evidence to justify why the “appalling”, “untenable” and “crisis” situation created by the unacceptably high number of vacancies has not yet been remedied by the Prime Minister, and now by two successive Ministers of Justice.

[196] While timelines are routinely ordered for hearings before immigration officials in immigration cases, I am not persuaded the situation of judicial appointments is analogous. The classic immigration situations does not usually involve delay caused by a shortage of decision makers but delay in obtaining evidence often from foreign governments. To the contrary, the sole issue in this case is the critical vacancy situation.

[197] While the Respondents cite *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paragraph 11 for the proposition that “a declaration can only be granted if it will have practical utility, that is, if it will settle a ‘live controversy’ between the parties,” in my respectful view the Court is entitled to expect the Respondents - particularly the Respondent Minister of Justice who in his capacity as Attorney General of Canada is the chief law officer of the Crown - to obey the law.

[198] The Court has no reason to believe a declaration in this case will be ignored. Rather, the Court has every expectation and entitlement to proceed on the opposite presumption. Indeed, in *Assiniboine v Meeches*, 2013 FCA 114 the Federal Court of Appeal holds that declaratory relief declares what the law is, without ordering any sanction or specific action that must be done. The

Federal Court of Appeal also holds that compliance by government actors (i.e., the state) is expected:

> 12 … [A] declaratory judgment is binding and has legal effect. A declaration differs from other judicial orders in that it declares what the law is without ordering any specific action or sanction against a party. Ordinarily, such declarations are not enforceable through traditional means. However, since the issues which are determined by a declaration set out in a judgment become res judicata between the parties, compliance with the declaration is nevertheless expected, and it is required in appropriate circumstances.
>
> 13. Declaratory relief is particularly useful when the subject of the relief is a public body or public official entrusted with public responsibilities, because it can be assumed that such bodies and officials will, without coercion, comply with the law as declared by the judiciary. Hence the inability of a declaration to sustain, without more, an execution process should not be seen as an inadequacy of declaratory orders against public bodies and public officials.
>
> 14 …[The] proposition that public bodies and their officials must obey the law is a fundamental aspect of the principle of the rule of law, which is enshrined in the Constitution of Canada by the preamble to the Canadian Charter of Rights and Freedoms. ... Thus, a public body or public official subject to a declaratory order is bound by that order and has a duty to comply with it. If the public body or official has doubts concerning a judicial declaration, the rule of law requires that body or official to pursue the matter through the legal system. ... The rule of law can mean no less.
>
> 15 … As further noted in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at par. 62, the assumption underlying the choice of a declaratory order as a remedy is that governments and public bodies subject to that order will comply with the declaration promptly and fully. However, should this not be the case, the Supreme Court of Canada has laid to rest any doubt about the availability of contempt proceedings in appropriate cases in the event that public bodies or officials do not comply with such an order. As noted by Iacobucci and Arbour JJ. at par. 67 of *Doucet-Boudreau*: “[o]ur colleagues LeBel and Deschamps JJ. suggest that the reporting order in this case was not called for since any violation of a simple declaratory remedy could be dealt with in contempt proceedings

> against the Crown. We do not doubt that contempt proceedings may be available in appropriate cases" (emphasis added).

[199] Given this, and with respect, the Court has concluded no timelines should be ordered as proposed at least at this time. That may change of course if the underlying situation does not, in respect of which the Court is not asked to speculate.

[200] For the reasons set out above, the Court declares that:

1. All federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice. In the case of appointment of Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet.

2. Appointments to fill judicial vacancies under section 96 of the *Constitution Act*, 1867 and section 5.2 of the *Federal Courts Act* must be made within a reasonable time of the vacancy.

3. Appointments to fill current judicial vacancies are required for the reasons set out in the letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated May 3, 2023, reproduced herein.

4. The Court makes Declarations 2 and 3 above in its expectation that the number of said judicial vacancies will be materially reduced within a reasonable time such that the total number of judicial vacancies returns to the mid-40s, that is, to the number of federal judicial vacancies in the Spring of 2016; in this manner the Court expects the untenable and appalling crisis and critical judicial vacancy situation found by this Court as identified by the Chief Justice and Canadian Judicial Council will be resolved.

   [Emphasis added]

XI. Conclusion

[201] The Court grants the application in part. The request for an order of *mandamus* is dismissed, as is the request for the first declaration. However declarations will be issued.

XII. Costs

[202] The parties agreed that if the Applicant is successful he would receive all inclusive costs of $1500.00 but if the Applicant is not successful, the parties would bear their own costs. In my discretion these agreements are reasonable. The Applicant having succeeded for the most part, the Court awards him costs in the all-inclusive sum of $1,500.00 payable by the Respondents.

JUDGMENT in T-1274-23

THIS COURT'S JUDGMENT is that:

1. The Application is granted in part.
2. It is hereby declared:
    1. That all federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice. In the case of appointment of Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet.
    2. That appointments to fill judicial vacancies under section 96 of the *Constitution Act, 1867* and section 5.2 of the *Federal Courts Act* must be made within a reasonable time of the vacancy.
    3. That appointments to fill current judicial vacancies are required for the reasons set out in the letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated May 3, 2023 set out in paragraph 1 and Schedule A to these Reasons for Judgment.
    4. That the Court makes Declarations 2 and 3 above in its expectation that the number of said judicial vacancies will be materially reduced in a reasonable time such that the total number of judicial vacancies returns to the mid-40s, that is, to the number of federal judicial vacancies in the Spring of 2016; in this manner the Court expects the untenable and appalling crisis, and critical judicial vacancy situation found by this Court as identified by the Chief Justice and Canadian Judicial Council will be resolved.

3. While I will not seize myself of this matter, the Court may provide guidance or resolution of related issues if requested.

4. Paragraphs 17, 20, 24, 26, 29, and 39-49 are struck from the Applicant's affidavit.

5. The Respondents shall pay the Applicant $1500.00 all inclusive costs.

"Henry S. Brown"
Judge

SCHEDULE A

Nicholas Pope

From: DANIEL LEBLANC <daniel.leblanc@radio-canada.ca>

Sent: June 16, 2023 9:18 AM

To: Nicholas Pope

Subject: Re: Wagner CJ's May 3 letter to PM

Good morning, here is the letter.

Le 3 mai 2023

Le très honorable Justin Trudeau

Monsieur le Premier ministre.

En tant que juge en chef du Canada et président du Conseil canadien de la magistrature, je dois vous faire part de ma très grande inquiétude concernant le nombre important de postes vacants au sein de la magistrature fédérale et l'incapacité du gouvernement à combler ces postes en temps opportun.

La situation actuelle est intenable et je crains qu'elle ne résulte en une crise pour notre système de justice, qui fait déjà face à de multiples défis. L'accès à la justice et la santé de nos institutions démocratiques sont en péril.

Vous le savez sans doute, il y a à l'heure actuelle 85 postes vacants au sein de la magistrature fédérale à travers le pays. Certains tribunaux doivent composer depuis des années avec un taux de postes vacants se situant entre 10 et 15 pour cent. Il n'est d'ailleurs pas rare de voir des postes demeurer vacants pendant plusieurs mois, voire, même dans certains cas, pendant des années. À titre d'exemple concret, la moitié des postes à la Cour d'appel du Manitoba sont présentement vacants. Les nominations aux postes clés de juges en chef et de juges en chef associés se font également à un rythme très lent. À cet effet, il y a récemment eu des délais considérables dans les nominations au poste de juge en chef dans nombre de provinces, incluant l'Alberta, l'Ontario et l'Île-du-Prince-Édouard. Le poste de juge en chef du Manitoba est quant à lui vacant depuis maintenant six mois, et les postes de juges en chef associés à la Cour du Banc du Roi de la Saskatchewan et à la Cour supérieure du Québec sont vacants depuis plus d'une année. Aucune explication claire ne justifie ces délais.

Il faut préciser que les difficultés engendrées par la pénurie de juges exacerbent une situation déjà critique au sein de plusieurs tribunaux, confrontés à un manque criant de ressources, en raison d'un sous-financement chronique de la part des provinces et territoires. Toutefois, bien que plusieurs facteurs expliquent la crise à laquelle fait face notre système de justice

actuellement, la nomination des juges en temps utile est une solution à portée de main, qui permettrait d'améliorer la situation de manière rapide et efficace. Compte tenu de ce fait évident et de la situation critique à laquelle nous sommes confrontés, l'inertie du gouvernement quant aux postes vacants et l'absence d'explications satisfaisantes pour ces retards sont déconcertantes. La lenteur des nominations est d'autant plus difficile à comprendre que la plupart des vacances judiciaires sont prévisibles, notamment celles générées par les départs à la retraite, pour lesquelles les juges donnent généralement un préavis de plusieurs mois. Dans ce contexte, les retards quant aux nominations envoient un signal qu'elles ne sont tout simplement pas une priorité pour le gouvernement.

Au nom du Conseil canadien de la magistrature, je peux attester que les juges en chef et juges en chef adjoints de tout le pays sont satisfaits de la qualité des récentes nominations et se réjouissent de l'ajout de nouveaux postes de juge dans les derniers budgets. Nous reconnaissons d'ailleurs que votre gouvernement a déployé des efforts afin d'instaurer un processus de nomination plus indépendant, transparent et impartial pour les juges de nomination fédérale. Il serait malheureux que le rythme perfectible des nominations à la magistrature fédérale à travers le pays discrédite ultimement ce processus.

J'ai eu récemment l'occasion de rencontrer le ministre de la Justice et de discuter avec lui à ce sujet. Les juges en chef entretiennent d'ailleurs de très bonnes relations avec le ministre et son cabinet et nous sommes confiants qu'il est disposé à déployer tous les efforts nécessaires pour remédier aux problèmes que je viens d'exposer.

Malgré tous ces efforts, il est impératif que le Cabinet du Premier ministre accorde à cette question l'importance qu'elle mérite et que les nominations soient faites en temps opportun. Il est en effet primordial de combler les postes vacants au sein de la magistrature avec diligence, afin d'assurer le bon fonctionnement du pouvoir judiciaire. Le Conseil canadien de la magistrature a dans le passé exhorté les gouvernements à procéder aux nominations judiciaires plus rapidement. Cette fois, nous craignons sérieusement que, sans des efforts concrets pour remédier à la situation, nous atteignions très bientôt un point de non-retour dans plusieurs juridictions. Les conséquences feront les manchettes et seront graves pour notre démocratie et l'ensemble des Canadiens et Canadiennes. La situation exige votre attention immédiate.

Les postes laissés vacants ont des impacts significatifs sur l'administration de la justice, le fonctionnement de nos tribunaux et la santé des juges. Les membres du Conseil canadien de la magistrature ont récemment entrepris de dresser un portrait plus complet des difficultés rencontrées dans leurs tribunaux respectifs. Les constats sont accablants.

Malgré tout le professionnalisme et le dévouement de nos juges, le manque d'effectifs se traduit nécessairement par des délais additionnels pour entendre des causes et rendre des jugements. Les juges en chef rapportent que, puisque les juges sont surchargés, les délais pour fixer des affaires sont inévitables et des audiences doivent être reportées ou ajournées. De plus, même lorsque les affaires sont entendues, les jugements tardent parfois à être rendus, puisque les juges doivent siéger davantage, ce qui leur laisse moins de temps pour délibérer. Le cadre d'analyse de l'arrêt R. c. Jordan, 2016 CSC 27, quant au droit de l'accusé

d'être jugé dans un délai raisonnable en vertu de la Charte canadienne des droits et libertés, joue également un rôle important à cet égard. Il prévoit que, devant les cours supérieures, les accusations pénales doivent être traitées dans un délai maximum de 30 mois, sauf circonstances exceptionnelles. Si un procès n'est pas achevé dans ce délai, un arrêt des procédures peut être ordonné. Plusieurs juges en chef mentionnent qu'en s'efforçant de respecter le délai prévu dans Jordan, ils sont actuellement contraints de choisir les affaires pénales qui « méritent » le plus d'être entendues. Malgré tous leurs efforts, des arrêts de procédure sont prononcés contre des individus accusés de crimes graves, comme des agressions sexuelles ou des meurtres, en raison de délais dus, en partie ou en totalité, à une pénurie de juges. À titre d'exemple, la Cour du Banc du Roi de l'Alberta rapporte que plus de 22 pour cent des affaires pénales en cours dépassent le délai de 30 mois et que 91 pour cent de ces affaires concernent des crimes graves et violents. Par ailleurs, l'urgence de traiter les affaires pénales a aussi pour effet d'écarter les affaires civiles du rôle des tribunaux. Pour celles-ci, le système de justice risque de plus en plus d'être perçu comme inutile. De telles situations démontrent une faillite de notre système de justice et sont susceptibles d'alimenter le cynisme auprès du public, et d'ébranler la confiance de ce dernier dans nos institutions démocratiques.

L'impact des postes laissés vacants sur les juges eux-mêmes est aussi non négligeable. Faisant face à une surcharge de travail chronique et à un stress accru, il est de plus en plus fréquent de voir des juges placés en congés médicaux, ce qui a un effet domino sur leurs collègues qui doivent alors porter un fardeau additionnel. Par ailleurs, il devient difficile pour les juges de certains tribunaux de trouver le temps nécessaire pour suivre des formations, y compris celles dites obligatoires. Cette situation n'augure rien de positif pour assurer une magistrature saine et prospère. Si les difficultés actuelles perdurent, il pourrait également devenir plus difficile d'attirer des candidatures de qualité aux postes de juge.

C'est d'ailleurs déjà le cas en Colombie-Britannique.

Richard Wagner

Le ven. 16 juin 2023, à 07 h 40, Nicholas Pope <npope@hameedlaw.ca> a écrit :

Hi Daniel,

I’m a lawyer in Ottawa. I read your story on Chief Justice Wagner’s May 3, 2023, letter to the Prime Minister about judicial vacancies. Would you be able to share a copy of this letter with me?

Thanks,

Nicholas Pope
Lawyer (he/him)
Phone: 613.656.6917 | Fax: 613.232.2680 | npope@hameedlaw.ca
43 Florence Street | Ottawa, Ontario, Canada | K2P 0W6
www.hameedlaw.ca

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1274-23
STYLE OF CAUSE:	YAVAR HAMEED v PRIME MINISTER AND MINISTER OF JUSTICE
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 15, 2023
JUDGMENT AND REASONS:	BROWN J.
DATED:	FEBRUARY 13, 2024

APPEARANCES:

Nicholas Pope	FOR THE APPLICANT
David Aaron Dylan Smith	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Hameed Law Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS

Robert Hryniak *Appellant*

v.

Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White and Athena Smith *Respondents*

and

Ontario Trial Lawyers Association and Canadian Bar Association *Interveners*

Indexed as: Hryniak *v.* Mauldin

2014 SCC 7

File No.: 34641.

2013: March 26; 2014: January 23.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil procedure — Summary judgment — Investors bringing action in civil fraud and subsequently bringing a motion for summary judgment — Motion judge granting summary judgment — Purpose of summary judgment motions — Access to justice — Proportionality — Interpretation of recent amendments to Ontario Rules of Civil Procedure — Trial management orders — Standard of review for summary judgment motions — Whether motion judge erred in granting summary judgment — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 20.

In June 2001, two representatives of a group of American investors met with H and others to discuss an investment opportunity. The group wired US$1.2 million, which was pooled with other funds and transferred to H's company, Tropos. A few months later, Tropos forwarded more than US$10 million to an offshore bank and the money disappeared. The investors brought an action for

Robert Hryniak *Appelant*

c.

Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White et Athena Smith *Intimés*

et

Ontario Trial Lawyers Association et Association du Barreau canadien *Intervenantes*

Répertorié : Hryniak *c.* Mauldin

2014 CSC 7

N° du greffe : 34641.

2013 : 26 mars; 2014 : 23 janvier.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Procédure civile — Jugement sommaire — Investisseur intentant une action pour fraude civile et présentant ensuite une requête en jugement sommaire —Requête en jugement sommaire accueillie — Objectif des requêtes en jugement sommaire — Accès à la justice — Proportionnalité — Interprétation des modifications récentes apportées aux Règles de procédure civile de l'Ontario — Ordonnances de gestion de l'instance — Norme de contrôle applicable aux requêtes en jugement sommaire — Le juge saisi de la requête a-t-il commis une erreur en accueillant la requête en jugement sommaire? — Règles de procédure civile, R.R.O. 1990, Règl. 194, règle 20.

Au mois de juin 2001, deux représentants d'un groupe d'investisseurs américains ont rencontré H et d'autres personnes afin de discuter d'une possibilité d'investissement. Le groupe a viré 1,2 million de dollars américains et cette somme a été mise en commun avec d'autres fonds et transférée à Tropos, la société de H. Quelques mois plus tard, Tropos a transféré plus de

civil fraud against H and others and subsequently brought a motion for summary judgment. The motion judge used his powers under Rule 20.04(2.1) of the Ontario *Rules of Civil Procedure* (amended in 2010) to weigh the evidence, evaluate credibility, and draw inferences. He concluded that a trial was not required against H. Despite concluding that this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied that the record supported the finding that H had committed the tort of civil fraud against the investors, and therefore dismissed H's appeal.

Held: The appeal should be dismissed.

Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised. However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

A shift in culture is required. The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure. Summary judgment motions provide an opportunity to simplify pre-trial procedures and move the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. Summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

Rule 20 was amended in 2010 to improve access to justice. These reforms embody the evolution of summary judgment rules from highly restricted tools used to weed out clearly unmeritorious claims or defences to their current status as a legitimate alternative means for adjudicating and resolving legal disputes. They offer significant new tools to judges, which allow them to adjudicate more cases through summary judgment motions and attenuate the risks when such motions do not resolve the

10 millions de dollars américains à une banque étrangère et l'argent a disparu. Les investisseurs ont intenté contre H et d'autres personnes une action pour fraude civile et ont ensuite présenté une requête en jugement sommaire. Le juge saisi de la requête a exercé les pouvoirs que lui confère le par. 20.04(2.1) des *Règles de procédure civile* de l'Ontario (modifiées en 2010) pour apprécier la preuve, évaluer la crédibilité et tirer des conclusions. Il a conclu que la tenue d'un procès n'était pas nécessaire dans l'instance intentée contre H. Bien qu'elle ait conclu que cette affaire ne se prêtait pas à un jugement sommaire, la Cour d'appel était convaincue que le dossier étayait la conclusion selon laquelle H avait commis le délit de fraude civile à l'endroit des investisseurs et elle a par conséquent rejeté l'appel de H.

Arrêt : Le pourvoi est rejeté.

Notre système de justice civile repose sur le principe que le processus décisionnel doit être juste et équitable. Ce principe ne souffre aucun compromis. Or, les formalités excessives et les procès interminables occasionnant des dépenses et des délais inutiles peuvent faire obstacle au règlement juste et équitable des litiges. Si la procédure est disproportionnée par rapport à la nature du litige et aux intérêts en jeu, elle n'aboutira pas à un résultat juste et équitable.

Un virage culturel s'impose. Le principe de la proportionnalité trouve aujourd'hui son expression dans les règles de procédure de nombreuses provinces et peut constituer la pierre d'assise de l'accès au système de justice civile. Le principe de la proportionnalité veut que le meilleur forum pour régler un litige ne soit pas toujours celui dont la procédure est la plus laborieuse. La requête en jugement sommaire offre une possibilité de simplifier les procédures préalables au procès et d'insister moins sur la tenue d'un procès conventionnel et plus sur des procédures proportionnées et adaptées aux besoins de chaque affaire. Les règles régissant les jugements sommaires doivent recevoir une interprétation large et propice à la proportionnalité et à l'accès équitable à un règlement abordable, expéditif et juste des demandes.

La règle 20 a été modifiée en 2010 afin d'améliorer l'accès à la justice. Ces réformes incarnent l'évolution des règles régissant les jugements sommaires, lesquelles passent du statut d'outil à usage très restreint visant à écarter les demandes ou défenses manifestement dénuées de fondement à celui de solution de rechange légitime pour trancher et régler les litiges d'ordre juridique. Les juges disposent ainsi de nouveaux outils importants qui leur permettent de trancher plus de litiges sur requête

entire case. The new powers in Rules 20.04(2.1) and (2.2) expand the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.

Summary judgment motions must be granted whenever there is no genuine issue requiring a trial. There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

The new fact-finding powers granted to motion judges in Rule 20.04 may be employed on a motion for summary judgment unless it is in the interest of justice for them to be exercised only at trial. When the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. The power to hear oral evidence should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can be heard. Where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the motion judge and to provide a description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence.

On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). Their use will not be against

en jugement sommaire et qui atténuent les risques lorsque pareille requête ne permet pas de trancher l'affaire dans son ensemble. Les nouveaux pouvoirs prévus aux par. 20.04(2.1) et (2.2) des Règles augmentent le nombre d'affaires qui ne soulèvent pas de véritable question litigieuse nécessitant la tenue d'un procès en permettant au juge saisi d'une requête d'apprécier la preuve, d'évaluer la crédibilité et de tirer des conclusions raisonnables.

La requête en jugement sommaire doit être accueillie dans tous les cas où il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès. Il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès lorsque le juge est en mesure de statuer justement et équitablement au fond sur une requête en jugement sommaire. Ce sera le cas lorsque la procédure (1) permet au juge de tirer les conclusions de fait nécessaires, (2) lui permet d'appliquer les règles de droit aux faits et (3) constitue un moyen proportionné, plus expéditif et moins coûteux d'arriver à un résultat juste.

Le juge saisi d'une requête en jugement sommaire peut exercer les nouveaux pouvoirs en matière de recherche des faits que lui confère la règle 20.04 à moins qu'il ne soit dans l'intérêt de la justice de ne les exercer que lors d'un procès. Lorsqu'il permettrait au juge de trancher une demande de manière juste et équitable, l'exercice des nouveaux pouvoirs serait généralement dans l'intérêt de la justice. Le pouvoir d'entendre des témoignages oraux devrait être exercé lorsqu'il permet au juge de rendre une décision juste et équitable sur le fond et que son exercice constitue la marche à suivre proportionnée. Ce sera plus probablement le cas lorsque le témoignage oral requis est succinct, mais dans certains cas, la requête en jugement sommaire comportera l'audition de longs témoignages oraux. La partie qui cherche à présenter des témoignages oraux doit être prête à démontrer en quoi ils aideraient le juge saisi de la requête et à fournir un exposé de la preuve proposée afin de permettre au juge d'établir la portée de ces témoignages oraux.

Lors de l'audition d'une requête en jugement sommaire aux termes de la règle 20.04, le juge devrait en premier lieu décider, compte tenu uniquement de la preuve dont il dispose et *sans* recourir aux nouveaux pouvoirs en matière de recherche des faits, s'il existe une véritable question litigieuse nécessitant la tenue d'un procès. Il n'y aura pas de question de ce genre si la procédure de jugement sommaire fournit au juge la preuve nécessaire pour trancher justement et équitablement le litige et constitue une procédure expéditive, abordable et proportionnée selon l'al. 20.04(2)a) des Règles. S'il semble y avoir une véritable question nécessitant la tenue d'un procès,

the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

Failed, or even partially successful, summary judgment motions add to costs and delay. This risk can be attenuated by a judge who makes use of the trial management powers provided in Rule 20.05 and the court's inherent jurisdiction. These powers allow the judge to use the insight she gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion. Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge.

Absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law which should not be overturned, absent palpable and overriding error. Similarly, the determination of whether it is in the interest of justice for the motion judge to exercise the new fact-finding powers provided by Rule 20.04(2.1) is also a question of mixed fact and law which attracts deference.

The motion judge did not err in granting summary judgment in the present case. The tort of civil fraud has four elements, which must be proven on a balance of probabilities: (1) a false representation by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; (4) the plaintiff's actions resulted in a loss. In granting summary judgment to the group against H, the motion judge did not explicitly address the correct test for civil fraud but his findings are sufficient to make out the cause of action. The motion

le juge devrait alors déterminer si l'exercice des nouveaux pouvoirs prévus aux par. 20.04(2.1) et (2.2) des Règles permettra d'écarter la nécessité d'un procès. L'exercice de ces pouvoirs ne sera pas contraire à l'intérêt de la justice s'il aboutit à un résultat juste et équitable et permettra d'atteindre les objectifs de célérité, d'accessibilité économique et de proportionnalité, compte tenu du litige dans son ensemble.

Qu'elle soit rejetée ou même accueillie en partie, la requête en jugement sommaire occasionne des frais et des délais additionnels. Le juge peut toutefois atténuer ce risque en exerçant la compétence inhérente du tribunal et les pouvoirs de gestion de l'instance prévus à la règle 20.05. Ces pouvoirs permettent au juge de mettre à profit les connaissances acquises lors de l'audition de la requête en jugement sommaire pour élaborer une procédure d'instruction de nature à régler le litige en tenant compte de la complexité et de l'importance de la question soulevée, de la somme en jeu et des efforts déployés lors de l'instruction de la requête rejetée. Le juge qui rejette une requête en jugement sommaire devrait également se saisir de l'instance à titre de juge du procès à moins que des raisons impérieuses l'en empêchent.

En l'absence d'une erreur de droit, l'exercice des pouvoirs que confère la nouvelle règle relative au jugement sommaire commande la retenue. Lorsque le juge saisi d'une requête exerce les nouveaux pouvoirs en matière de recherche des faits que lui confère le par. 20.04(2.1) des Règles et détermine s'il existe une véritable question litigieuse nécessitant la tenue d'un procès, il s'agit d'une question mixte de fait et de droit et sa décision ne doit pas être infirmée en l'absence d'erreur manifeste et dominante. De même, la décision quant à savoir s'il est dans l'intérêt de la justice que le juge saisi d'une requête exerce les nouveaux pouvoirs en matière de recherche des faits prévus au par. 20.04(2.1) des Règles constitue également une question mixte de fait et de droit qui commande la retenue.

Le juge saisi de la requête n'a pas eu tort de rendre un jugement sommaire en l'espèce. Le délit de fraude civile comporte quatre éléments dont il faut prouver l'existence selon la prépondérance des probabilités : (1) une fausse déclaration du défendeur; (2) une certaine connaissance de la fausseté de la déclaration de la part du défendeur (connaissance ou insouciance); (3) le fait que la fausse déclaration a amené le demandeur à agir; (4) le fait que les actes du demandeur ont entraîné une perte. Lorsqu'il a prononcé contre H un jugement sommaire en faveur du groupe, le juge saisi de la requête n'a pas traité explicitement du critère qu'il convient d'appliquer à la fraude

judge found no credible evidence to support H's claim that he was a legitimate trader, and the outcome was therefore clear, so the motion judge concluded there was no issue requiring a trial. It was neither against the interest of justice for the motion judge to use his fact-finding powers nor was his discretionary decision to do so tainted with error.

civile mais ses conclusions suffisent pour établir la cause d'action. Le juge saisi de la requête a conclu qu'il n'existait pas d'élément de preuve crédible à l'appui de la prétention de H selon laquelle ce dernier était un courtier légitime et l'issue était donc claire; ainsi le juge a conclu qu'il n'y avait pas de question litigieuse nécessitant la tenue d'un procès. L'exercice, par le juge, de ses pouvoirs en matière de recherche des faits n'allait pas à l'encontre de l'intérêt de la justice, et sa décision discrétionnaire d'exercer ces pouvoirs n'était pas non plus entachée d'erreur.

Cases Cited

Referred to: *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, 541 A.R. 312; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371; *Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311; *Bal Global Finance Canada Corp. v. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII); *Vaughan v. Warner Communications, Inc.* (1986), 56 O.R. (2d) 242; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

Jurisprudence

Arrêts mentionnés : *Bruno Appliance and Furniture, Inc. c. Hryniak*, 2014 CSC 8, [2014] 1 R.C.S. 126; *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46; *Medicine Shoppe Canada Inc. c. Devchand*, 2012 ABQB 375, 541 A.R. 312; *Saturley c. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371; *Szeto c. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311; *Bal Global Finance Canada Corp. c. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII); *Vaughan c. Warner Communications, Inc.* (1986), 56 O.R. (2d) 242; *Canada (Procureur général) c. Lameman*, 2008 CSC 14, [2008] 1 R.C.S. 372; *Aguonie c. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161; *Dawson c. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235.

Statutes and Regulations Cited

Code of Civil Procedure, R.S.Q., c. C-25, arts. 4.2, 54.1 *et seq.*, 165(4).
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 1.04(1), (1.1), 1.05, 20, 20.04(2)(a), (2.1), (2.2), 20.05, 20.06(a).
Supreme Court Civil Rules, B.C. Reg. 168/2009, r. 1-3(2).

Lois et règlements cités

Code de procédure civile, L.R.Q., ch. C-25, art. 4.2, 54.1 et suiv., 165(4).
Règles de procédure civile, R.R.O. 1990, Règl. 194, règles 1.04(1), (1.1), 1.05, 20, 20.04(2)a), (2.1), (2.2), 20.05, 20.06a).
Supreme Court Civil Rules, B.C. Reg. 168/2009, règle 1-3(2).

Authors Cited

Agrast, Mark David, Juan Carlos Botero and Alejandro Ponce. *World Justice Project Rule of Law Index 2011*. Washington, D.C.: World Justice Project, 2011.
Ontario. Ministry of the Attorney General. *Civil Justice Reform Project: Summary of Findings and Recommendations*. Toronto: The Ministry, 2007.
Walsh, Teresa, and Lauren Posloski. "Establishing a Workable Test for Summary Judgment: Are We There Yet?", in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation 2013*. Toronto: Thomson Carswell, 2013, 419.

Doctrine et autres documents cités

Agrast, Mark David, Juan Carlos Botero and Alejandro Ponce. *World Justice Project Rule of Law Index 2011*. Washington, D.C. : World Justice Project, 2011.
Ontario. Ministère du procureur général. *Projet de réforme du système de justice civile : Résumé des conclusions et des recommandations*. Toronto : Le ministère, 2007.
Walsh, Teresa, and Lauren Posloski. « Establishing a Workable Test for Summary Judgment : Are We There Yet? », in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation 2013*. Toronto : Thomson Carswell, 2013, 419.

APPEAL from a judgment of the Ontario Court of Appeal (Winkler C.J.O. and Laskin, Sharpe, Armstrong and Rouleau JJ.A.), 2011 ONCA 764, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 14 C.P.C. (7th) 242, 13 R.P.R. (5th) 167, 93 B.L.R. (4th) 1, 344 D.L.R. (4th) 193, 10 C.L.R. (4th) 17, [2011] O.J. No. 5431 (QL), 2011 CarswellOnt 13515 (*sub nom. Combined Air Mechanical Services Inc. v. Flesch*), affirming a decision of Grace J., 2010 ONSC 5490, [2010] O.J. No. 4661 (QL), 2010 CarswellOnt 8325. Appeal dismissed.

Sarit E. Batner, *Brandon Kain* and *Moya J. Graham*, for the appellant.

Javad Heydary, *Jeffrey D. Landmann*, *David K. Alderson*, *Michelle Jackson* and *Jonathan A. Odumeru*, for the respondents.

Allan Rouben and *Ronald P. Bohm*, for the intervener the Ontario Trial Lawyers Association.

Paul R. Sweeny and *David Sterns*, for the intervener the Canadian Bar Association.

The judgment of the Court was delivered by

[1] Karakatsanis J. — Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

[2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pretrial

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (le juge en chef Winkler et les juges Laskin, Sharpe, Armstrong et Rouleau), 2011 ONCA 764, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 14 C.P.C. (7th) 242, 13 R.P.R. (5th) 167, 93 B.L.R. (4th) 1, 344 D.L.R. (4th) 193, 10 C.L.R. (4th) 17, [2011] O.J. No. 5431 (QL), 2011 CarswellOnt 13515 (*sub nom. Combined Air Mechanical Services Inc. c. Flesch*), qui a confirmé une décision du juge Grace, 2010 ONSC 5490, [2010] O.J. No. 4661 (QL), 2010 CarswellOnt 8325. Pourvoi rejeté.

Sarit E. Batner, *Brandon Kain* et *Moya J. Graham*, pour l'appelant.

Javad Heydary, *Jeffrey D. Landmann*, *David K. Alderson*, *Michelle Jackson* et *Jonathan A. Odumeru*, pour les intimés.

Allan Rouben et *Ronald P. Bohm*, pour l'intervenante Ontario Trial Lawyers Association.

Paul R. Sweeny et *David Sterns*, pour l'intervenante l'Association du Barreau canadien.

Version française du jugement de la Cour rendu par

[1] La juge Karakatsanis — De nos jours, garantir l'accès à la justice constitue le plus grand défi à relever pour assurer la primauté du droit au Canada. Les procès sont de plus en plus coûteux et longs. La plupart des Canadiens n'ont pas les moyens d'intenter une action en justice lorsqu'ils subissent un préjudice ou de se défendre lorsqu'ils sont poursuivis; ils n'ont pas les moyens d'aller en procès. À défaut de moyens efficaces et accessibles de faire respecter les droits, la primauté du droit est compromise. L'évolution de la common law ne peut se poursuivre si les affaires civiles ne sont pas tranchées en public.

[2] On reconnaît de plus en plus qu'un virage culturel s'impose afin de créer un environnement favorable à l'accès expéditif et abordable au système de justice civile. Ce virage implique que

procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

[3] Summary judgment motions provide one such opportunity. Following the *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007) (the Osborne Report), Ontario amended the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (Ontario *Rules* or Rules) to increase access to justice. This appeal, and its companion, *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, address the proper interpretation of the amended Rule 20 (summary judgment motion).

[4] In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

[5] To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

[6] As the Court of Appeal observed, the inappropriate use of summary judgment motions creates

l'on simplifie les procédures préalables au procès et que l'on insiste moins sur la tenue d'un procès conventionnel et plus sur des procédures proportionnées et adaptées aux besoins de chaque affaire. L'équilibre entre la procédure et l'accès à la justice qu'établit notre système de justice doit en venir à refléter la réalité contemporaine et à reconnaître que de nouveaux modèles de règlement des litiges peuvent être justes et équitables.

[3] La requête en vue d'obtenir un jugement sommaire offre une occasion d'atteindre ces objectifs. À la suite du rapport de 2007 intitulé *Projet de réforme du système de justice civile : Résumé des conclusions et des recommandations* (le rapport Osborne), l'Ontario a modifié ses *Règles de procédure civile*, R.R.O. 1990, Règl. 194 (les *Règles* de l'Ontario ou les Règles) afin d'améliorer l'accès à la justice. Le présent pourvoi et le pourvoi connexe, *Bruno Appliance and Furniture, Inc. c. Hryniak*, 2014 CSC 8, [2014] 1 R.C.S. 126, portent sur l'interprétation correcte de la règle 20 (requête en jugement sommaire) modifiée.

[4] Lorsqu'elle a interprété les dispositions de cette règle, la Cour d'appel de l'Ontario a accordé trop d'importance à la « pleine appréciation » que l'on peut faire de la preuve lors d'un procès conventionnel, étant donné que pareil procès ne constitue pas une solution de rechange réaliste pour la plupart des parties à un litige. À mon avis, la tenue d'un procès n'est pas nécessaire si une requête en jugement sommaire peut déboucher sur une décision juste et équitable, si elle offre un processus qui permet au juge de tirer les conclusions de fait nécessaires, d'appliquer les règles de droit à ces faits et si elle constitue, par rapport au procès, un moyen proportionné, plus expéditif et moins onéreux d'arriver à un résultat juste.

[5] Je conclus à cette fin que les règles régissant les jugements sommaires doivent recevoir une interprétation large et propice à la proportionnalité et à l'accès équitable à un règlement abordable, expéditif et juste des demandes.

[6] Comme l'a indiqué la Cour d'appel, le recours inapproprié à la requête en jugement sommaire

its own costs and delays. However, judges can mitigate such risks by making use of their powers to manage and focus the process and, where possible, remain seized of the proceedings.

[7] While I differ in part on the interpretation of Rule 20, I agree with the Court of Appeal's disposition of the matter and would dismiss the appeal.

I. Facts

[8] More than a decade ago, a group of American investors, led by Fred Mauldin (the Mauldin Group), placed their money in the hands of Canadian "traders". Robert Hryniak was the principal of the company Tropos Capital Inc., which traded in bonds and debt instruments; Gregory Peebles, is a corporate-commercial lawyer (formerly of Cassels Brock & Blackwell) who acted for Hryniak, Tropos and Robert Cranston, formerly a principal of a Panamanian company, Frontline Investments Inc.

[9] In June 2001, two members of the Mauldin Group met with Cranston, Peebles, and Hryniak, to discuss an investment opportunity.

[10] At the end of June 2001, the Mauldin Group wired US$1.2 million to Cassels Brock, which was pooled with other funds and transferred to Tropos. A few months later, Tropos forwarded more than US$10 million to an offshore bank, and the money disappeared. Hryniak claims that at this point, Tropos' funds, including the funds contributed by the Mauldin Group, were stolen.

[11] Beyond a small payment of US$9,600 in February 2002, the Mauldin Group lost its investment.

occasionne lui-même des frais et des délais. Or, le juge peut atténuer ces risques en exerçant ses pouvoirs de gérer et de circonscrire la procédure et, si possible, en demeurant saisi de l'instance.

[7] Bien que mon interprétation de la règle 20 diffère en partie de celle de la Cour d'appel, je souscris à sa décision en l'espèce et je suis d'avis de rejeter le pourvoi.

I. Les faits

[8] Il y a plus de 10 ans, un groupe d'investisseurs américains, dirigé par Fred Mauldin (le Groupe Mauldin), ont confié leur argent à des « courtiers » canadiens. Robert Hryniak était le dirigeant de la société Tropos Capital Inc., qui faisait le commerce des obligations et des titres de créance; Gregory Peebles, un avocat spécialisé en droit des sociétés et en droit commercial (ancien avocat du cabinet Cassels Brock & Blackwell), représentait M. Hryniak, Tropos et Robert Cranston, l'ancien dirigeant d'une société panaméenne, Frontline Investments Inc.

[9] Au mois de juin 2001, deux membres du Groupe Mauldin ont rencontré MM. Cranston, Peebles et Hryniak pour discuter d'une possibilité d'investissement.

[10] À la fin juin 2001, le Groupe Mauldin a viré 1,2 million de dollars américains à Cassels Brock; cette somme a été mise en commun avec d'autres fonds et transférée à Tropos. Quelques mois plus tard, Tropos a transféré plus de 10 millions de dollars américains à une banque étrangère et l'argent a disparu. M. Hryniak soutient qu'à ce stade, les fonds appartenant à Tropos, y compris ceux versés par le Groupe Mauldin, ont été dérobés.

[11] À part un paiement modique de 9 600 dollars américains versé en février 2002, le Groupe Mauldin a perdu son placement.

people look for alternatives or simply give up on justice. Sometimes, they choose to represent themselves, often creating further problems due to their lack of familiarity with the law.

[26] In some circles, private arbitration is increasingly seen as an alternative to a slow judicial process. But private arbitration is not the solution since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined.

[27] There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

[28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

[29] There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the

judiciaires deviennent excessifs, les gens cherchent d'autres solutions ou renoncent tout simplement à obtenir justice. Ils décident parfois de se représenter eux-mêmes, ce qui entraîne souvent d'autres difficultés en raison de leur méconnaissance du droit.

[26] Dans certains milieux, l'arbitrage privé est de plus en plus considéré comme une solution de rechange à un processus judiciaire lent. Or, ce n'est pas la solution : en l'absence d'un forum public accessible pour faire trancher les litiges, la primauté du droit est compromise et l'évolution de la common law, freinée.

[27] Les solutions de rechange au règlement des différents recueillent de plus en plus d'appuis et il se dégage un consensus sur le fait que l'équilibre traditionnel entre les longues procédures préalables au procès et le procès conventionnel ne correspond plus à la réalité actuelle et doit être rajusté. L'atteinte d'un juste équilibre exige la mise en place de procédures de règlement des litiges simplifiées et proportionnées, et influe sur le rôle des avocats et des juges. Il faut reconnaître par cet équilibre qu'un processus peut être juste et équitable sans entraîner les dépenses et les délais propres au procès, et que les autres modèles de règlement des litiges sont aussi légitimes que le procès conventionnel.

[28] Un virage culturel s'impose. L'objectif principal demeure le même : une procédure équitable qui aboutit au règlement juste des litiges. Une procédure juste et équitable doit permettre au juge de dégager les faits nécessaires au règlement du litige et d'appliquer les principes juridiques pertinents aux faits établis. Or, cette procédure reste illusoire si elle n'est pas également accessible — soit proportionnée, expéditive et abordable. Le principe de la proportionnalité veut que le meilleur forum pour régler un litige ne soit pas toujours celui dont la procédure est la plus laborieuse.

[29] De toute évidence, il existe toujours un certain tiraillement entre l'accessibilité et la fonction de recherche de la vérité, mais, tout comme l'on ne s'attend pas à la tenue d'un procès avec jury dans le cas d'une contravention de stationnement contestée, les procédures en place pour trancher des

nature of the dispute and the interests involved, then it will not achieve a fair and just result.

[30] The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice.[3] For example, Ontario Rules 1.04(1) and (1.1) provide:

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[31] Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes . . . an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation": *Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, at para. 53.

[32] This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks,

3 This principle has been expressly codified in British Columbia, Ontario, and Quebec: *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 1-3(2); Ontario *Rules*, Rule 1.04(1.1); and *Code of Civil Procedure*, R.S.Q., c. C-25, art. 4.2. Aspects of Alberta's and Nova Scotia's rules of court have also been interpreted as reflecting proportionality: *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, 541 A.R. 312, at para. 11; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371, at para. 12.

litiges civils doivent être adaptées à la nature de la demande. Si la procédure est disproportionnée par rapport à la nature du litige et aux intérêts en jeu, elle n'aboutira pas à un résultat juste et équitable.

[30] Le principe de la proportionnalité trouve aujourd'hui son expression dans les règles de procédure de nombreuses provinces et peut constituer la pierre d'assise de l'accès au système de justice civile[3]. Par exemple, les par. 1.04(1) et (1.1) des *Règles* de l'Ontario prévoient ce qui suit :

1.04 (1) Les présentes règles doivent recevoir une interprétation large afin d'assurer la résolution équitable sur le fond de chaque instance civile, de la façon la plus expéditive et la moins onéreuse.

(1.1) Lorsqu'il applique les présentes règles, le tribunal rend des ordonnances et donne des directives qui sont proportionnées à l'importance et au degré de complexité des questions en litige ainsi qu'au montant en jeu dans l'instance.

[31] Même si la proportionnalité n'est pas expressément codifiée, l'application de règles de procédure qui font intervenir un pouvoir discrétionnaire [TRADUCTION] « englobe [. . .] un principe sous-jacent de proportionnalité, selon lequel il faut tenir compte de l'opportunité de la procédure, de son coût, de son incidence sur le litige et de sa célérité, selon la nature et la complexité du litige » : *Szeto c. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, par. 53.

[32] Ce virage culturel oblige les juges à gérer activement le processus judiciaire dans le respect du principe de la proportionnalité. La requête en jugement sommaire peut permettre d'économiser temps et ressources, mais, à l'instar de la plupart des procédures préalables au procès, elle peut ralentir l'instance si elle est utilisée de manière

3 Ce principe a été expressément codifié en Colombie-Britannique, en Ontario et au Québec : *Supreme Court Civil Rules*, B.C. Reg. 168/2009, par. 1-3(2); *Règles* de l'Ontario, par. 1.04(1.1); et *Code de procédure civile*, L.R.Q., ch. C-25, art. 4.2. Certaines dispositions des règles de procédure de l'Alberta et de la Nouvelle-Écosse ont également été considérées comme illustrant la proportionnalité : *Medicine Shoppe Canada Inc. c. Devchand*, 2012 ABQB 375, 541 A.R. 312, par. 11; *Saturley c. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371, par. 12.

counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

[33] A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

B. *Summary Judgment Motions*

[34] The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial. With the exception of Quebec, all provinces feature a summary judgment mechanism in their respective rules of civil procedure.[4] Generally, summary judgment is available where there is no genuine issue for trial.

[35] Rule 20 is Ontario's summary judgment procedure, under which a party may move for summary judgment to grant or dismiss all or part of a claim. While Ontario's Rule 20 in some ways goes further than other rules throughout the country, the values

4 Quebec has a procedural device for disposing of abusive claims summarily: see arts. 54.1 *et seq.* of the *Code of Civil Procedure*. While this procedural device is narrower on its face, it has been likened to summary judgment: see *Bal Global Finance Canada Corp. v. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII). Moreover, s. 165(4) of the *Code* provides that the defendant may ask for an action to be dismissed if the suit is "unfounded in law".

inappropriée. Bien que les juges puissent contribuer à la réduction de ce risque, et devraient le faire, les avocats doivent, conformément aux traditions de leur profession, agir de manière à faciliter plutôt qu'à empêcher l'accès à la justice. Ils devraient ainsi tenir compte des moyens limités de leurs clients et de la nature de leur dossier et élaborer des moyens proportionnés d'arriver à un résultat juste et équitable.

[33] Une demande complexe peut comporter un dossier volumineux et exiger un investissement important en temps et en argent. Toutefois, la proportionnalité est forcément de nature comparative; même les procédures lentes et coûteuses peuvent s'avérer proportionnées lorsqu'elles constituent la solution la plus rapide et la plus efficace. La question est de savoir si les frais et les délais additionnels occasionnés par la recherche des faits lors du procès sont essentiels à un processus décisionnel juste et équitable.

B. *Requêtes en jugement sommaire*

[34] La requête en jugement sommaire constitue un outil important pour faciliter l'accès à la justice parce qu'elle peut offrir une solution de rechange au procès complet plus abordable et plus rapide que celui-ci. À l'exception du Québec, toutes les provinces prévoient dans leurs règles de procédure civile respectives des dispositions relatives au jugement sommaire[4]. En règle générale, le tribunal peut rendre un jugement sommaire si aucune véritable question litigieuse ne requiert un procès.

[35] La règle 20 énonce la procédure de jugement sommaire à suivre en Ontario; une partie peut demander, par voie de requête, un jugement sommaire accueillant ou rejetant en totalité ou en partie la demande. Bien que la règle 20 de l'Ontario

4 Le Québec dispose d'un mécanisme procédural pour écarter sommairement les demandes abusives : voir les art. 54.1 et suiv. du *Code de procédure civile*. Bien qu'il ait une portée plus circonscrite à première vue, ce mécanisme a été assimilé au jugement sommaire : voir *Bal Global Finance Canada Corp. c. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII). De plus, selon le par. 165(4) du *Code*, le défendeur peut solliciter le rejet de l'action si la demande « n'est pas fondée en droit ».

CITATION: Lounds v. Lounds; MacIsaac v. Lounds, 2024 ONSC 2010
COURT FILE NO.: CV-15-6241
CV-15-6178
DATE: 2024/04/05

SUPERIOR COURT OF JUSTICE – ONTARIO (North Bay)

BETWEEN: DARRELL MacISAAC and LYNN CONNOR, *Plaintiffs*

AND:

HARRY LOUNDS and LYNDA LOUNDS, *Defendants*

AND:

BETWEEN: LYNDA LOUNDS, *Plaintiff*

AND:

HARRY LOUNDS, *Defendant*

BEFORE: Justice J.S. Richard

COUNSEL: *Michael Switzer and Mikolaj Grodzki*, for the Plaintiffs, Darrell MacIsaac and Lynn Connor (CV-15-6241)
Sandi Smith, for the Defendants Harry Lounds and Lynda Lounds (CV-15-6241)
Sonam Sapra, for the Plaintiff Lynda Lounds (CV-15-6178)
Sandi Smith, for the Defendant Harry Lounds (CV-15-6178)

MOTION TO STRIKE JURY NOTICE – REASONS FOR DECISION

[1] Two actions arose out of a motor vehicle accident that occurred on January 27, 2014: CV-15-6241 (the "Main Action") and CV-15-6178 (the "Companion Action"). In May 2017, the Honourable Justice M.G. Ellies ordered that these two actions be tried together or one immediately after the other, or as otherwise directed by the trial judge.

[2] Trial dates have been fixed commencing on September 9, 2024, with a jury, for a maximum of six weeks. Liability and damages continue to be live issues in both actions.

[3] The Plaintiffs in the Main Action, Darrell MacIsaac and Lynn Connor, bring a motion to strike a jury notice on the basis that it will be impossible for these actions, or even just one of them, to be completed in 6 weeks with a jury. They argue that for this reason it should be converted to a judge-alone trial.

[4] The Defendants oppose the motion stating that leave should not be granted to bring this motion. Alternatively, they argue that if leave is granted, the motion should be denied on the basis that the Plaintiffs' arguments are entirely speculative, that this motion is premature,

and that there is insufficient evidence to support the Plaintiffs' position. According to the Defendants, justice would be better served by a "wait and see" approach when there will be a higher degree of certainty related to the operation of the civil courts and the issues in dispute have been trial-managed.

[5] The Plaintiff in the Companion Action takes no position in this motion to strike the jury notice.

Facts

[6] The highlights of the procedural history following the motor vehicle accident of January 27, 2014, are as follows:

- 2015: The two actions are commenced. Defendants file Jury Notice.
- 2017: Justice Ellies orders that both actions will be tried together, or one immediately following the other, unless otherwise directed by the trial judge;
- February 2018: The Trial Record is filed. The court asks parties and counsel for trial availability;
- December 2019: Regional Senior Justice Ellies, orders that "*these actions will be tried one after the other, with the MacIsaac action proceeding first*";
- September 2021: During one of multiple assignment courts attended by counsel, Regional Senior Justice Ellies advises that the North Bay jurisdiction has no jury sittings available to accommodate these matters. The transcript, entered into evidence, highlights Regional Senior Justice Ellies' comments: *it's easier for us to set judge-alone dates than jury trial dates, because we don't have to fit a particular sitting, and we can fit particular sittings even with judge-alone matters when we have enough judges, but the problem is I don't have enough judges to just plug it into one of the sittings next year*.
- January 2023: Trial dates are fixed commencing September 9, 2024, for an absolute maximum of 6 weeks, for both actions.
- May 2023**:** Plaintiffs in Main Action file their Motion Record for this motion that includes a supporting affidavit of Mikolaj T. Grodzki dated May 23, 2023, indicating "*To date, the court has been unable to accommodate a jury trial because the trial is estimated to last ten (10) weeks with the companion action expected to be of similar duration. The delay has been due to the COVID-19 pandemic and, subsequent to same, the limited judicial resources in the judicial region which makes the scheduling of a ten-week jury trial impossible.*"

- May 29, 2023: I endorse that there are no long motion dates available to hear this motion to strike the jury notice in 2023, and the matters were returnable to September 2023 to set a date for this hearing in 2024.
- April 2024: This motion to strike the jury notice is finally heard.

[7] It should also be noted that these two matters, being ready for trial since 2018, were pre-tried three times, and have been in assignment court multiple times.

Issues

[8] These are the issues before the court at this time:

1. Should leave be granted to the Plaintiffs in the Main Action allowing them to bring this motion?
2. If so, should the jury notice of October 30, 2015, be struck thereby converting the Main Action (CV-15-6241) trial to a judge-alone trial?

Analysis

Leave to bring this motion

[9] Leave sought is governed by Rule 48.04(1):

> *... a party who has set an action down for trial shall not initiate or continue any motion or form of discovery without leave of the court.*

[10] The Defendants argue that the motion to strike the jury is premature given the importance of the right to a jury trial. They urge, furthermore, that the Court ought to be prudent and apply the "wait and see approach", leaving the decision to strike the jury to the trial judge. They further argue that there is only speculation before the court, not evidence, with respect to estimated trial time, and since the matters are already set down for trial by jury for six weeks, they ought to proceed.

[11] The Plaintiffs, of course, argue the opposite and urge the court to draw on the court's experience to conclude that completing these trials, or even just one of them, within six weeks is a forgone impossibility. For this reason, they argue, their motion cannot be said to be premature.

[12] As was summarized recently by the Honourable Madam Justice A.A. Casullo in *Byard v. Reid*, 2023 ONSC 5146, at para 21:

> There are two lines of authority with respect to the proper test for granting leave to bring a motion after an action has been set down for trial. As the Court of Appeal set out in *Horani (Litigation Guardian of) v. Manulife Financial Corp.*, 2023 ONCA 51, [2023] O.J. No. 228 at paras. 17-19:
>
> > Some courts have required the moving party to show "a substantial or unexpected change in circumstances such that a refusal to make an order under Section 48.04(1) would be manifestly unjust": see, *Hill v. Ortho Pharmaceutical (Canada) Ltd.*, [1992] O.J. No. 1740, 11 C.P.C. (3d) 236 (Gen. Div.); for cases adopting *Hill*, see *LML Investments Inc. v Choi* (2007), 85 O.R. (3d) 351 (S.C.), at para. 10; *Jetport v Jones Brown*

> *Inc.,* 2013 ONSC 2740, 115 O.R. (3d) 772, at paras. 68, 70 and 71; *Lugen Corporation v Starbucks Coffee Canada Inc*., 2014 ONSC 7141, at paras. 12, 30, 31; *Denis v Lalonde,* 2016 ONSC 5960, at para. 11; *Secure Solutions Inc. v. Smiths Detection Toronto Ltd*., 2017 ONSC 2401, at paras. 42-46.
>
> Others have determined that leave be granted if the moving party can demonstrate that "the interlocutory step is necessary in the interests of justice" even in the absence of a substantial or unexpected change in circumstances: see, *A.G.C. Mechanical Structural Security Inc. v. Rizzo*, 2013 ONSC 1316 (CanLII), at paras. 21-23; *BNL Entertainment Inc. v. Ricketts*, 2015 ONSC 1737, 126, O.R. (3d) 154 (Mast.), at paras. 12, 14; *Fruitland Juices Inc. v. Custom Farm Service Inc. et al*., 2012 ONSC 4902, at para. 28; and *Cromb v. Bouwmeester*, 2014 ONSC 5318, at para. 35.
>
> In yet other cases, courts have considered both tests and determined that they need not weigh in on the prevailing approach as the moving party could not meet the bar even under the broader "interest of justice" test: see for instance, *Alofs v. Blake, Cassels & Graydon LLP*, 2017 ONSC 950, at paras. 22-23; *Chokler v. FCA Canada Inc. 2017,* ONSC 4494, at para. 13.

[13] In *Byard, v. Reid, supra*, leave to bring the motion to strike was denied. Justice Casullo concluded that there was no evidence before the court to explain the delay in bringing the motion to strike the jury notice. Justice Casullo further explained that counsel for the moving party argued that “lawyers are entitled to change their litigation strategy,” and that the responding party had not been advised in advance of scheduling court that the Plaintiff intended to strike the jury notice. Finally, in her reasons, Justice Casullo concluded that the moving party had not met the bar under the interest of justice test.

[14] In this case, there is affidavit evidence before the court explaining the delay in bringing this motion, as well as assignment court transcripts and court endorsements from as recently as 2023, setting an absolute maximum of six weeks, on the court’s own initiative, for trial sitting time for these cases due to limits on judicial resources in the region. In my view, the evidence meets both tests for leave to be granted under *Rule* 48.

[15] First, the pandemic imposed an unprecedented strain on court operations that were already backlogged, and it was not until 2023 that the parties were informed that they would be limited to 6 weeks for a jury trial, or both. I find that bringing this motion only a few months later does not constitute a delay.

[16] Secondly, even if one could have foreseen this unprecedented strain on court operations, these matters are already 9 years old, with the accident already well past its 10th anniversary. It is unequivocally clear that in these circumstances, this interlocutory step is just.

[17] Leave to bring the motion to strike the jury notice is, therefore, granted.

Should the jury notice be struck?

[18] Yes. Ideally, there would be no time constraints and limitations on judicial resources. It is clear to the court, based on the evidence presented, that this motion is not being brought as a change in legal strategy, but rather, as a means to ensure that the Main Action proceeds, that it proceed efficiently, and that it at least have an opportunity to be completed, without having to strike the jury notice midway through the trial if and when it becomes clear that completing it with a jury will be impossible, as was suggested by the Defence.

[19] The Plaintiff, Darrell MacIsaac, claims he sustained serious and permanent orthopaedic, psychological and cognitive impairments. He claims compensatory damages, including general damages, damages for income loss, damages for future loss of income, damages for costs of future care, and damages for home maintenance and housekeeping.

[20] The Defendants have thus far not made any payments to the Plaintiffs, and liability continues to be a live issue. The Plaintiffs' evidence in support of this motion includes a list of 25 witnesses they intend on calling, all of whom are reasonably necessary in this set of facts. It also includes a reasonable and detailed breakdown of estimated days required for a jury trial, which amounts to 8 to 9 weeks for the first trial. All of this points to not only a possibility, but in fact to a likelihood, that the Main Action, the MacIsaac trial, with a jury, will take much more than the allotted six weeks.

[21] The test applicable for a motion to strike a Jury notice under *Rule* 47.02(2) is whether justice to the parties would be better served by dismissing or retaining the jury. (See *Cowles v. Balac*, 2006 ONCA 34916 at para. 28). The object of a civil trial is to provide justice between the parties, and therefore neither party should have an unfettered right to determine the mode of trial. (*Cowles v. Balac, supra*, at para. 71).

[22] In *Louis v. Poitras*, 2021 ONCA 49, the Court of Appeal addressed the "unprecedented crisis" and the "overwhelm" of our civil justice system requiring judges "to respond to local conditions to ensure the timely delivery of justice" as a result of the pandemic. At para. 15, moreover, the Court of Appeal emphasized that "while a court should not interfere with the right to a jury trial in a civil case without just cause or compelling reasons, a judge considering a motion to strike a jury notice has broad discretion to determine the mode of trial." The pandemic restrictions may have been lifted, and the pandemic may be considered "over", but its effects on our courts persist and will continue to do so for some time.

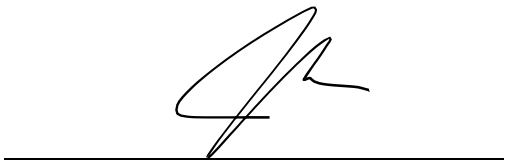
[23] At the time of the accident, the Plaintiff, Darrell MacIsaac, was 54 years old and had significant experience as a sales representative for a pharmaceutical company. He is now 65 years old and relying on CPP and old age security for income. The Plaintiffs' claim alleges that Mr. MacIsaac has been totally and permanently disabled as a result of the accident. The events in question are 10 years old. As time goes on, witnesses will become less reliable, and the potential recovery for loss of income erodes due to s.267.5 of the *Insurance Act, R.S.O. 1990, c.I.8.* The matters need to proceed, and to commence a trial with a jury knowing that the jury will almost certainly have to be dismissed partly though the trial because of time constraints is a waste of our already limited resources, and unnecessarily disrupts the lives and livelihood of jurors.

[24] The Defendants argue that this motion is premature and that the court ought to adopt a "wait and see" approach, as encouraged by our case law. With respect, the parties have been "waiting and seeing" since 2018, and it would be unjust to continue to do so.

Order

[25] Simply put, North Bay cannot accommodate a jury trial of this duration and complexity, let alone two of them. The parties have already been prejudiced enough by the age of the case. It is not only in the interest of justice to strike the jury notice, at this point, it has become necessary.

[26] For reasons already mentioned, the motion to strike the jury notice of October 30, 2015, is granted, and the trial of action CV-15-6241 shall proceed by judge alone on September 9, 2024. If the parties are unable to agree on costs for this motion, Darrell MacIsaac and Lynn Connor may submit a bill of costs within 30 days. All parties may file cost submissions, not exceeding 3 pages, double-spaced, within 30 days.



Justice J.S. Richard

MediaQMI inc. *Appellant*

v.

Magdi Kamel and
Centre intégré universitaire de santé et de services sociaux de l'Ouest-de-l'Île-de-Montréal *Respondents*

and

Fédération professionnelle des journalistes du Québec,
Canadian Broadcasting Corporation,
La Presse Inc. and
Ad IDEM/Canadian Media Lawyer Association *Interveners*

Indexed as: MediaQMI inc. *v.* Kamel

2021 SCC 23

File No.: 38755.

2020: November 12; 2021: May 28.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC

Civil procedure — Openness of court proceedings — Right to access court record — Discontinuance — Retrieval of exhibits — Public body bringing action against former manager alleging misappropriation of public funds — Newspaper publishing company filing motion for access to sealed exhibits in court record — Court authorizing retrieval of exhibits because of discontinuance filed by public body before motion heard — Whether Superior Court judge was obliged to decide application for access to court record before authorizing retrieval of exhibits — Code of Civil Procedure, CQLR, c. C-25.01, arts. 11, 108.

On October 6, 2016, the Centre intégré universitaire de santé et de services sociaux de l'Ouest-de-l'Île-de-Montréal ("CIUSSS") brought a legal action against a former manager, alleging misappropriation of public

MédiaQMI inc. *Appelante*

c.

Magdi Kamel et
Centre intégré universitaire de santé et de services sociaux de l'Ouest-de-l'Île-de-Montréal *Intimés*

et

Fédération professionnelle des journalistes du Québec,
Société Radio-Canada,
La Presse Inc. et
Ad IDEM/Canadian Media Lawyer Association *Intervenantes*

Répertorié : MédiaQMI inc. *c.* Kamel

2021 CSC 23

N° du greffe : 38755.

2020 : 12 novembre; 2021 : 28 mai.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et Kasirer.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Procédure civile — Publicité des débats judiciaires — Droit d'accès au dossier du tribunal — Désistement — Retrait des pièces — Action intentée par un organisme public contre un ancien cadre alléguant le détournement de fonds publics — Requête sollicitant l'accès aux pièces se trouvant sous scellés au dossier du tribunal déposée par une entreprise de publication de journaux — Retrait des pièces autorisé par le tribunal en raison du désistement de l'organisme public avant l'audition de la requête — Le juge de première instance avait-il l'obligation de trancher la demande d'accès au dossier du tribunal avant d'autoriser le retrait des pièces? — Code de procédure civile, RLRQ, c. C-25.01, art. 11, 108.

Le 6 octobre 2016, le Centre intégré universitaire de santé et de services sociaux de l'Ouest-de-l'Île-de-Montréal (« CIUSSS ») a entrepris une action en justice contre un ancien cadre, alléguant un détournement de

funds. The action was accompanied by an application for a *Norwich* order to obtain the identity of the holder of the four bank accounts to which the money had allegedly been diverted. On October 7, 2016, the Superior Court made the *Norwich* order and ordered that the entire record be sealed, including the four exhibits filed by the CIUSSS in support of its allegations. On March 29, 2017, MediaQMI, a newspaper publishing company, filed a motion to unseal based on art. 11 of the *Code of Civil Procedure* ("*C.C.P.*") and s. 23 of the *Charter of human rights and freedoms* ("*Quebec Charter*") in order to have access to the court record, including the exhibits that might be in it. The hearing of the motion, scheduled for April 5, 2017, was postponed to April 25, 2017. In the meantime, on April 19, 2017, the CIUSSS discontinued its legal action. It tried to retrieve the exhibits it had filed, but the staff of the court office could not find them. When the motion was heard on April 25, the CIUSSS made an oral request to retrieve the exhibits filed in the court record. MediaQMI opposed that request.

The Superior Court ordered that the court record be unsealed based on the test set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, finding that the evidence was insufficient to depart from the principle of open court proceedings. However, it granted the request to retrieve the exhibits made by the CIUSSS, in accordance with art. 108 *C.C.P.*, because of the discontinuance that had terminated the proceeding. The day after the judgment was rendered, the CIUSSS retrieved its exhibits. The Court of Appeal dismissed MediaQMI's appeal from the conclusion relating to the retrieval of exhibits.

Held (Wagner C.J. and Rowe, Martin and Kasirer JJ. dissenting): The appeal should be dismissed.

Per Abella, Moldaver, Karakatsanis, Côté and Brown JJ.: MediaQMI cannot obtain a copy of the exhibits that were in the Superior Court's record at the time its motion was filed. The right to have access to court records set out in art. 11 *C.C.P.* does not extend beyond what is in these records at the time they are consulted. Once the parties retrieve their exhibits at the end of a proceeding in accordance with art. 108 *C.C.P.*, members of the public will still be able to consult the record but will no longer have access to the exhibits that have been removed from it.

Article 11 *C.C.P.*, which sets out the principle of open proceedings, does not confer a specific right to access

fonds publics. L'action était assortie d'une demande d'ordonnance de type *Norwich* destinée à obtenir l'identité du détenteur des quatre comptes bancaires au profit desquels les sommes d'argent auraient été détournées. Le 7 octobre 2016, la Cour supérieure a rendu l'ordonnance de type *Norwich* et ordonné la mise sous scellés de l'ensemble du dossier, dont les quatre pièces déposées par le CIUSSS au soutien de ses allégations. MédiaQMI, une entreprise de publication de journaux, a déposé le 29 mars 2017 une requête pour mettre fin aux scellés fondée sur l'art. 11 du *Code de procédure civile* (« *C.p.c.* ») et l'art. 23 de la *Charte des droits et libertés de la personne* (« *Charte québécoise* ») dans le but de prendre connaissance du dossier du tribunal, y compris les pièces qui pouvaient s'y trouver. L'audition de la requête, prévue pour le 5 avril 2017, a été remise au 25 avril 2017. Entre-temps, le 19 avril 2017, le CIUSSS s'est désisté de son action en justice. Il a tenté de reprendre possession des pièces qu'il avait déposées, mais le personnel du greffe n'a pas réussi à les retrouver. Lors de l'audition de la requête le 25 avril, le CIUSSS a formulé une demande verbale afin de reprendre possession des pièces déposées au dossier du tribunal. MédiaQMI s'est opposée à cette demande.

La Cour supérieure a ordonné la levée des scellés suivant le test énoncé dans les arrêts *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, et *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442, au motif que la preuve était insuffisante pour déroger au principe du caractère public des débats judiciaires. Elle a toutefois autorisé la demande de retrait des pièces formulée par le CIUSSS, conformément à l'art. 108 *C.p.c.*, en raison du désistement ayant mis fin à l'instance. Le lendemain du prononcé du jugement, le CIUSSS a repris possession de ses pièces. La Cour d'appel a rejeté l'appel de MédiaQMI formulé à l'encontre de la conclusion relative au retrait des pièces.

Arrêt (le juge en chef Wagner et les juges Rowe, Martin et Kasirer sont dissidents): Le pourvoi est rejeté.

Les juges Abella, Moldaver, Karakatsanis, Côté et Brown : MédiaQMI ne peut obtenir une copie des pièces qui se trouvaient au dossier de la Cour supérieure au moment du dépôt de sa requête. Le droit de prendre connaissance des dossiers des tribunaux énoncé à l'art. 11 *C.p.c.* ne s'étend pas au-delà de ce qui se trouve dans ces dossiers au moment de la consultation. Lorsqu'à la fin d'une instance les parties reprennent possession de leurs pièces conformément à l'art. 108 *C.p.c.*, les membres du public pourront toujours consulter le dossier mais n'auront plus accès aux pièces qui en ont été retirées.

L'article 11 *C.p.c.*, qui énonce le principe de la publicité des débats, ne confère pas un droit spécifique d'accéder

exhibits that were once part of court records. That provision gives access to a court record whose content is governed in part by art. 108 *C.C.P.* Thus, the retrieval of exhibits from a record in the circumstances described in art. 108 *C.C.P.*, when an application to consult the record is pending, does not infringe a rule of public order; it simply constitutes the exercise of a right provided for in the *Code of Civil Procedure*. The position that the scope of the principle of open proceedings should be interpreted in light of the charters must be rejected. Whatever protection that principle may have under the charters, the legislature remains free to fix the scope of the principle in the rules it enacts, and it is not the role of the courts to do so in its place. In the civil law context, creating law remains the legislature's prerogative. Accordingly, in the absence of a constitutional challenge, the rules clearly stated in the *Code of Civil Procedure* are what apply. Moreover, except where there is ambiguity that persists even though the contextual approach to interpretation has been applied, courts do not have to interpret statutes so as to make them consistent with the principles and values of the *Canadian Charter of Rights and Freedoms*. This approach also accords with the interpretative provisions of the *Quebec Charter*.

The new *Code of Civil Procedure* that came into force in 2016 sets out the general scheme relating to the public nature of civil justice in arts. 11 to 16 and establishes two distinct rights in art. 11: the right to attend court hearings wherever they are held and the right to have access to court records and entries in the registers of the courts. Article 108 *C.C.P.* makes explicit reference to that general scheme; this is clear both from the words used by the legislature and from the holistic reading of the *Code of Civil Procedure* called for by its preliminary provision and by s. 41.1 of Quebec's *Interpretation Act*. It therefore seems to be beyond question that art. 108 *C.C.P.* concerns the content of the records contemplated in arts. 11 to 16 *C.C.P.*, that is, the records that are subject to a court's supervisory power and control. That provision thus governs the keeping, retrieval and preservation of the exhibits filed in the record to which art. 11 *C.C.P.* gives access.

The scope of art. 108 para. 2 *C.C.P.* cannot be limited on the basis of passages from parliamentary debates suggesting that the legislature's objective was to reduce the costs associated with the judicial system. Arguments from parliamentary history cannot result in the refusal to apply a clear rule, as doing so would compromise the reader's right to rely on the letter of the law interpreted in its context. Courts do not have to interpret or implement the objective underlying a legislative scheme or provision,

aux pièces qui ont un jour fait partie des dossiers des tribunaux. Cette disposition donne accès au dossier du tribunal dont le contenu est en partie régi par l'art. 108 *C.p.c.* Ainsi, le fait de retirer des pièces du dossier dans les circonstances décrites à l'art. 108 *C.p.c.*, alors qu'une demande de consultation du dossier est pendante, ne constitue pas une atteinte à une règle d'ordre public; ce n'est que l'exercice d'un droit prévu par le *Code de procédure civile*. La position selon laquelle la portée du principe de la publicité des débats devrait s'interpréter à la lumière des chartes doit être rejetée. Quelle que soit la protection que les chartes accordent à ce principe, le législateur demeure libre d'en fixer la portée dans les règles qu'il édicte et il n'appartient pas aux tribunaux de le faire à sa place. En contexte civiliste, la création de règles de droit demeure la prérogative du législateur, de telle sorte qu'en l'absence de contestation constitutionnelle, ce sont les règles clairement énoncées au *Code de procédure civile* qui s'appliquent. En outre, en l'absence d'ambiguïté qui persisterait malgré l'application de la méthode d'interprétation contextuelle, les tribunaux n'ont pas à interpréter les lois de façon à les rendre conformes aux principes et valeurs de la *Charte canadienne des droits et libertés*. Cette approche s'accorde par ailleurs avec les dispositions interprétatives de la *Charte québécoise*.

Le nouveau *Code de procédure civile*, entré en vigueur en 2016, prévoit, à ses art. 11 à 16, le régime général de la publicité de la justice civile et édicte, à l'art. 11, deux droits distincts : le droit d'assister aux audiences des tribunaux où qu'elles se tiennent et le droit de prendre connaissance des dossiers et des inscriptions aux registres des tribunaux. L'article 108 *C.p.c.* se réfère explicitement à ce régime général; cela ressort tout autant des termes employés par le législateur que de la lecture holistique du *Code de procédure civile* préconisée par sa disposition préliminaire et par l'art. 41.1 de la *Loi d'interprétation* québécoise. Ainsi, il paraît indiscutable que l'art. 108 *C.p.c.* concerne le contenu des dossiers dont il est question aux art. 11 à 16 *C.p.c.*, à savoir ceux dont le tribunal a la surveillance et le contrôle. Cette disposition régit donc le maintien, le retrait et la conservation des pièces produites au dossier auquel l'art. 11 *C.p.c.* donne accès.

On ne saurait restreindre la portée de l'art. 108, al. 2 *C.p.c.* en s'appuyant sur des passages des débats parlementaires d'après lesquels l'objectif du législateur aurait été de réduire les coûts associés au système judiciaire. Le recours aux travaux préparatoires ne saurait servir à justifier de ne pas appliquer une règle claire, minant ainsi la confiance que le lecteur doit pouvoir mettre dans le libellé du texte interprété à la lumière de son contexte. Les tribunaux n'ont pas à interpréter ni à appliquer l'objectif sous-jacent à une

but must rather interpret and apply the text through which the legislature seeks to achieve that objective.

In this case, the text of art. 108 para. 2 *C.C.P.* authorizes the parties to retrieve their exhibits by consent in the course of a proceeding, and requires them to retrieve their exhibits once the proceeding has ended. It reiterates, with some modifications, the two rules set out in arts. 83 and 331.9 of the former *Code of Civil Procedure*, which were incorporated when the general scheme for the communication and filing of exhibits was reformed. That 1994 reform was designed to encourage parties to exchange information with regard to their respective evidence and to communicate their exhibits to one another directly, without first filing them in the court record. It contemplated that exhibits would be filed and kept on the basis of usefulness and necessity. As the successor of that scheme, art. 108 *C.C.P.* revises and unifies the rules on the keeping, retrieval and preservation of the exhibits filed in court records. Insofar as it governs the content of those records, it has a direct impact on the information to which the public can have access under art. 11 *C.C.P.*

Article 11 *C.C.P.* gives the public the right to have access to court records, subject to exceptions for confidential information. This right applies during and after a proceeding. Even after the proceeding has ended, the exhibits can be consulted as long as they remain in the record, but once the parties retrieve them or the court clerk destroys them, they cease to be part of the record to which the public can have access. This conclusion is in keeping with the intention expressed by the legislature through the words of arts. 11 and 108 *C.C.P.*, with the legislative objectives underlying those provisions, with the general scheme of the *Code of Civil Procedure* and with civil law principles of interpretation. It also avoids giving the principle that civil justice is public set out in art. 11 *C.C.P.* a scope that might distort that principle, just as it avoids undermining other important objectives of the *Code of Civil Procedure*, such as the prevention and resolution of disputes. The objective of facilitating the resolution of disputes would surely be undermined if parties who wished to come to an agreement after taking a matter to court could not bring the documents they had filed with the court back into the private sphere.

Because arts. 11 and 108 *C.C.P.* do not give rise to any judicial discretion, the test from *Dagenais* and *Mentuck* should not be applied in this case. That test establishes that the discretion to make an order limiting the openness

disposition ou à un régime législatif, mais plutôt le texte au moyen duquel le législateur entend atteindre cet objectif.

En l'occurrence, le texte de l'art. 108, al. 2 *C.p.c.* autorise les parties à retirer leurs pièces de façon consensuelle en cours d'instance et les oblige à les récupérer une fois l'instance terminée. Il reprend, à quelques modifications près, les deux règles énoncées aux art. 83 et 331.9 de l'ancien *Code de procédure civile* intégrées à l'occasion d'une réforme relative au régime général de la communication et de la production de pièces. Cette réforme, survenue en 1994, visait à encourager les parties à s'échanger les informations en lien avec leurs preuves respectives et à se communiquer directement leurs pièces sans passer par la production au dossier du tribunal. Elle envisageait la production et la conservation des pièces sous l'angle de l'utilité et de la nécessité. Héritier de ce régime, l'art. 108 *C.p.c.* refond et unifie les règles liées au maintien, au retrait et à la conservation des pièces produites au dossier du tribunal. Dans la mesure où il régit le contenu de ces dossiers, il entraîne des conséquences immédiates sur les informations dont le public peut prendre connaissance en vertu de l'art. 11 *C.p.c.*

L'article 11 *C.p.c.* confère au public le droit de prendre connaissance des dossiers du tribunal, sous réserve des exceptions relatives à la confidentialité. Ce droit s'applique pendant et après l'instance. Même après la fin de l'instance, les pièces peuvent être consultées tant qu'elles restent au dossier, mais dès que les parties les reprennent ou que le greffier les détruit, elles cessent de faire partie du dossier dont le public peut prendre connaissance. Cette conclusion s'accorde avec l'intention du législateur exprimée dans le texte des art. 11 et 108 *C.p.c.*, avec les objectifs législatifs sous-jacents à ces dispositions, avec l'économie générale du *Code de procédure civile* et avec les principes d'interprétation civilistes. Elle évite par ailleurs de donner au principe de la publicité de la justice civile énoncé à l'art. 11 *C.p.c.* une étendue susceptible de le dénaturer, de même qu'elle évite de compromettre d'autres objectifs importants visés par le *Code de procédure civile* comme la prévention et le règlement des différends. En effet, l'objectif de favoriser le règlement des différends serait assurément compromis si les parties désireuses de s'entendre après avoir saisi les tribunaux ne pouvaient rapatrier dans la sphère privée les documents qu'elles y ont produits.

Comme les art. 11 et 108 *C.p.c.* ne font intervenir aucune discrétion judiciaire, il n'y a pas lieu d'appliquer le test des arrêts *Dagenais* et *Mentuck* en l'espèce. En effet, ce test établit que le pouvoir discrétionnaire de rendre une

of proceedings must be exercised within the boundaries set by the *Canadian Charter*, having regard to rights and interests that pull in opposite directions. But where the law fixes the scope of the principle of open proceedings without conferring any discretion on judges, there is no reason to seek a correct balance between competing rights and interests that is within the boundaries set by the *Canadian Charter*.

In this case, MediaQMI's right under art. 11 *C.C.P.* to have access to court records was never compromised. This was because the sealing order that had kept the record confidential until then came to an end when the Superior Court's judgment was rendered. MediaQMI could have consulted the exhibits in issue if it had applied for access to the record during the time when the exhibits were available, since no conservatory measure had been sought by the parties. It did not do so. Only the terms of access to the court record and the content of that record changed between the filing of the motion to unseal and the retrieval of the exhibits. However, that situation was beyond the reach of art. 11 because it fell within art. 108 *C.C.P.* The fact that MediaQMI filed its motion under art. 11 *C.C.P.* prior to the CIUSSS's discontinuance is not determinative and did not give it any acquired right to argue that motion. Nor did it give MediaQMI any right to require that the content of the court record remain unchanged until the motion was decided.

The legal consequence that art. 213 *C.C.P.* attaches to a discontinuance is the termination of the proceeding. Yet the termination of the proceeding entitles the parties to retrieve their exhibits in accordance with art. 108 *C.C.P.* In this case, if MediaQMI wanted to prevent the exercise of that power, it had to contest the discontinuance extinguishing the proceeding. It did not do so. There was therefore nothing that prohibited the CIUSSS from retrieving its exhibits.

Per Wagner C.J. and Rowe, Martin and Kasirer JJ. (dissenting): The appeal should be allowed. The case should be remanded to the Superior Court so that it can decide the application for access to the exhibits on the basis of the analytical framework established in *Dagenais* and *Mentuck*, which was affirmed for civil proceedings in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 52, and make the orders it considers necessary.

The parties' control over the course of their case is a guiding principle set out in art. 19 *C.C.P.* This principle

ordonnance limitant la publicité des débats doit être exercé dans les limites prescrites par la *Charte canadienne* en tenant compte des droits et des intérêts qui militent dans des directions opposées. Or, lorsque la loi fixe la portée d'application du principe de publicité sans attribuer de discrétion au juge, la recherche d'un juste équilibre entre des droits et intérêts opposés qui respecterait les limites prescrites par la *Charte canadienne* n'a aucune raison d'être.

En l'espèce, le droit reconnu à MédiaQMI par l'art. 11 du *C.p.c.* de prendre connaissance des dossiers des tribunaux n'a jamais été compromis. En effet, l'ordonnance de mise sous scellés qui avait assuré jusque-là la confidentialité du dossier a pris fin avec le prononcé du jugement de première instance. MédiaQMI aurait pu consulter les pièces litigieuses si elle avait demandé à prendre connaissance du dossier pendant l'intervalle où elles étaient disponibles, puisqu'aucune mesure conservatoire n'avait été demandée par les parties. Elle ne l'a pas fait. Seules les modalités d'accès au dossier du tribunal et le contenu de ce dossier ont changé entre le dépôt de la requête pour mettre fin aux scellés et le retrait des pièces. Il s'agit là cependant d'une situation qui échappe à l'emprise de l'art. 11 puisqu'elle relève de l'art. 108 *C.p.c.* Le fait que MédiaQMI a déposé sa requête fondée sur l'art. 11 *C.p.c.* avant le désistement du CIUSSS n'est pas déterminant. Il ne lui confère aucun droit acquis à en débattre. De même, il ne lui accorde aucun droit d'exiger le maintien, de façon statique, du contenu du dossier judiciaire jusqu'à ce que la requête soit tranchée.

La conséquence juridique que l'art. 213 du *C.p.c.* attache au désistement, c'est la fin de l'instance. Or, la fin de l'instance habilite les parties à retirer leurs pièces suivant l'art. 108 *C.p.c.* En l'espèce, si MédiaQMI souhaitait prévenir l'exercice de cette faculté, elle devait contester le désistement qui emportait extinction de l'instance. Elle ne l'a pas fait. Dès lors, rien n'interdisait au CIUSSS de reprendre possession de ses pièces.

Le juge en chef Wagner et les juges Rowe, Martin et Kasirer (dissidents) : L'appel devrait être accueilli. Le dossier devrait être retourné à la Cour supérieure afin qu'elle tranche la demande d'accès aux pièces suivant le cadre d'analyse établi dans les arrêts *Dagenais* et *Mentuck* dont l'application en matière civile a été confirmée dans l'arrêt *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522, et qu'elle rende les ordonnances qu'elle juge nécessaire.

La maîtrise par les parties de leur dossier est un principe directeur consacré à l'art. 19 *C.p.c.*, qui englobe la

extends to the parties' right to agree at any stage of the proceeding to settle their dispute or otherwise terminate the proceeding (para. 3). It does not allow them to override a judge's discretion to ensure compliance with the rule of public order arising from the principle of open proceedings, nor does it allow them to exercise their powers at the expense of the existing and legitimate interests of third persons in seeking the application of that rule. The fact is that when parties decide to have recourse to the civil justice system, which is a public service, they do so knowing that members of the public may exercise their fundamental right to information about court proceedings. The private resolution of a dispute alone cannot *ipso facto* supplant the principle of open proceedings when invoked in accordance with procedural rules while a proceeding is still under way. This is all the more true in a case in which a judge issued an order limiting the principle of open court proceedings as soon as the legal action was filed, as in this case.

The fundamental principle of open court proceedings, a hallmark of a free and democratic society, is affirmed in art. 11 *C.C.P.*, which provides that anyone may attend court hearings and have access to court records. The public, and in particular the news media, have the interest required to seek the application of this principle. The legislature provides for two specific exceptions to this fundamental principle: first, where the law provides for *in camera* proceedings (art. 15 *C.C.P.*) or restricts access to court records (art. 16 *C.C.P.*), which is notably the case in family matters; second, by giving the court a discretion to make an exception to the fundamental principle of open proceedings if, in its opinion, public order or the protection of substantial and legitimate interests so requires (art. 12 *C.C.P.*). A court seized of an application to limit the openness of court proceedings must exercise its discretion in accordance with the analytical framework developed in *Dagenais*, *Mentuck* and *Sierra Club*, even if the application is unopposed.

The rules on discontinuance flow from the principle that the parties control the course of their case (art. 19 para. 3 *C.C.P.*). To be set up against the other parties, the unilateral discontinuance need only be notified to those parties in accordance with art. 213 *C.C.P.* However, the principle that the parties control the course of their case is subject to a qualification, developed and consistently applied by the courts: a discontinuance may not prejudice the rights of the other parties or of third persons, including the right to have an application filed prior to the discontinuance

faculté des parties de choisir, à tout moment de l'instance, de régler leur litige ou de mettre autrement fin à l'instance (al. 3). Ce principe ne permet pas aux parties d'écarter le pouvoir discrétionnaire du juge de veiller au respect de la règle d'ordre public découlant du principe de la publicité des débats ou d'exercer leurs pouvoirs au détriment des intérêts nés et légitimes que possèdent des tiers d'en revendiquer l'application. En effet, lorsque les parties décident d'avoir recours à la justice civile, un service public, elles le font en sachant que le public peut exercer son droit fondamental à l'information concernant les procédures judiciaires. Le règlement d'un différend par voie privée ne peut à lui seul supplanter *ipso facto* le principe de la publicité des débats lorsque celui-ci est invoqué dans le respect des règles procédurales alors que l'instance est toujours en cours. Ceci est d'autant plus vrai dans le cadre d'un litige où, dès le dépôt du recours en justice, un juge a émis une ordonnance limitant le principe du caractère public des débats judiciaires, comme en l'espèce.

Le principe fondamental de la publicité des débats judiciaires, caractéristique d'une société libre et démocratique, est consacré à l'art. 11 *C.p.c.*, qui prévoit que tous peuvent assister aux audiences des tribunaux et prendre connaissance des dossiers. Le public et, en particulier, les médias d'information, possèdent l'intérêt requis pour en revendiquer l'application. Le législateur prévoit deux exceptions précises à ce principe fondamental. Premièrement, lorsque la loi prévoit le huis clos (art. 15 *C.p.c.*) ou restreint l'accès aux dossiers (art. 16 *C.p.c.*), ce qui est notamment le cas en matière familiale. Deuxièmement, en accordant au tribunal un pouvoir discrétionnaire lui permettant de faire exception au principe fondamental de la publicité des débats s'il considère que l'ordre public ou la protection d'intérêts légitimes importants l'exigent (art. 12 *C.p.c.*). Le tribunal qui est saisi d'une demande visant à limiter la publicité des procédures judiciaires doit exercer son pouvoir discrétionnaire conformément au cadre d'analyse élaboré dans les arrêts *Dagenais*, *Mentuck* et *Sierra Club*, et ce, même si personne ne s'y oppose.

Le régime du désistement découle du principe voulant que les parties aient la maîtrise de leur dossier (art. 19 al. 3 *C.p.c.*). Pour être opposable aux autres parties, il suffit que le désistement unilatéral leur soit notifié aux termes de l'art. 213 *C.p.c.* Il existe cependant un tempérament au principe de la maîtrise par les parties de leur dossier, lequel a été développé et appliqué par une jurisprudence constante : le désistement ne peut porter préjudice aux droits des autres parties ou des tiers, y compris le droit de faire juger d'une demande antérieure au désistement.

decided. Because discontinuance constitutes a voluntary renunciation of a right or claim, it affects only the rights of the renouncing party, that is, the party that discontinues proceedings or waives a right or claim. A discontinuance may therefore be valid yet ineffective against the rights of third persons. It follows that the purpose or effect of a party's discontinuance cannot be to avoid a suit already brought against it.

If the discontinuance of a proceeding cannot be relied on at the expense of third persons' existing legitimate interests or contrary to the rules of public order, then parties cannot avail themselves of art. 108 para. 2 *C.C.P.* in order to remove exhibits from the record after an application has been made under art. 11 *C.C.P.* The control that the parties have over the course of their case must be exercised in compliance with the principles of civil procedure (art. 19 *C.C.P.*). The parties cannot displace a rule of public order, even by mutual consent. Applying the principle that the parties control the course of their case as if it were an end in itself would be contrary to Quebec jurisprudence and to the general scheme of the *Code of Civil Procedure*. It would also conflict with the well-established principle that the *Code*'s provisions must be interpreted in harmony with the *Quebec Charter* and the general principles of law. Therefore, the principle that the parties control the course of the case could not adversely affect MediaQMI's existing and legitimate interests in seeking the application of the rule of public order requiring open court proceedings.

From the moment MediaQMI applied to unseal the record and access the exhibits, a new proceeding began, and it went beyond the strictly private interests of the parties to the principal litigation. The discontinuance filed following the application brought under art. 11 *C.C.P.* could not defeat that new proceeding, which was separate from the principal litigation and related to the proper functioning of the judicial institution, whose legitimacy depends on its openness and in part on media scrutiny. MediaQMI was thus seeking to play its role as a surrogate for the public and to inform readers of what was taking place in the courts, a crucial role in a context where it was alleged that fraud had been committed within a public body responsible for ensuring the proper functioning of regional health institutions. The court had to exercise the discretion conferred on it by art. 12 *C.C.P.* However, the discontinuance would have produced its full effects if MediaQMI had filed its application after the CIUSSS's discontinuance and had sought access to the exhibits when they were no longer in the record. Its appeal would have failed on that basis unless it challenged the constitutionality of art. 108 *C.C.P.*

Comme le désistement constitue une renonciation volontaire à un droit, à une prétention, ses effets se limitent aux droits du renonçant, soit la partie qui se désiste. Il peut donc être valide, sans être opposable aux droits des tiers. En conséquence, le désistement d'une partie ne peut avoir pour objet ou effet de lui permettre d'échapper à une demande déjà formulée contre elle.

Si un désistement d'instance ne peut être invoqué au préjudice des intérêts nés et légitimes des tiers et à l'encontre des règles d'ordre public, les parties ne peuvent se prévaloir de l'art. 108 al. 2 *C.p.c.* afin de retirer des pièces du dossier, à la suite d'une demande fondée sur l'art. 11 *C.p.c.* La maîtrise dont jouissent les parties à l'égard de leur dossier doit s'exercer dans le respect des principes de la procédure civile (art. 19 *C.p.c.*). Les parties ne peuvent écarter une règle d'ordre public, et ce, même par consentement mutuel. Appliquer le principe de la maîtrise du dossier comme s'il constituait une fin en soi serait non seulement contraire à la jurisprudence québécoise, mais irait également à l'encontre de l'économie générale du *Code de procédure civile* et du principe bien établi voulant qu'il faille interpréter ses dispositions en harmonie avec la *Charte québécoise* et les principes généraux du droit. Par conséquent, le principe de la maîtrise du dossier ne peut porter atteinte aux intérêts nés et légitimes de MédiaQMI de revendiquer l'application de la règle d'ordre public de la publicité des débats judiciaires.

Dès le moment où MédiaQMI a demandé la levée des scellés et l'accès aux pièces, un nouveau débat s'est engagé qui dépasse le strict intérêt privé des parties au litige principal. Le désistement produit à la suite de la demande déposée en vertu de l'art. 11 *C.p.c.* ne peut faire échec à ce nouveau débat, distinct du litige principal, qui porte sur le bon fonctionnement de l'institution judiciaire dont la légitimité dépend de sa transparence et en partie du regard des médias. MédiaQMI cherchait ainsi à jouer son rôle de suppléant du public et à informer les lecteurs des activités se déroulant devant les tribunaux, un rôle crucial dans un contexte d'allégations de fraude au sein d'un organisme public responsable d'assurer le bon fonctionnement des établissements de santé régionaux. Le tribunal devait exercer le pouvoir discrétionnaire qui lui est conféré par l'art. 12 *C.p.c.* Le désistement aurait toutefois produit ses pleins effets si MédiaQMI avait déposé sa demande après le désistement du CIUSSS et qu'elle avait demandé l'accès aux pièces alors que celles-ci ne se trouvaient plus au dossier. Son pourvoi aurait échoué sur cette base en l'absence de contestation de la validité constitutionnelle de l'art. 108 *C.p.c.*

Cases Cited

By Côté J.

Referred to: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; *Cie Immobilière Viger Ltée v. Giguère Inc.*, [1977] 2 S.C.R. 67; *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Pharmascience Inc. v. Binet*, 2006 SCC 48, [2006] 2 S.C.R. 513; *R. v. Clarke*, 2014 SCC 28, [2014] 1 S.C.R. 612; *Michel v. Graydon*, 2020 SCC 24, [2020] 2 S.C.R. 763; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Construction Gilles Paquette ltée v. Entreprises Végo ltée*, [1997] 2 S.C.R. 299; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135; *Canada 3000 Inc. (Re)*, 2006 SCC 24, [2006] 1 S.C.R. 865; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144; *R. v. Rafilovich*, 2019 SCC 51; *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287; *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671; *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623; *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)* (2002), 59 O.R. (3d) 18; *Hong v. Lavy*, 2019 NSSC 271, 46 C.P.C. (8th) 327; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19; *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, [2020] 2 S.C.R. 506; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253; *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65; *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666; *Classic Fabrics Corp. v. B. Rawe GMBH & Co.*, 2001 CanLII 7221; *L'Espérance v. Atkins*, [1956] B.R. 62; *175809 Canada inc. v. 2740478 Canada inc.*, 2000

Jurisprudence

Citée par la juge Côté

Arrêts mentionnés : *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442; *Lac d'Amiante du Québec Ltée c. 2858-0702 Québec Inc.*, 2001 CSC 51, [2001] 2 R.C.S. 743; *Cie Immobilière Viger Ltée c. Giguère Inc.*, [1977] 2 R.C.S. 67; *Prud'homme c. Prud'homme*, 2002 CSC 85, [2002] 4 R.C.S. 663; *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Communauté urbaine de Montréal*, 2004 CSC 30, [2004] 1 R.C.S. 789; *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559; *Pharmascience inc. c. Binet*, 2006 CSC 48, [2006] 2 R.C.S. 513; *R. c. Clarke*, 2014 CSC 28, [2014] 1 R.C.S. 612; *Michel c. Graydon*, 2020 CSC 24, [2020] 2 R.C.S. 763; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Construction Gilles Paquette ltée c. Entreprises Végo ltée*, [1997] 2 R.C.S. 299; *Compagnie des chemins de fer nationaux du Canada c. Canada (Procureur général)*, 2014 CSC 40, [2014] 2 R.C.S. 135; *Canada 3000 Inc. (Re)*, 2006 CSC 24, [2006] 1 R.C.S. 865; *Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271; *TELUS Communications Inc. c. Wellman*, 2019 CSC 19, [2019] 2 R.C.S. 144; *R. c. Rafilovich*, 2019 CSC 51; *Pétrolière Impériale c. Jacques*, 2014 CSC 66, [2014] 3 R.C.S. 287; *Vickery c. Cour suprême de la Nouvelle-Écosse (Protonotaire)*, [1991] 1 R.C.S. 671; *Sable Offshore Energy Inc. c. Ameron International Corp.*, 2013 CSC 37, [2013] 2 R.C.S. 623; *CTV Television Inc. c. Ontario Superior Court of Justice (Toronto Region)* (2002), 59 O.R. (3d) 18; *Hong c. Lavy*, 2019 NSSC 271, 46 C.P.C. (8th) 327; *Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522; *Société Radio-Canada c. Canada (Procureur général)*, 2011 CSC 2, [2011] 1 R.C.S. 19; *Colombie-Britannique (Procureur général) c. Provincial Court Judges' Association of British Columbia*, 2020 CSC 20, [2020] 2 R.C.S. 506; *Tremblay c. Québec (Commission des affaires sociales)*, [1992] 1 R.C.S. 952; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Globe and Mail c. Canada (Procureur général)*, 2010 CSC 41, [2010] 2 R.C.S. 592; *Personne désignée c. Vancouver Sun*, 2007 CSC 43, [2007] 3 R.C.S. 253; *Société Radio-Canada c. La Reine*, 2011 CSC 3, [2011] 1 R.C.S. 65; *Bisaillon c. Université Concordia*, 2006 CSC 19, [2006] 1 R.C.S. 666; *Classic Fabrics Corp. c. B. Rawe GMBH & Co.*, 2001 CanLII 7221; *L'Espérance c. Atkins*, [1956] B.R. 62; *175809 Canada inc. c. 2740478 Canada*

CanLII 9254; *Droit de la famille — 092038*, 2009 QCCS 3822, [2009] R.D.F. 646.

By Wagner C.J. and Kasirer J. (dissenting)

Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; *Charland v. Lessard*, 2015 QCCA 14; *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287; *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, [2014] 1 S.C.R. 800; *Homans v. Gestion Paroi inc.*, 2017 QCCA 480; *J.G. v. Nadeau*, 2016 QCCA 167; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592; *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33; *B. (B.) v. Québec (Procureur général)*, [1998] R.J.Q. 317; *Rosei v. Benesty*, 2020 QCCS 1795; *Marcovitz v. Bruker*, 2005 QCCA 835, [2005] R.J.Q. 2482, rev'd on another point 2007 SCC 54, [2007] 3 S.C.R. 607; *Sirius Services conseils en technologie de l'information inc. v. Boisvert*, 2017 QCCA 518; *Horic v. Nepveu*, 2016 QCCS 3921; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *3834310 Canada Inc. v. R.C.*, 2004 CanLII 4122; *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Georgiadis v. Angelopoulos*, 2008 QCCS 6890; *Classic Fabrics Corp. v. B. Rawe GMBH & Co.*, 2001 CanLII 7221; *175809 Canada inc. v. 2740478 Canada inc.*, 2000 CanLII 9254; *L'Espérance v. Atkins*, [1956] B.R. 62; *Graham-Albulet v. Albulet*, [1977] C.A. 323; *Barzelex Inc. v. M.E.C.S. International Inc.* (1989), 29 Q.A.C. 63; *Constructions Panthéon inc. v. Clinique Altermed inc.*, 2015 QCCA 50; *Taran Furs (Mtl) inc. v. Tuac, local 501*, 2005 CanLII 11669; *7006098 Canada inc. v. Sobeys Canada inc.*, 2020 QCCS 897; *Berenbaum v. Berenbaum Reichson*, 2014 QCCA 1630; *Entreprises de béton Fern Leclerc Ltée v. Bourassa*, [1990] R.D.J. 558; *Droit de la famille — 092038*, 2009 QCCS 3822, [2009] R.D.F. 646; *Wetherall v. Macdonald* (1903), 9 R. de J. 381; *9163-5771 Québec inc. v. Bonifier inc.*, 2017 QCCA 1316; *Ditomene v. Syndicat des enseignants du Cégep de l'Outaouais (SECO)*, 2012 QCCA 1296; *Byer v. Québec (Inspecteur général des institutions financières)*, [2000] R.L. 615; *Fers et métaux américains, s.e.c. v. Picard*, 2013 QCCA 2255; *Banque Commerciale Italienne du Canada v. Magas Development Corp.*, [1992] R.D.I. 246; *Portnoff (Syndic de)*, [2000] R.J.Q. 1290.

inc., 2000 CanLII 9254; *Droit de la famille — 092038*, 2009 QCCS 3822, [2009] R.D.F. 646.

Citée par le juge en chef Wagner et le juge Kasirer (dissidents)

Dagenais c. Société Radio-Canada, [1994] 3 R.C.S. 835; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442; *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522; *Charland c. Lessard*, 2015 QCCA 14; *Pétrolière Impériale c. Jacques*, 2014 CSC 66, [2014] 3 R.C.S. 287; *Union Carbide Canada Inc. c. Bombardier Inc.*, 2014 CSC 35, [2014] 1 R.C.S. 800; *Homans c. Gestion Paroi inc.*, 2017 QCCA 480; *J.G. c. Nadeau*, 2016 QCCA 167; *Lac d'Amiante du Québec Ltée c. 2858-0702 Québec Inc.*, 2001 CSC 51, [2001] 2 R.C.S. 743; *Globe and Mail c. Canada (Procureur général)*, 2010 CSC 41, [2010] 2 R.C.S. 592; *Canada (Citoyenneté et Immigration) c. Harkat*, 2014 CSC 37, [2014] 2 R.C.S. 33; *B. (B.) c. Québec (Procureur général)*, [1998] R.J.Q. 317; *Rosei c. Benesty*, 2020 QCCS 1795; *Marcovitz c. Bruker*, 2005 QCCA 835, [2005] R.J.Q. 2482, inf. sur un autre point par 2007 CSC 54, [2007] 3 R.C.S. 607; *Sirius Services conseils en technologie de l'information inc. c. Boisvert*, 2017 QCCA 518; *Horic c. Nepveu*, 2016 QCCS 3921; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Richmond Newspapers, Inc. c. Virginia*, 448 U.S. 555 (1980); *3834310 Canada Inc. c. R.C.*, 2004 CanLII 4122; *Société Radio-Canada c. La Reine*, 2011 CSC 3, [2011] 1 R.C.S. 65; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Georgiadis c. Angelopoulos*, 2008 QCCS 6890; *Classic Fabrics Corp. c. B. Rawe GMBH & Co.*, 2001 CanLII 7221; *175809 Canada inc. c. 2740478 Canada inc.*, 2000 CanLII 9254; *L'Espérance c. Atkins*, [1956] B.R. 62; *Graham-Albulet c. Albulet*, [1977] C.A. 323; *Barzelex Inc. c. M.E.C.S. International Inc.* (1989), 29 Q.A.C. 63; *Constructions Panthéon inc. c. Clinique Altermed inc.*, 2015 QCCA 50; *Fourrures Taran (Mtl) inc. c. Tuac, local 501*, 2005 CanLII 11669; *7006098 Canada inc. c. Sobeys Canada inc.*, 2020 QCCS 897; *Berenbaum c. Berenbaum Reichson*, 2014 QCCA 1630; *Entreprises de béton Fern Leclerc Ltée c. Bourassa*, [1990] R.D.J. 558; *Droit de la famille — 092038*, 2009 QCCS 3822, [2009] R.D.F. 646; *Wetherall c. Macdonald* (1903), 9 R. de J. 381; *9163-5771 Québec inc. c. Bonifier inc.*, 2017 QCCA 1316; *Ditomene c. Syndicat des enseignants du Cégep de l'Outaouais (SECO)*, 2012 QCCA 1296; *Byer c. Québec (Inspecteur général des institutions financières)*, [2000] R.L. 615; *Fers et métaux américains, s.e.c. c. Picard*, 2013 QCCA 2255; *Banque Commerciale Italienne du Canada c. Magas Development Corp.*, [1992] R.D.I. 246; *Portnoff (Syndic de)*, [2000] R.J.Q. 1290.

Statutes and Regulations Cited

Act to modify the organization and governance of the health and social services network, in particular by abolishing the regional agencies, CQLR, c. O-7.2, s. 38.
An Act to amend the Code of Civil Procedure, Bill 24, 3rd Sess., 34th Leg., Quebec, 1994.
Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 11(d).
Charter of human rights and freedoms, CQLR, c. C-12, ss. 3, 9.1, 23, 51, 53.
Civil Code of Québec, art. 33.
Code de procédure civile (France), 1806, art. 87.
Code of Civil Procedure, S.Q. 1897, c. 48, art. 16.
Code of Civil Procedure, CQLR, c. C-25, arts. 13, 47, 83 [am. 1994, c. 28, s. 3], 331.7, 331.9 [ad. *idem*, s. 20].
Code of Civil Procedure, CQLR, c. C-25.01, preliminary provision, arts. 1 to 7, 8 to 28, 49, 107, 108, 205, 206, 213, 214, 220, 246 to 252.
Interpretation Act, CQLR, c. I-16, art. 41.1.
Loi sur la procédure civile du canton de Genève, 1837, s. 84.
Nouveau Code de procédure civile (France), arts. 394, 395, 396.
Regulation of the Court of Québec, CQLR, c. C-25, r. 4, ss. 3, 4, 18, 19.
Rules of practice of the Superior Court of Québec in civil matters, R.R.Q. 1981, c. C-25, r. 8, rr. 2, 3.

Authors Cited

Bachand, Frédéric. "Les principes généraux de la justice civile et le nouveau *Code de procédure civile*" (2015), 61 *McGill L.J.* 447.
Chamberland, Luc, dir. *Le grand collectif: Code de procédure civile — Commentaires et annotations*, vol. 1, *Articles 1 à 390*, 5e éd. Montréal: Yvon Blais, 2020.
Côté, Pierre-André, in collaboration with Stéphane Beaulac and Mathieu Devinat. *The Interpretation of Legislation in Canada*, 4th ed. Toronto: Carswell, 2011.
Cromwell, Thomas A., Siena Anstis and Thomas Touchie. "Revisiting the Role of Presumptions of Legislative Intent in Statutory Interpretation" (2017), 95 *Can. Bar Rev.* 297.
d'Aguesseau, Henri François. *Discours de M. le chancelier d'Aguesseau*, t. 1, nouv. éd. Lyon: L. Boget, 1822.
Dorais, O. P., et A. P. Dorais, *Code de procédure civile de la province de Québec, comprenant les observations spéciales des commissaires chargés de la révision et modification du Code de procédure civile du Bas-Canada*. Montréal: Théoret, 1897.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 2b), 11d).
Charte des droits et libertés de la personne, RLRQ, c. C-12, art. 3, 9.1, 23, 51, 53.
Code civil du Québec, art. 33.
Code de procédure civile (France), 1806, art. 87.
Code de procédure civile, S.Q. 1897, c. 48, art. 16.
Code de procédure civile, RLRQ, c. C-25, art. 13, 47, 83 [mod. 1994, c. 28, art. 3], 331.7, 331.9 [aj. *idem*, art. 20].
Code de procédure civile, RLRQ, c. C-25.01, disposition préliminaire, art. 1 à 7, 8 à 28, 49, 107, 108, 205, 206, 213, 214, 220, 246 à 252.
Loi d'interprétation, RLRQ, c. I-16, art. 41.1.
Loi modifiant le Code de procédure civile, projet de loi 24, 3e sess., 34e lég., Québec, 1994.
Loi modifiant l'organisation et la gouvernance du réseau de la santé et des services sociaux notamment par l'abolition des agences régionales, RLRQ, c. O-7.2, art. 38.
Loi sur la procédure civile du canton de Genève, 1837, art. 84.
Nouveau Code de procédure civile (France), art. 394, 395, 396.
Règlement de la Cour du Québec, RLRQ, c. C-25, r. 4, art. 3, 4, 18, 19.
Règles de pratique de la Cour supérieure du Québec en matières civiles, R.R.Q. 1981, c. C-25, r. 8, règles 2, 3.

Doctrine et autres documents cités

Bachand, Frédéric. « Les principes généraux de la justice civile et le nouveau *Code de procédure civile* » (2015), 61 *R.D. McGill* 447.
Chamberland, Luc, dir. *Le grand collectif : Code de procédure civile — Commentaires et annotations*, vol. 1, *Articles 1 à 390*, 5e éd., Montréal, Yvon Blais, 2020.
Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4e éd., Montréal, Thémis, 2009.
Cromwell, Thomas A., Siena Anstis and Thomas Touchie. « Revisiting the Role of Presumptions of Legislative Intent in Statutory Interpretation » (2017), 95 *R. du B. can.* 297.
d'Aguesseau, Henri François. *Discours de M. le chancelier d'Aguesseau*, t. 1, nouv. éd., Lyon, L. Boget, 1822.
Dorais, O. P., et A. P. Dorais, *Code de procédure civile de la province de Québec, comprenant les observations spéciales des commissaires chargés de la révision et modification du Code de procédure civile du Bas-Canada*, Montréal, Théoret, 1897.

Dreifuss-Netter, Frédérique. *Les manifestations de volonté abdicatives*. Paris: Librairie générale de droit et de jurisprudence, 1985.

Fauteux, Gérald. *Le livre du magistrat*. Ottawa: Ministre des Approvisionnements et Services Canada, 1980.

Ferland, Denis, et Benoît Emery. *Précis de procédure civile du Québec*, vol. 1, 6e éd. Montréal: Yvon Blais, 2020.

Frain du Tremblay, Jean. *Essais sur l'idée du parfait magistrat où l'on fait voir une partie des obligations des Juges*. Paris: Pierre Emery, 1701.

Fricero, Natalie. "Audience et débats", dans *JurisClasseur France — Procédure civile*, par Philippe Carillon et Roger Perrot, dir. Paris: LexisNexis, 2019, fascicule 800-50 (mis à jour novembre 2020) (online: www.lexisnexis.ca).

Fricero, Natalie. "Désistement", dans *JurisClasseur France — Procédure civile*, par Philippe Carillon et Roger Perrot, dir. Paris: LexisNexis, 2018, fascicule 800-40 (online: www.lexisnexis.ca).

Grammatikas, Georges. *Théorie générale de la renonciation en droit civil*. Paris: Librairie générale de droit et de jurisprudence, 1971.

Guillemard, Sylvette. "Réflexions autour des sept premiers articles du *Code de procédure civile*", dans Sylvette Guillemard, dir., *Le Code de procédure civile: quelles nouveautés?* Montréal: Yvon Blais, 2016, 123.

Guillemard, Sylvette, et Séverine Menétrey. *Comprendre la procédure civile québécoise*, 2e éd. Montréal: Yvon Blais, 2017, "*pièce*".

Lafond, Pierre-Claude. "Introduction", dans Pierre-Claude Lafond, dir., *Régler autrement les différends*, 2e éd. Montréal: LexisNexis, 2018, 1.

Lamothe, Maxime. *La renonciation à l'exercice des droits et libertés garantis par les chartes*. Cowansville, Que.: Yvon Blais, 2007.

LeBel, Louis. "La loi et le droit: la nature de la fonction créatrice du juge dans le système de droit québécois" (2015), 56 *C. de D.* 87.

LeBel, Louis. "La méthode d'interprétation moderne: le juge devant lui-même et en lui-même", dans Stéphane Beaulac et Mathieu Devinat, dir., *Interpretatio non cessat — Mélanges en l'honneur de Pierre-André Côté*. Cowansville, Que.: Yvon Blais, 2011, 103.

Lluelles, Didier, et Benoît Moore. *Droit des obligations*, 3e éd. Montréal: Thémis, 2018.

Maillette, Hélène. "Incidents qui mettent fin à l'instance", dans *JurisClasseur Québec — Collection droit civil — Procédure civile I*, 2e éd., par Pierre-Claude Lafond, dir. Montréal: LexisNexis, 2015, fascicule 21 (feuilles mobiles mises à jour novembre 2019, envoi no 9).

Dreifuss-Netter, Frédérique. *Les manifestations de volonté abdicatives*, Paris, Librairie générale de droit et de jurisprudence, 1985.

Fauteux, Gérald. *Le livre du magistrat*, Ottawa, Ministre des Approvisionnements et Services Canada, 1980.

Ferland, Denis, et Benoît Emery. *Précis de procédure civile du Québec*, vol. 1, 6e éd., Montréal, Yvon Blais, 2020.

Frain du Tremblay, Jean. *Essais sur l'idée du parfait magistrat où l'on fait voir une partie des obligations des Juges*, Paris, Pierre Emery, 1701.

Fricero, Natalie. « Audience et débats », dans *JurisClasseur France — Procédure civile*, par Philippe Carillon et Roger Perrot, dir., Paris, LexisNexis, 2019, fascicule 800-50 (mis à jour novembre 2020) (en ligne : www.lexisnexis.ca).

Fricero, Natalie. « Désistement », dans *JurisClasseur France — Procédure civile*, par Philippe Carillon et Roger Perrot, dir., Paris, LexisNexis, 2018, fascicule 800-40 (en ligne : www.lexisnexis.ca).

Guillemard, Sylvette. « Réflexions autour des sept premiers articles du *Code de procédure civile* », dans Sylvette Guillemard, dir., *Le Code de procédure civile : quelles nouveautés?*, Montréal, Yvon Blais, 2016, 123.

Guillemard, Sylvette, et Séverine Menétrey. *Comprendre la procédure civile québécoise*, 2e éd., Montréal, Yvon Blais, 2017, « pièce ».

Grammatikas, Georges. *Théorie générale de la renonciation en droit civil*, Paris, Librairie générale de droit et de jurisprudence, 1971.

Lafond, Pierre-Claude. « Introduction », dans Pierre-Claude Lafond, dir., *Régler autrement les différends*, 2e éd., Montréal, LexisNexis, 2018, 1.

Lamothe, Maxime. *La renonciation à l'exercice des droits et libertés garantis par les chartes*, Cowansville (Qc), Yvon Blais, 2007.

LeBel, Louis. « La loi et le droit : la nature de la fonction créatrice du juge dans le système de droit québécois » (2015), 56 *C. de D.* 87.

LeBel, Louis. « La méthode d'interprétation moderne : le juge devant lui-même et en lui-même », dans Stéphane Beaulac et Mathieu Devinat, dir., *Interpretatio non cessat — Mélanges en l'honneur de Pierre-André Côté*, Cowansville (Qc), Yvon Blais, 2011, 103.

Lluelles, Didier, et Benoît Moore. *Droit des obligations*, 3e éd., Montréal, Thémis, 2018.

Maillette, Hélène. « Incidents qui mettent fin à l'instance », dans *JurisClasseur Québec — Collection droit civil — Procédure civile I*, 2e éd., par Pierre-Claude Lafond, dir., Montréal, LexisNexis, 2015, fascicule 21 (feuilles mobiles mises à jour novembre 2019, envoi no 9).

Menétrey, Séverine. "L'évolution des fondements de la publicité des procédures judiciaires internes et son impact sur certaines procédures arbitrales internationales" (2008), 40 *Ottawa L. Rev.* 117.

Mignault, P. B. "Le Code Civil de la Province de Québec et son Interprétation" (1935), 1 *U.T.L.J.* 104.

Montesquieu. *The Spirit of Laws*, v. 1. London: T. Evans, 1777.

Morissette, Yves-Marie. "Gestion d'instance, proportionnalité et preuve civile: état provisoire des questions" (2009), 50 *C. de D.* 381.

Motulsky, Henri. *Principes d'une réalisation méthodique du droit privé (La théorie des éléments générateurs des droits subjectifs)*. Paris: Librairie du Recueil Sirey, 1948.

Perrot, Roger. *Institutions judiciaires*. Paris: Les cours de droit, 1978.

Perrot, Roger, Bernard Beignier et Lionel Miniato. *Institutions judiciaires*, 18e éd. Paris: L.G.D.J., 2020.

Piché, Catherine. "La disposition préliminaire du *Code de procédure civile*" (2014), 73 *R. du B.* 135.

Piché-Messier, Mathieu, et Anaïs Bussières McNicoll. "Développements récents en matière de propriété intellectuelle dans le cadre des ordonnances de type *Anton Piller*, *Mareva* et *Norwich*", dans Service de la qualité de la profession du Barreau du Québec, vol. 464, *Développements récents en droit de la propriété intellectuelle*. Montréal: Yvon Blais, 2019, 89.

Pigeon, Louis-Philippe. *Drafting and Interpreting Legislation*. Toronto: Carswell, 1988.

Plamondon, Jacinthe. "Les principes directeurs et le nouveau *Code de procédure civile* (art. 17 à 24 C.p.c.)", dans Sylvette Guillemard, dir., *Le Code de procédure civile: quelles nouveautés?* Montréal: Yvon Blais, 2016, 27.

Québec. Assemblée nationale. "Adoption du principe — Projet de loi 24 — Loi modifiant le Code de procédure civile", *Journal des débats*, vol. 33, no 30, 3e sess., 34e lég., 1er juin 1994, p. 1573-1579.

Québec. Assemblée nationale. Commission permanente des institutions, "Étude détaillée du projet de loi no 28 — Loi instituant le nouveau Code de procédure civile", *Journal des débats*, vol. 43, no 79, 1re sess., 40e lég., 29 octobre 2013, p. 73-77.

Québec. Ministère de la Justice. Comité de révision de la procédure civile. *Une nouvelle culture judiciaire*. Québec: 2001.

Québec. Ministère de la Justice. *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01*. Montréal: SOQUIJ, 2015.

Raynaud, Pierre. "La renonciation à un droit. Sa nature et son domaine en Droit civil" (1936), 35 *R.T.D. civ.* 763.

Menétrey, Séverine. « L'évolution des fondements de la publicité des procédures judiciaires internes et son impact sur certaines procédures arbitrales internationales » (2008), 40 *R.D. Ottawa* 117.

Mignault, P. B. « Le Code Civil de la Province de Québec et son Interprétation » (1935), 1 *U.T.L.J.* 104.

Morissette, Yves-Marie. « Gestion d'instance, proportionnalité et preuve civile : état provisoire des questions » (2009), 50 *C. de D.* 381.

Montesquieu. *De l'Esprit des Lois*, t. 1, Genève, Barrillot & fils, 1748.

Motulsky, Henri. *Principes d'une réalisation méthodique du droit privé (La théorie des éléments générateurs des droits subjectifs)*, Paris, Librairie du Recueil Sirey, 1948.

Perrot, Roger. *Institutions judiciaires*, Paris, Les cours de droit, 1978.

Perrot, Roger, Bernard Beignier et Lionel Miniato. *Institutions judiciaires*, 18e éd., Paris, L.G.D.J., 2020.

Piché, Catherine. « La disposition préliminaire du *Code de procédure civile* » (2014), 73 *R. du B.* 135.

Piché-Messier, Mathieu, et Anaïs Bussières McNicoll. « Développements récents en matière de propriété intellectuelle dans le cadre des ordonnances de type *Anton Piller*, *Mareva* et *Norwich* », dans Service de la qualité de la profession du Barreau du Québec, vol. 464, *Développements récents en droit de la propriété intellectuelle*, Montréal, Yvon Blais, 2019, 89.

Pigeon, Louis-Philippe. *Rédaction et interprétation des lois*, 3e éd., Québec, Publications du Québec, 1986.

Plamondon, Jacinthe. « Les principes directeurs et le nouveau *Code de procédure civile* (art. 17 à 24 C.p.c.) », dans Sylvette Guillemard, dir., *Le Code de procédure civile : quelles nouveautés ?*, Montréal, Yvon Blais, 2016, 27.

Québec. Assemblée nationale. « Adoption du principe — Projet de loi 24 — Loi modifiant le Code de procédure civile », *Journal des débats*, vol. 33, no 30, 3e sess., 34e lég., 1er juin 1994, p. 1573-1579.

Québec. Assemblée nationale. Commission permanente des institutions, « Étude détaillée du projet de loi no 28 — Loi instituant le nouveau Code de procédure civile », *Journal des débats*, vol. 43, no 79, 1re sess., 40e lég., 29 octobre 2013, p. 73-77.

Québec. Ministère de la Justice. Comité de révision de la procédure civile. *Une nouvelle culture judiciaire*, Québec, 2001.

Québec. Ministère de la Justice. *Commentaires de la ministre de la Justice : Code de procédure civile, chapitre C-25.01*, Montréal, SOQUIJ, 2015.

Raynaud, Pierre. « La renonciation à un droit. Sa nature et son domaine en Droit civil » (1936), 35 *R.T.D. civ.* 763.

Reid, Hubert, avec la collaboration de Simon Reid. *Dictionnaire de droit québécois et canadien*, 5e éd. Montréal: Wilson & Lafleur, 2015, "*désistement*", "*pièce*".

Thériault, Michelle. "Le défi du passage vers la nouvelle culture juridique de la justice participative" (2015), 74 *R. du B.* 1.

Vincent, Jean, et Serge Guinchard. *Procédure civile*, 27e éd. Paris: Dalloz, 2003.

APPEAL from a judgment of the Quebec Court of Appeal (Marcotte and Schrager JJ.A. and Samson J. (*ad hoc*)), 2019 QCCA 814, [2019] AZ-51434213, [2019] J.Q. no 3707 (QL), 2019 CarswellQue 3871 (WL Can.), affirming a decision of Gagnon J., 2017 QCCS 4691, [2017] AZ-51434213, [2017] J.Q. no 14219 (QL), 2017 CarswellQue 9231 (WL Can.). Appeal dismissed, Wagner C.J. and Rowe, Martin and Kasirer JJ. dissenting.

Mathieu Quenneville and *Marc-André Nadon*, for the appellant.

Jonathan Pierre-Étienne and *Antoun Al-Saoub*, for the respondent Magdi Kamel.

Dominique Vallières, for the respondent Centre intégré universitaire de santé et de services sociaux de l'Ouest-de-l'Île-de-Montréal.

Mark Bantey, for the intervener Fédération professionnelle des journalistes du Québec.

Christian Leblanc, for the intervener the Canadian Broadcasting Corporation, La Presse Inc. and Ad IDEM/Canadian Media Lawyer Association.

English version of the judgment of Abella, Moldaver, Karakatsanis, Côté and Brown JJ. delivered by

CÔTÉ J. —

I. Overview

[1] The importance of the principle of open court proceedings is no longer a matter of controversy

Reid, Hubert, avec la collaboration de Simon Reid. *Dictionnaire de droit québécois et canadien*, 5e éd., Montréal, Wilson & Lafleur, 2015, « désistement », « pièce ».

Thériault, Michelle. « Le défi du passage vers la nouvelle culture juridique de la justice participative » (2015), 74 *R. du B.* 1.

Vincent, Jean, et Serge Guinchard. *Procédure civile*, 27e éd., Paris, Dalloz, 2003.

POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Marcotte et Schrager et le juge Samson (*ad hoc*)), 2019 QCCA 814, [2019] AZ-51434213, [2019] J.Q. no 3707 (QL), 2019 CarswellQue 3871 (WL Can.), qui a confirmé une décision du juge Gagnon, 2017 QCCS 4691, [2017] AZ-51434213, [2017] J.Q. no 14219 (QL), 2017 CarswellQue 9231 (WL Can.). Pourvoi rejeté, le juge en chef Wagner et les juges Rowe, Martin et Kasirer sont dissidents.

Mathieu Quenneville et *Marc-André Nadon*, pour l'appelante.

Jonathan Pierre-Étienne et *Antoun Al-Saoub*, pour l'intimé Magdi Kamel.

Dominique Vallières, pour l'intimé le Centre intégré universitaire de santé et de services sociaux de l'Ouest-de-l'Île-de-Montréal.

Mark Bantey, pour l'intervenante la Fédération professionnelle des journalistes du Québec.

Christian Leblanc, pour les intervenantes la Société Radio-Canada, La Presse Inc. et Ad IDEM/Canadian Media Lawyer Association.

Le jugement des juges Abella, Moldaver, Karakatsanis, Côté et Brown a été rendu par

LA JUGE CÔTÉ —

I. Aperçu

[1] L'importance du principe de la publicité des débats judiciaires ne suscite plus aujourd'hui de

"[t]o emphasize them and ensure their primacy" (*Une nouvelle culture judiciaire* (2001), at p. 38, cited in *Charland v. Lessard*, 2015 QCCA 14, at para. 169 (CanLII)). These principles are now gathered together in arts. 8 to 28 *C.C.P.* under the title "Principles of procedure applicable before the courts", which has four chapters: mission of the courts, public nature of procedure before the courts, guiding principles of procedure, and rules of interpretation and application of the *Code*.

[95] The parties' control over the course of their case is a guiding principle set out in art. 19 *C.C.P.* The parties thus have a [TRANSLATION] "circumscribe[d]" freedom to choose the appropriate proceedings and the grounds of fact and law they will raise (Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01* (2015), art. 19; *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287, at para. 25). This principle extends to the parties' right to agree "at any stage of the proceeding" to settle their dispute or otherwise terminate the proceeding (para. 3). They may therefore decide to remove their dispute from the judicial arena in order to resolve it privately.

[96] This ability to withdraw a case from the courts is consistent with the general approach taken by the *Code of Civil Procedure*, which places a [TRANSLATION] "spectacularly" high value on private civil justice (C. Piché, "La disposition préliminaire du *Code de procédure civile*" (2014), 73 *R. du B.* 135, at p. 152). As its preliminary provision indicates, the *Code of Civil Procedure* "is designed to provide, in the public interest, means to prevent and resolve disputes", and it sets out general principles in this regard in arts. 1 to 7. In this way, the legislature expressly recognizes that when parties enter into a dispute prevention and resolution process by mutual agreement, civil justice is possible, even desirable, without the intervention of the courts. Facilitating the resolution of disputes is a public objective of undeniable importance, both for the parties and for our overburdened justice system (*Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, [2014] 1 S.C.R. 800, at para. 32; L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations*, vol. 1, *Articles 1 à 390* (5th ed. 2020),

des procédures (*Une nouvelle culture judiciaire* (2001), p. 38, cité dans *Charland c. Lessard*, 2015 QCCA 14, par. 169 (CanLII)). Ces principes sont désormais rassemblés sous le titre « Les principes de la procédure applicable devant les tribunaux de l'ordre judiciaire » aux art. 8 à 28 *C.p.c.*, en quatre chapitres : la mission des tribunaux, le caractère public de la procédure devant les tribunaux judiciaires, les principes directeurs de la procédure, et les règles d'interprétation et d'application du *Code*.

[95] La maîtrise par les parties de leur dossier est un principe directeur consacré à l'art. 19 *C.p.c.* Les parties jouissent ainsi d'une liberté « encadr[ée] » quant au choix des procédures appropriées et des moyens de fait et de droit qu'elles avancent (Ministère de la Justice, *Commentaires de la ministre de la Justice : Code de procédure civile, chapitre C-25.01* (2015), art. 19; *Pétrolière Impériale c. Jacques*, 2014 CSC 66, [2014] 3 R.C.S. 287, par. 25). Ce principe englobe la faculté des parties de choisir, « à tout moment de l'instance », de régler leur litige ou de mettre autrement fin à l'instance (al. 3). Ainsi, les parties peuvent décider de retirer leur litige de l'arène judiciaire en vue de le régler en privé.

[96] Cette faculté de dessaisir le tribunal s'harmonise avec l'orientation générale du *Code de procédure civile*, qui valorise la justice civile privée « de façon spectaculaire » (C. Piché, « La disposition préliminaire du *Code de procédure civile* » (2014), 73 *R. du B.* 135, p. 152). Comme l'indique sa disposition préliminaire, le *Code de procédure civile* « vise à permettre, dans l'intérêt public, la prévention et le règlement des différends » et énonce des principes généraux en la matière aux art. 1 à 7. Ce faisant, le législateur reconnaît expressément que, lorsque les parties s'y engagent d'un commun accord, la justice civile est possible, voire souhaitable, sans l'intervention des tribunaux judiciaires. Favoriser le règlement des différends constitue un objectif public d'une importance indéniable, autant pour les parties que pour notre système judiciaire surchargé (*Union Carbide Canada Inc. c. Bombardier Inc.*, 2014 CSC 35, [2014] 1 R.C.S. 800, par. 32; L. Chamberland, dir., *Le grand collectif : Code de procédure civile — Commentaires et annotations*, vol. 1, *Articles 1 à 390* (5e éd. 2020), p. 9). Les règlements

at p. 9). Private dispute resolution processes have several advantages, including [TRANSLATION] "their confidentiality, their more informal nature, their flexibility, better conflict management by the parties, lower costs and the possibility of arriving at individualized solutions" (P.-C. Lafond, "Introduction", in P.-C. Lafond, ed., *Régler autrement les différends* (2nd ed. 2018), 1, at p. 20; see also M. Thériault, "Le défi du passage vers la nouvelle culture juridique de la justice participative" (2015), 74 *R. du B.* 1, at pp. 9-12).

[97] However, the parties' control over the course of their case is not absolute: it cannot be exercised contrary to rules of public order or to the existing and legitimate interests of third persons. In exercising this power, the parties must "comply with the principles, objectives and rules of procedure" (art. 19 para. 1 *C.C.P.*). The latitude given to the parties in conducting the proceeding is therefore limited by the general principles of civil procedure, including the rules found in the *Code of Civil Procedure*, which confer on judges a role as [TRANSLATION] "protectors of the judicial process and the various parties' rights" (J. Plamondon, "Les principes directeurs et le nouveau *Code de procédure civile* (art. 17 à 24 C.p.c.)", in S. Guillemard, ed., *Le Code de procédure civile: quelles nouveautés?* (2016), 27, at pp. 38-39). As Professor Piché notes, the *Code of Civil Procedure* [TRANSLATION] "gives the judge's duties priority over the parties' rights" (p. 166). Having chosen to go before the courts, the parties must therefore comply with the established rules and principles.

[98] The parties' control over the course of their case, for example, is subject to the "duty of the courts to ensure proper case management and the orderly conduct of proceedings" (art. 19 para. 1 *C.C.P.*). The courts are therefore required to play an active role in the management of cases, thereby incidentally limiting the parties' control over the conduct of a proceeding (F. Bachand, "Les principes généraux de la justice civile et le nouveau *Code de procédure civile*" (2015), 61 *McGill L.J.* 447, at p. 458; *Homans v. Gestion Paroi inc.*, 2017 QCCA 480, at paras. 92-93 (CanLII)). The principle of proportionality set out in art. 18 *C.C.P.* is also a good example of a restriction on [TRANSLATION] "the parties' freedom

privés des différends comportent plusieurs avantages, dont « leur confidentialité, leur caractère plus informel, leur flexibilité, une meilleure gestion du conflit par les parties, des coûts moindres et la possibilité d'en arriver à des solutions individualisées » (P.-C. Lafond, « Introduction », dans P.-C. Lafond, dir., *Régler autrement les différends* (2e éd. 2018), 1, p. 20; voir aussi M. Thériault, « Le défi du passage vers la nouvelle culture juridique de la justice participative » (2015), 74 *R. du B.* 1, p. 9-12).

[97] Cependant, la maîtrise par les parties de leur dossier n'est pas absolue : elle ne peut s'exercer à l'encontre de règles d'ordre public et des intérêts nés et légitimes que possèdent des tiers. Ce pouvoir doit être exercé « dans le respect des principes, des objectifs et des règles de la procédure » (art. 19 al. 1 *C.p.c.*). La latitude laissée aux parties dans la conduite de l'instance est, en conséquence, limitée par les principes généraux de la procédure civile, dont les règles contenues au *Code de procédure civile*, qui confèrent aux juges un rôle de « protecteurs du processus judiciaire et des droits des diverses parties » (J. Plamondon, « Les principes directeurs et le nouveau *Code de procédure civile* (art. 17 à 24 C.p.c.) », dans S. Guillemard, dir., *Le Code de procédure civile : quelles nouveautés?* (2016), 27, p. 38-39). Comme le signale la professeure Piché, le *Code de procédure civile* « donne priorité aux devoirs du juge sur les droits des parties » (p. 166). Ayant choisi la voie judiciaire, les parties doivent alors se conformer aux règles et principes établis.

[98] À titre d'exemple, la maîtrise par les parties de leur dossier est assujettie au « devoir des tribunaux d'assurer la saine gestion des instances et de veiller à leur bon déroulement » (art. 19 al. 1 *C.p.c.*). Les tribunaux doivent donc jouer un rôle actif dans la gestion des instances, limitant ainsi de manière incidente le contrôle des parties sur le déroulement de l'instance (F. Bachand, « Les principes généraux de la justice civile et le nouveau *Code de procédure civile* » (2015), 61 *R.D. McGill* 447, p. 458; *Homans c. Gestion Paroi inc.*, 2017 QCCA 480, par. 92-93 (CanLII)). Le principe de proportionnalité que consacre l'art. 18 *C.p.c.* offre également un bon exemple de restriction à « la liberté des parties de

to conduct their case as they see fit" (*J.G. v. Nadeau*, 2016 QCCA 167, at para. 40 (CanLII); see also Y.-M. Morissette, "Gestion d'instance, proportionnalité et preuve civile: état provisoire des questions" (2009), 50 *C. de D.* 381, at p. 412). In short, the parties can have only [TRANSLATION] "incomplete" control over the course of the case given the interplay between that control and the competing and divergent principles set out in the *Code of Civil Procedure* (see D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at No. 1-164). S. Guillemard and S. Menétrey conclude from this that, especially since the enactment of the new 2016 *Code of Civil Procedure*, [TRANSLATION] "a kind of dilution" of the power given to the parties to control the course of their case may be observed, in comparison with the "lead role" they had prior to the revision (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at No. 100).

[99] Similarly, the parties' control over the course of their case does not allow them to override the judge's discretion to ensure compliance with the rule of public order arising from the principle of open proceedings, nor does it allow them to exercise their powers at the expense of the existing and legitimate interests of third persons in seeking the application of that rule. This fundamental principle is affirmed in art. 11 *C.C.P.*, which provides that anyone may attend court hearings and have access to court records. This principle also guarantees rights protected in ss. 3 and 23 of the *Quebec Charter* and s. 2(b) of the *Canadian Charter of Rights and Freedoms* (see, e.g., *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, at para. 62; *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592, at para. 87). As the Court reiterated in *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33, the openness of court proceedings is an important hallmark of a free and democratic society such as ours (para. 24).

[100] In the chapter entitled "Public nature of procedure before the courts", the legislature provides for two specific exceptions to this fundamental principle. First, art. 11 para. 2 *C.C.P.* states that an exception to this principle applies if the *law* provides for

mener leur cause comme bon leur semble » (*J.G. c. Nadeau*, 2016 QCCA 167, par. 40 (CanLII); voir aussi Y.-M. Morissette, « Gestion d'instance, proportionnalité et preuve civile : état provisoire des questions » (2009), 50 *C. de D.* 381, p. 412). Somme toute, la maîtrise du dossier ne peut être que « relative » eu égard à ses interactions avec les principes concurrents et divergents énoncés au *Code de procédure civile* (voir D. Ferland et B. Emery, *Précis de procédure civile du Québec* (6e éd. 2020), vol. 1, no 1-164). Les autrices S. Guillemard et S. Menétrey en concluent que l'on peut observer, surtout depuis l'adoption du nouveau *Code de procédure civile* de 2016, « une sorte de dilution » du pouvoir qui est donné aux parties comme maîtres de leur dossier, par rapport au « premier rôle » qui était le leur avant la refonte (*Comprendre la procédure civile québécoise* (2e éd. 2017), no 100).

[99] De même, la maîtrise par les parties de leur dossier ne leur permet pas d'écarter le pouvoir discrétionnaire du juge de veiller au respect de la règle d'ordre public découlant du principe de la publicité des débats ou d'exercer leurs pouvoirs au détriment des intérêts nés et légitimes que possèdent des tiers d'en revendiquer l'application. Ce principe fondamental est consacré à l'art. 11 *C.p.c.*, qui prévoit que tous peuvent assister aux audiences des tribunaux et prendre connaissance des dossiers. Ce principe garantit également des droits protégés aux art. 3 et 23 de la *Charte québécoise* et à l'al. 2b) de la *Charte canadienne des droits et libertés* (voir, p. ex., *Lac d'Amiante du Québec Ltée c. 2858-0702 Québec Inc.*, 2001 CSC 51, [2001] 2 R.C.S. 743, par. 62; *Globe and Mail c. Canada (Procureur général)*, 2010 CSC 41, [2010] 2 R.C.S. 592, par. 87). Comme l'a réitéré notre Cour dans l'arrêt *Canada (Citoyenneté et Immigration) c. Harkat*, 2014 CSC 37, [2014] 2 R.C.S. 33, la publicité des débats judiciaires est une caractéristique importante d'une société libre et démocratique comme la nôtre (par. 24).

[100] Au chapitre portant sur « Le caractère public de la procédure devant les tribunaux judiciaires », le législateur prévoit deux exceptions précises à ce principe fondamental. Premièrement, l'art. 11 al. 2 *C.p.c.* énonce qu'il est fait exception à ce principe

SUPREME COURT OF CANADA

CITATION: Peace River Hydro Partners *v.* Petrowest Corp., 2022 SCC 41

APPEAL HEARD: January 19, 2022
JUDGMENT RENDERED: November 10, 2022
DOCKET: 39547

BETWEEN:

Peace River Hydro Partners, Acciona Infrastructure Canada Inc., Samsung C&T Canada Ltd., Acciona Infraestructuras S.A. and Samsung C&T Corporation
Appellants

and

Petrowest Corporation, Petrowest Civil Services LP by its general partner, Petrowest GP Ltd., carrying on business as RBEE Crushing, Petrowest Construction LP by its general partner Petrowest GP Ltd., carrying on business as Quigley Contracting, Petrowest Services Rentals LP by its general partner Petrowest GP Ltd., carrying on business as Nu-Northern Tractor Rentals, Petrowest GP Ltd., as general partner of Petrowest Civil Services LP, Petrowest Construction LP and Petrowest Services Rentals LP, Trans Carrier Ltd. and Ernst & Young Inc. in its capacity as court-appointed receiver and manager of Petrowest Corporation, Petrowest Civil Services LP, Petrowest Construction LP, Petrowest Services Rentals LP, Petrowest GP Ltd. and Trans Carrier Ltd.
Respondents

- and -

Canadian Commercial Arbitration Center, Arbitration Place, Chartered Institute of Arbitrators (Canada) Inc., Insolvency Institute of Canada and Canadian Federation of Independent Business

Interveners

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

REASONS FOR JUDGMENT: (paras. 1 to 189)	Côté J. (Wagner C.J. and Moldaver, Rowe and Kasirer JJ. concurring)
CONCURRING REASONS: (paras. 190 to 199)	Jamal J. (Karakatsanis, Brown and Martin JJ. concurring)

Peace River Hydro Partners,
Acciona Infrastructure Canada Inc.,
Samsung C&T Canada Ltd.,
Acciona Infraestructuras S.A. and
Samsung C&T Corporation *Appellants*

v.

Petrowest Corporation,
Petrowest Civil Services LP by its general partner, Petrowest GP Ltd.,
carrying on business as RBEE Crushing,
Petrowest Construction LP by its general partner Petrowest GP Ltd.,
carrying on business as Quigley Contracting,
Petrowest Services Rentals LP by its general partner Petrowest GP Ltd.,
carrying on business as Nu-Northern Tractor Rentals,
Petrowest GP Ltd., as general partner of Petrowest Civil Services LP,
Petrowest Construction LP and Petrowest Services Rentals LP,
Trans Carrier Ltd. and
Ernst & Young Inc. in its capacity as court-appointed receiver and
manager of Petrowest Corporation, Petrowest Civil Services LP,
Petrowest Construction LP, Petrowest Services Rentals LP,
Petrowest GP Ltd. and
Trans Carrier Ltd. *Respondents*

and

Canadian Commercial Arbitration Center,
Arbitration Place,
Chartered Institute of Arbitrators (Canada) Inc.,
Insolvency Institute of Canada and
Canadian Federation of Independent Business *Interveners*

Indexed as: Peace River Hydro Partners *v.* Petrowest Corp.

2022 SCC 41

File No.: 39547.

2022: January 19; 2022: November 10.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and insolvency — Court-ordered receivership — Enforceability of arbitration agreement — Receiver commencing civil action for payment of amounts allegedly owed to debtors under agreements that include mandatory arbitration clauses — Defendants seeking stay of proceedings of receiver's action under provincial arbitration legislation on basis that arbitration clauses govern dispute — Receiver opposing stay and arguing that court authorized to assert centralized judicial control over matter under federal bankruptcy and insolvency legislation — Whether receiver's action should be stayed — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 183(1), 243(1) — Arbitration Act, R.S.B.C. 1996, c. 55, s. 15.

Peace River is a partnership formed to build a hydroelectric dam in northeastern British Columbia. Peace River subcontracted work to Petrowest, an Alberta-based construction company, and its affiliates. The parties executed several clauses providing that disputes arising from their relationship were to be resolved through arbitration ("Arbitration Agreements"). When Petrowest encountered financial

difficulties, the Alberta Court of Queen's Bench granted an order ("Receivership Order"), pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act* ("*BIA*"), appointing a receiver ("Receiver") to manage the assets and property of Petrowest and its affiliates. The Receiver then brought a civil claim against Peace River seeking to collect funds allegedly owed to Petrowest and its affiliates for subcontracted work. Peace River applied under s. 15 of British Columbia's *Arbitration Act* for a stay of proceedings on the ground that the Arbitration Agreements governed the dispute. The chambers judge dismissed the stay application and the Court of Appeal dismissed Peace River's appeal.

Held: The appeal should be dismissed.

Per Wagner C.J. and Moldaver, **Côté**, Rowe and Kasirer JJ.: The civil claim brought by the Receiver should be allowed to proceed. Section 15 of the *Arbitration Act* does not require a court, in every case, to stay a civil claim brought by a court-appointed receiver where the claim is subject to a valid arbitration agreement. A court may decline to grant a stay where the arbitration agreement at issue is "void, inoperative or incapable of being performed" within the meaning of s. 15(2). An otherwise valid arbitration agreement may, in some circumstances, be inoperative or incapable of being performed if enforcing it would compromise the integrity of court-ordered receivership proceedings. In the specific circumstances of this case, the chaotic nature of the arbitral proceedings bargained for by the parties would compromise the orderly and efficient resolution of the receivership, to the detriment of

affected creditors and contrary to the purpose of the *BIA*. Accordingly, the chambers judge was entitled to refuse to grant a stay.

Competence-competence is a principle that gives precedence to the arbitration process. Generally, arbitrators should be allowed to rule first on their own jurisdiction. The principle is not absolute, however. A court may resolve a challenge to an arbitrator's jurisdiction if the challenge involves pure questions of law or, as in this case, questions of mixed fact and law requiring only superficial consideration of the evidentiary record.

In a dispute governed by an arbitration agreement with an insolvent or bankrupt counterparty, there is a tension between arbitration law and insolvency law as regards the forum in which the dispute is to be resolved. The modern view expressed in Canadian arbitration legislation is that parties should be held to their contractual agreements to arbitrate, consistent with principles of party autonomy and freedom of contract. Generally speaking, judicial intervention in commercial disputes governed by a valid agreement clause should be the exception, not the rule. On the other hand, insolvency proceedings are creatures of statute subject to close judicial oversight. The role of courts in ensuring the equitable and orderly resolution of insolvency disputes is reflected in the single proceeding model, which favours the enforcement of stakeholder rights through a centralized judicial process. Section 183(1) of the *BIA* confers a broad scope of authority on superior courts to deal with most bankruptcy disputes. Court-ordered receiverships under s. 243 of the *BIA* are one available tool for

enhancing the judicial oversight and flexibility underlying Canadian insolvency law, whereby receivers may take various actions to preserve the debtor's assets for the benefit of all creditors. While a court order under s. 243 of the *BIA* gives a receiver wide-ranging powers, the receiver remains under a fiduciary duty to act honestly and in the best interests of all interested parties.

Notwithstanding these differences, arbitration law and insolvency law have much in common. Each prioritizes efficiency and expediency; procedural flexibility is a hallmark of both arbitration and insolvency law; and both often rely on specialized decision makers to achieve their respective objectives. In many cases, these shared interests will converge through arbitration, and parties should be held to their agreement to arbitrate notwithstanding ongoing insolvency proceedings. Valid arbitration agreements are generally to be respected. The presumption in favour of arbitral jurisdiction is supported by the Court's longstanding jurisprudence, the pro-arbitration stance adopted in provincial and territorial legislation nationwide, and the foundational principle that contracting parties are free to structure their affairs as they see fit. However, in certain insolvency matters, it may be necessary to preclude arbitration in favour of a centralized judicial process, when arbitration would compromise the orderly and efficient conduct of a court-ordered receivership. In such a scenario, a court may assert control over the proceedings, both to ensure the timely resolution of the parties' dispute and to protect the orderly restructuring or dissolution of the debtor and the equal treatment of its creditors.

The exercise required to determine if a stay of proceedings should be granted in favour of arbitration is highly factual. It requires the court to review the statutory regimes and arbitration agreements in play, having regard to the principles of party autonomy and freedom of contract and to the policy imperatives underpinning bankruptcy and insolvency law. To guide this exercise, a two-part framework, implicit in provincial arbitration legislation across the country and mirrored in ss. 15(1) and (2) of the *Arbitration Act*, applies. The two general components of this framework are: (1) the technical prerequisites for a mandatory stay of court proceedings; and (2) the statutory exceptions to a mandatory stay of court proceedings. These components ought to remain analytically distinct because the burden of proof shifts between them. The applicant for a stay in favour of arbitration must establish the technical prerequisites. If the applicant discharges this burden, under the second component, the party seeking to avoid arbitration must show that a statutory exception applies.

The first component, technical prerequisites, is concerned with whether the arbitration agreement at issue engages the mandatory stay provision in the applicable provincial arbitration statute. Considerations at this stage may differ depending on the jurisdiction and the nature of the arbitration, i.e. whether it relates to domestic or international arbitration. There are typically four technical prerequisites: an arbitration agreement exists; court proceedings have been commenced by a party to the arbitration agreement; the court proceedings are in respect of a matter that the parties agreed to submit to arbitration; and the party applying for a stay does so before taking any step in the court proceedings. The applicant must only establish an arguable case that these

prerequisites are met.

For the purposes of the technical prerequisites set out in s. 15(1) of the *Arbitration Act*, a court-appointed receiver may be a party to the debtor's pre-receivership arbitration agreement through the operation of ordinary contract law. First, it is well established that an entity connected with a signatory to a contract may become bound as a party by operation of law; for example, subsidiaries, assignees, trustees and others claiming through or under the named party. There is no principled reason why this should not apply to a court-appointed receiver claiming through a debtor under a contract containing an arbitration agreement. It would violate basic principles of contract law to permit a receiver to enforce a contract on the debtor's behalf while avoiding the burdens, including the obligations to arbitrate contractual disputes. Nor does a receiver's duty as an officer of the court preclude it from being considered a party to an arbitration agreement within the meaning of s. 15(1). To the contrary, a receiver owes a fiduciary duty to all interested parties involving the debtor's assets, property, and undertakings, and may not arbitrarily break contracts entered into by the debtor with third parties prior to the receivership. Second, s. 15(1) does not expressly preclude non-signatories like receivers from being considered parties. Where legislation does not fully address a matter, courts may look to the common law to interpret the statutory language. It is a foundational contractual doctrine that all non-signatories to a contract may claim only through or under a signatory upon stepping into its contractual shoes. Nothing in the legislative record or text of the *Arbitration Act* indicates that the legislature intended to change or displace the common

law. Third, effectively preventing arbitration as soon as one of the contracting parties entered receivership would subvert the core arbitral principles of party autonomy, limited court intervention, and competence-competence.

As for determining whether the party applying for a stay took a step in the proceedings, this requires an objective approach. The court must ask itself whether, on the facts, the party should be held to have impliedly affirmed the correctness of the proceedings and its willingness to go along with a determination by a court of law instead of arbitration. Undertaking to file a defence does not constitute a step in the proceedings, nor does requesting an extension of time to file a defence. In the context of s. 15(1), the very purpose of such a request is to decide whether or not to take a step, and there is no election to proceed with the action.

At the second stage of the analysis, the key question is whether, on a balance of probabilities, one or more of the statutory exceptions set out in the applicable provincial arbitration statute apply. If not, the court must grant a stay. A court should dismiss a stay application on the basis of a statutory exception only in a clear case. One such exception, set out in s. 15(2) of the *Arbitration Act*, is when the arbitration clause is "void, inoperative or incapable of being performed". A court-appointed receiver cannot unilaterally disclaim an arbitration agreement, thereby rendering it void, inoperative or incapable of being performed. Section 15(2) should be interpreted narrowly to prevent parties from avoiding arbitration in favour of what they view as a preferable procedure. Allowing a receiver to avoid arbitration by unilaterally

disclaiming a debtor's pre-existing arbitration agreement conflicts with the text and intent of s. 15 and diminishes the presumptive enforceability and predictability of arbitration agreements. As s. 15(2) makes plain, the sole basis upon which a party may sue to enforce a contract and yet avoid the obligation to arbitrate is that the arbitration agreement has been found by a court to be void, inoperative, or incapable of being performed. Preferably, court-appointed receivers should seek such a judicial determination by bringing a motion for directions in the supervising court. However, when a receiver initiates court proceedings without prior judicial approval, the court must decide whether to decline to enforce the agreement under s. 15 of the *Arbitration Act*.

Section 15(2) gives a court the power to refuse a stay by finding that an arbitration agreement has become inoperative or incapable of being performed because of court-ordered receivership proceedings where arbitration would compromise the orderly and efficient resolution of a receivership. There is no conflict between the provincial *Arbitration Act* and the federal *BIA* giving rise to paramountcy concerns. In the typical case, the purposes of the *Arbitration Act* will be served by holding the parties to their agreement to arbitrate through a narrow interpretation of the words "void", "inoperative" and "incapable of being performed". An arbitration agreement will be considered "void" only in the rare circumstances where it is intrinsically defective according to the usual rules of contract law, including when it is undermined by fraud, undue influence, unconscionability, duress, mistake, or misrepresentation. The term "inoperative" has no universal common law definition. Possible reasons for finding an

arbitration agreement inoperative include frustration, discharge by breach, waiver, or a subsequent agreement between the parties. The party seeking to avoid arbitration bears the heavy onus of showing that the exception for an inoperative arbitration agreement applies. The making of a winding-up order or a receivership order may be grounds to find an arbitration agreement inoperative. However, the term inoperative may not always cover scenarios where a court-appointed creditor representative initiates court proceedings on behalf of a debtor. This is because insolvency law generally stays legal claims brought against a debtor while permitting claims brought on its behalf to proceed. An arbitration agreement is "incapable of being performed" where the arbitral process cannot effectively be set into motion because of a physical or legal impediment beyond the parties' control. Physical impediments may include inconsistencies, inherent contradictions, or vagueness in the arbitration agreement that cannot be remedied by interpretation or other contractual techniques; the non-availability of the arbitrator specified in the agreement; the dissolution or non-existence of the chosen arbitration institution; or political or other circumstances at the seat of arbitration rendering arbitration impossible. Legal impediments include express legislative overrides of the parties' agreement to arbitrate.

There is statutory jurisdiction arising from ss. 183(1) and 243(1)(c) of the *BIA* for a court to hold that an arbitration agreement is inoperative in the receivership context. It is therefore unnecessary for courts to resort to inherent jurisdiction, which is to be considered only after statutory jurisdiction is determined to be unavailable. The *BIA* is remedial legislation that is intended, in part, to provide for an orderly and

efficient distribution of a bankrupt's funds to various creditors. As such, it is to be given a liberal interpretation in order to facilitate its objectives. Section 183(1) of the *BIA* confirms that superior courts have jurisdiction in bankruptcy and insolvency matters which may be exercised concurrently with their jurisdiction in ordinary civil matters. Further, under s. 243(1)(c) of the *BIA*, a court may appoint a receiver to, among other things, take any action that the court considers advisable, if the court considers it just or convenient to do so. This very expansive wording has been interpreted as giving judges the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise in relation to court-ordered receiverships. Section 243(1)(c) thus permits a court to do not only what justice dictates but what practicality demands. Practicality demands that a court have the ability, in limited circumstances, to decline to enforce an arbitration agreement following a commercial insolvency. Factors that may be relevant in determining whether an arbitration agreement is inoperative under s. 15(2) include: (a) the effect of arbitration on the integrity of the insolvency proceedings; (b) the relative prejudice to the parties to the arbitration agreement and the debtor's stakeholders; (c) the urgency of resolving the dispute; (d) the effect of a stay of proceedings arising from the bankruptcy or insolvency proceedings; and (e) any other factors the court considers material in the circumstances. Each factor may carry more or less weight depending on the circumstances of the case.

In the instant case, the technical prerequisites set out in s. 15(1) of the *Arbitration Act* are met. The impugned civil proceedings are in respect of a contractual dispute covered by valid arbitration agreements. In addition, Peace River has

established an arguable case that the Receiver is a party to the Arbitration Agreements and Peace River has not taken a step in the proceedings. As s. 15 is engaged, a stay in favour of arbitration must be granted unless the Arbitration Agreements are found to be void, inoperative or incapable of being performed under s. 15(2). The Receiver has established that the Arbitration Agreements are inoperative. The multiple arbitral processes contemplated in the Arbitration Agreements would compromise the orderly and efficient resolution of the receivership, contrary to the objectives of the *BIA*. While recognizing the importance of party autonomy and freedom of contract, referral to arbitration in the unique circumstances of the instant case would jeopardize the Receiver's ability to maximize recovery for the creditors and to allow Petrowest and its affiliates to move forward with certainty.

Per Karakatsanis, Brown, Martin and **Jamal** JJ.: There is agreement that the appeal should be dismissed as the Arbitration Agreements are inoperative under s. 15(2) of the *Arbitration Act*. However, there is disagreement as to the primary basis for finding the Arbitration Agreements to be inoperative. The analysis should start with the terms of the Receivership Order itself. By suing in court as authorized under the Receivership Order, the Receiver disclaimed the Arbitration Agreements and they were thereby rendered inoperative.

The Receivership Order authorized the Receiver to receive and collect all monies and accounts owed or owing to Petrowest; to exercise all remedies of Petrowest in collecting such monies; to initiate, prosecute, and continue the prosecution of any

and all proceedings with respect to Petrowest's property, assets, and undertakings, including all proceeds thereof; and to cease to perform any contracts of Petrowest. An arbitration agreement is a contractual right of a party to have a claim referred to arbitration to the exclusion of the courts and thus could be disclaimed pursuant to the Receivership Order. The combined effect of these terms authorized the Receiver to disclaim the Arbitration Agreements and to sue in court for amounts owing to Petrowest. The terms of the Receivership Order authorized the Receiver to sue, either in court or before an arbitrator, at the Receiver's election, based on what will best promote the orderly and efficient resolution of the receivership under the *BIA*. The legal effect of the Receiver suing in court and not before an arbitrator was undoubtedly to disclaim reliance on the Arbitration Agreements.

There is agreement with the majority that to the extent that the Receivership Order did not authorize the Receiver to sue in court, the *BIA* provided a statutory basis for the chambers judge to declare the Arbitration Agreements inoperative and to dismiss the stay application. Requiring arbitration of the Receiver's collection action would compromise the orderly and efficient resolution of the receivership.

Cases Cited

By Côté J.

Referred to: *Commonwealth Insurance Co. v. Larc Developments Ltd.*,

2010 BCCA 18, 315 D.L.R. (4th) 242; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *Residential Warranty Co. of Canada Inc. (Re)*, 2006 ABCA 293, 275 D.L.R. (4th) 498; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 16 C.B.R. (4th) 141; *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.*, [1993] 3 W.L.R. 42; *Uber Technologies Inc. v. Heller*, 2020 SCC 16; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921; *In re U.S. Lines, Inc.*, 197 F.3d 631 (1999); *Societe Nationale Algerienne v. Distrigas Corp.*, 80 B.R. 606 (1987); *Astoria Medical Group v. Health Insurance Plan of Greater New York*, 182 N.E.2d 85 (1962); *Hofer v. Hofer*, [1970] S.C.R. 958; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92, [2001] 3 S.C.R. 978; *Stewart v. LePage* (1916), 53 S.C.R. 337; *Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 281; *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230; *Rosenberg v. Minster*, 2014 ONSC 845, 119 O.R. (3d) 27; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *3GS Inc. v. Altus Group Ltd.*, 2011 ONSC 5755, 96 B.L.R. (4th) 268; *Hosting Metro Inc. v. Poornam Info Vision Pvt, Ltd.*, 2016 BCSC 2371; *Sum Trade Corp. v. Agricom International Inc.*, 2018 BCCA 379, 18 B.C.L.R. (6th) 322; *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66

B.C.L.R. (2d) 113; *Clayworth v. Octaform Systems Inc.*, 2020 BCCA 117, 446 D.L.R. (4th) 626; *Dalimpex Ltd. v. Janicki* (2000), 137 O.A.C. 390, aff'd (2003), 228 D.L.R. (4th) 179; *Ives & Barker v. Willans*, [1894] 2 Ch. 478; *Central Investments & Development Corp. v. Miller* (1982), 133 D.L.R. (3d) 440; *ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH* (1996), 135 D.L.R. (4th) 130; *Petro-Canada v. 366084 Ontario Ltd.* (1995), 25 B.L.R. (2d) 19; *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3; *Canada (Attorney General) v. Reliance Insurance Co.* (2007), 87 O.R. (3d) 42; *Heyman v. Darwins, Ld.*, [1942] A.C. 356; *Kaverit Steel and Crane Ltd. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129; *James v. Thow*, 2005 BCSC 809, 5 B.L.R. (4th) 315; *Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368; *MacKinnon v. National Money Mart Co.*, 2004 BCCA 473, 50 B.L.R. (3d) 291; *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416; *Cantore v. Nemaska Lithium Inc.*, 2020 QCCA 1333; *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, 2021 ABCA 226, 459 D.L.R. (4th) 538; *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176; *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123; *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150; *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162.

By Jamal J.

Referred to: *Dell Computer Corp. v. Union des consommateurs*, 2007

SCC 34, [2007] 2 S.C.R. 801; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531; *Uber Technologies Inc. v. Heller*, 2020 SCC 16.

Statutes and Regulations Cited

Arbitration Act, R.S.B.C. 1996, c. 55, ss. 1 "arbitration agreement", 15, 22.

Arbitration Act, S.B.C. 2020, c. 2, s. 4(a).

Arbitration Act, 1991, S.O. 1991, c. 17, ss. 7(2), 17(2).

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 71, 72(1), 183, 243.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

International Commercial Arbitration Act, R.S.B.C. 1996, c. 233, s. 2(1) "party".

Treaties and Other International Instruments

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Can. T.S. 1986 No. 43, art. II(3).

United Nations. Commission on International Trade Law. *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17, Ann. I, June 21, 1985, arts. 8(1), 16.

Authors Cited

Bennett, Frank. *Bennett on Receiverships*, 3rd ed. Toronto: Carswell, 2011.

British Columbia. Legislative Assembly. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 16, No. 7, 4th Sess., 33rd Parl., April 21, 1986, p. 7865.

Casey, J. Brian. *Arbitration Law of Canada: Practice and Procedure*, 3rd ed. Huntington, N.Y.: Juris, 2017.

Chan, Darius, and Sidharrth Rajagopal. “To Stay or Not to Stay? A Clash of Arbitration and Insolvency Regimes” (2021), 38 *J. Int’l Arb.* 457.

DaRe, Vern W., and Teodora Prpa. “Imagine One Restructuring Act in Canada” (2021), 36 *B.F.L.R.* 363.

Esslinger, Heidi. “Creditors Over Contract: A Case Comment on *Chandos*”, in Jill Corraini and D. Blair Nixon, eds., *Annual Review of Insolvency Law 2021*. Toronto: Thomson Reuters, 2022, 747.

Fortier, L. Yves. “Delimiting the Spheres of Judicial and Arbitral Power: ‘Beware, My Lord, of Jealousy’” (2001), 80 *Can. Bar Rev.* 143.

Houlden, L. W., G. B. Morawetz and Janis Sarra. *Bankruptcy and Insolvency Law of Canada*, 4th ed. rev. Toronto: Thomson Reuters, 2022 (loose-leaf updated March 2022, release 3).

Jackson, Georgina R., and Janis Sarra. “Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters”, in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*. Toronto: Thomson Carswell, 2008, 41.

Joseph, David. *Jurisdiction and Arbitration Agreements and Their Enforcement*, 2nd ed. London: Thomson Reuters, 2010.

Kirgis, Paul F. “Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis” (2009), 17 *Am. Bankr. Inst. L. Rev.* 503.

Kröll, Stefan. “The ‘Incapable of Being Performed’ Exception in Article II(3) of the New York Convention”, in Emmanuel Gaillard, Domenico Di Pietro and Nanou Leleu-Knobil, eds., *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*. London: Cameron May, 2008, 323.

Kühn, Wolfgang. “Arbitration and Insolvency” (2011), 5 *Disp. Res. Int’l* 203.

Lamm, Carolyn B., and Jeremy K. Sharpe. “Inoperative Arbitration Agreements Under the New York Convention”, in Emmanuel Gaillard, Domenico Di Pietro and Nanou Leleu-Knobil, eds., *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*. London: Cameron May, 2008, 297.

McElcheran, Kevin P. *Commercial Insolvency in Canada*, 4th ed. Toronto: LexisNexis, 2019.

McEwan, J. Kenneth, and Ludmila B. Herbst. *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations*. Toronto: Thomson Reuters, 2022 (loose-leaf updated February 2022, release 1).

Meshel, Tamar. "*Petrowest v. Peace River Hydro*: The Revocability and Separability of Commercial Arbitration Agreements" (2022), 65 *Can. Bus. L.J.* 329.

Pavlović, Marina, and Anthony Daimsis. "Arbitration", in John C. Kleefeld et al., eds., *Dispute Resolution: Readings and Case Studies*, 4th ed. Toronto: Emond Montgomery, 2016, 483.

Salzberg, Mark A., and Gary M. Zinkgraf. "When Worlds Collide: The Enforceability of Arbitration Agreements in Bankruptcy" (2007), 27 *Franchise L.J.* 37.

Schramm, Dorothee, Elliott Geisinger and Philippe Pinsolle. "Article II", in Herbert Kronke et al., eds., *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*. Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2010, 37.

St. John Sutton, David, Judith Gill and Matthew Gearing. *Russell on Arbitration*, 24th ed. London: Thomson Reuters, 2015.

Sullivan, Ruth. *The Construction of Statutes*, 7th ed. Toronto: LexisNexis, 2022.

Swan, Angela, Jakub Adamski and Annie Y. Na. *Canadian Contract Law*, 4th ed. Toronto: LexisNexis, 2018.

van den Berg, Albert Jan. *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*. Hingham, Mass.: Kluwer Law and Taxation, 1981.

Wood, Roderick J. *Bankruptcy and Insolvency Law*, 2nd ed. Toronto: Irwin Law, 2015.

APPEAL from a judgment of the British Columbia Court of Appeal (Bennett, Dickson and Grauer JJ.A.), 2020 BCCA 339, 43 B.C.L.R. (6th) 8, 452 D.L.R. (4th) 535, 5 C.L.R. (5th) 31, 84 C.B.R. (6th) 174, 9 B.L.R. (6th) 163, [2021] 7 W.W.R. 195, [2020] B.C.J. No. 1940 (QL), 2020 CarswellBC 3008 (WL), affirming a decision of Iyer J., 2019 BCSC 2221, 5 C.L.R. (5th) 14, 74 C.B.R. (6th) 53, 100 B.L.R. (5th) 128, [2019] B.C.J. No. 2489 (QL), 2019 CarswellBC 3819 (WL). Appeal dismissed.

David de Groot, *Joanne Luu*, *Robert Martz* and *Alison Scott*, for the appellants.

Kelsey Meyer, *Ciara Mackey*, *Stephanie Clark* and *Paul Romaniuk*, for the respondents.

Laurent Debrun and *Charles Côté-De Lagrave*, for the intervener the Canadian Commercial Arbitration Center.

Lisa C. Munro and *Cynthia B. Kuehl*, for the intervener Arbitration Place.

Christina Doria, *Michael Nowina* and *Brendan O'Grady*, for the intervener the Chartered Institute of Arbitrators (Canada) Inc.

Kibben Jackson, *Tom Posyniak* and *Glen Nesbitt*, for the intervener the Insolvency Institute of Canada.

Anthony Daimsis, for the intervener the Canadian Federation of Independent Business.

The judgment of Wagner C.J. and Moldaver, Côté, Rowe and Kasirer JJ. was delivered by

CÔTÉ J. —

[64] Further, procedural flexibility is a hallmark of both arbitration law and insolvency law.

[65] Chief among the reputed advantages of arbitration is the freedom of parties to choose their own procedural rules rather than being bound by rules of court (*Seidel*, at para. 22; *Wellman*, at paras. 48-56; L. Y. Fortier, "Delimiting the Spheres of Judicial and Arbitral Power: 'Beware, My Lord, of Jealousy'" (2001), 80 *Can. Bar Rev.* 143). This enhances expediency and cost-effectiveness in arbitral proceedings, where discovery procedures can be curtailed, written submissions can be used instead of witness testimony, and strict evidentiary rules can be relaxed (McEwan and Herbst, at §§ 2:1 and 7:12).

[66] Flexibility is likewise a characteristic of Canadian insolvency law. But in the insolvency context, both the court *and* the parties can tailor proceedings to fit a particular case. Indeed, the *BIA* and the *CCAA* both accord broad judicial discretion to, among other things, authorize the assignment and disclaimer of contracts and the sale of assets, impose and lift stays of proceedings, grant extensions of time, terminate proceedings, and approve creditor proposals (Wood, at pp. 432-33). Much like arbitration law does for arbitrating parties, Canadian insolvency law thus allows debtors, creditors, and courts "to design a process and [an] outcome that is appropriate for individual . . . cases" (McElcheran, at ¶¶5.11-5.12).

(c) *Decision Makers With Specialized Expertise*

[67] Finally, both arbitration law and insolvency law often rely on specialized decision makers to achieve their respective objectives.

[68] One "great merit" of arbitration is that parties are able to select a decision maker with "special expertise in the field of their dispute" (*3GS Inc. v. Altus Group Ltd.*, 2011 ONSC 5755, 96 B.L.R. (4th) 268, at para. 19; McEwan and Herbst, at § 4:1).

[69] Similarly, specialized judicial expertise is essential to meet the challenges of complex restructuring and insolvency proceedings, often called the "hothouse of real-time litigation" (*Century Services*, at para. 58, quoting R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484).

[70] The interests of expediency and procedural flexibility inform the need for judicial specialization in the realm of bankruptcy and insolvency. Indeed, in many provinces, there are specialist judges who take carriage of restructuring proceedings and all related issues. Their expertise and "file knowledge" allow them to find the right balance of procedural formality while meeting the need for timely resolution of disputes within the overall restructuring process (McElcheran, at ¶5.85).

[71] In sum, reliance on a decision maker with expertise in the relevant field is a core feature of both arbitration law and insolvency law, and for good reason. Specialized expertise can assist in capitalizing on other attributes that are also common to both bodies of law, such as expediency and procedural flexibility.

(d) *Conclusion on the Interplay Between Arbitration Law and Insolvency Law*

[72] In many cases, the shared interests in expediency, procedural flexibility, and specialized expertise will converge through arbitration. In such a scenario, the parties should be held to their agreement to arbitrate notwithstanding ongoing insolvency proceedings. In other words, the court should grant a stay of legal proceedings in favour of arbitration, and any dispute as to the scope of the arbitration agreement or the arbitrator's jurisdiction should be left to the arbitrator to resolve. As is evident from the foregoing, valid arbitration agreements are generally to be respected. This presumption in favour of arbitral jurisdiction is supported by this Court's longstanding jurisprudence, the pro-arbitration stance adopted in provincial and territorial legislation nationwide, and the foundational principle that contracting parties are free to structure their affairs as they see fit.

[73] However, in certain insolvency matters, it may be necessary to preclude arbitration in favour of a centralized judicial process. This may occur when arbitration would compromise the orderly and efficient conduct of a court-ordered receivership. In such a scenario, a court may assert control over the proceedings, both to ensure the timely resolution of the parties' dispute and to protect the public interest in the orderly restructuring or dissolution of the debtor and the equal treatment of its creditors. This authority arises from the statutory jurisdiction conferred on superior courts under ss. 243(1) and 183(1) of the *BIA*.

Valentin Pintea *Appellant*

v.

Dale Johns and
Dylan Johns *Respondents*

and

National Self-Represented Litigants Project,
Pro Bono Ontario and
Access Pro Bono *Interveners*

Indexed as: Pintea *v.* Johns

2017 SCC 23

File No.: 37109.

2017: April 18.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Civil procedure — Contempt of court — Required knowledge — Self-represented plaintiff failing to comply with case management orders and failing to attend case management meetings after having moved without filing change of address with court as required — Case management judge striking claim, finding plaintiff in contempt of court and awarding costs to defendants — Majority of Court of Appeal affirming decision — Dissenting judge finding that plaintiff's failure to attend case management meetings not act of contempt and that costs award significantly disproportionate consequence for failing to file change of address — Actual knowledge of impugned orders necessary for plaintiff to be found in contempt — Action restored and costs award vacated — Alberta Rules of Court, Alta. Reg. 124/2010, r. 10.52(3)(a)(iii).

Valentin Pintea *Appelant*

c.

Dale Johns et
Dylan Johns *Intimés*

et

National Self-Represented Litigants Project,
Pro Bono Ontario et
Access Pro Bono *Intervenants*

Répertorié : Pintea *c.* Johns

2017 CSC 23

N° du greffe : 37109.

2017 : 18 avril.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Procédure civile — Outrage au tribunal — Connaissance requise — Défaut par un demandeur non représenté de se conformer à des ordonnances relatives à la gestion de l'instance et de se présenter à des rencontres de gestion d'instance après avoir déménagé sans communiquer au tribunal son changement d'adresse comme il était tenu de le faire — Décision de la juge chargée de la gestion de l'instance radiant la demande, déclarant le demandeur coupable d'outrage au tribunal et adjugeant les dépens en faveur des défendeurs — Arrêt de la Cour d'appel confirmant cette décision à la majorité — Opinion dissidente concluant que le défaut du demandeur de se présenter aux rencontres de gestion d'instance ne représentait pas un outrage au tribunal et que la condamnation aux dépens constituait une conséquence disproportionnée par rapport à l'omission d'avoir communiqué le changement d'adresse — Preuve de la connaissance réelle par le demandeur des ordonnances en cause requise pour justifier sa condamnation pour outrage au tribunal — Rétablissement de l'action en justice et annulation de la condamnation aux dépens — Alberta Rules of Court, Alta. Reg. 124/2010, art. 10.52(3)(a)(iii).

Statutes and Regulations Cited

Alberta Rules of Court, Alta. Reg. 124/2010, r. 10.52(3)(a)(iii).

Authors Cited

Canadian Judicial Council. *Statement of Principles on Self-represented Litigants and Accused Persons*, September 2006 (online: https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf; archived version: http://www.scc-csc.ca/cso-dce/2017SCC-CSC23_1_eng.pdf).

APPEAL from a judgment of the Alberta Court of Appeal (Martin, McDonald and Veldhuis JJ.A.), 2016 ABCA 99, [2016] A.J. No. 432 (QL), 2016 CarswellAlta 772 (WL Can.), affirming a decision of the Court of Queen's Bench (Kenny J.). Appeal allowed.

Colin Feasby, *Sean Sutherland* and *Adam LaRoche*, for the appellant.

Duncan C. Boswell and *Alyssa J. Duke*, for the respondents.

Ilan Ishai and *Ranjan Agarwal*, for the intervener the National Self-Represented Litigants Project.

Andrew Bernstein, *Jeremy Opolsky* and *Leora Jackson*, for the interveners Pro Bono Ontario and Access Pro Bono.

The judgment of the Court was delivered orally by

[1] KARAKATSANIS J. — The common law of civil contempt requires that the respondents prove beyond a reasonable doubt that Mr. Pintea had actual knowledge of the Orders for the case management meetings he failed to attend.

[2] The case management judge failed to consider whether Mr. Pintea had actual knowledge of two of the three Orders upon which she based her

Lois et règlements cités

Alberta Rules of Court, Alta. Reg. 124/2010, art. 10.52(3)(a)(iii).

Doctrine et autres documents cités

Conseil canadien de la magistrature. *Énoncé de principes concernant les plaideurs et les accusés non représentés par un avocat*, septembre 2006 (en ligne : https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_fr.pdf; version archivée : http://www.scc-csc.ca/cso-dce/2017SCC-CSC23_1_fra.pdf).

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (les juges Martin, McDonald et Veldhuis), 2016 ABCA 99, [2016] A.J. No. 432 (QL), 2016 CarswellAlta 772 (WL Can.), qui a confirmé une décision de la Cour du Banc de la Reine (juge Kenny). Pourvoi accueilli.

Colin Feasby, *Sean Sutherland* et *Adam LaRoche*, pour l'appelant.

Duncan C. Boswell et *Alyssa J. Duke*, pour les intimés.

Ilan Ishai et *Ranjan Agarwal*, pour l'intervenant National Self-Represented Litigants Project.

Andrew Bernstein, *Jeremy Opolsky* et *Leora Jackson*, pour les intervenantes Pro Bono Ontario et Access Pro Bono.

Version française du jugement de la Cour rendu oralement par

[1] LA JUGE KARAKATSANIS — Suivant les règles de la common law relatives à l'outrage au tribunal en matière civile, les intimés doivent prouver hors de tout doute raisonnable que M. Pintea connaissait réellement l'existence des ordonnances fixant la tenue des rencontres de gestion d'instance auxquelles il a omis d'assister.

[2] La juge chargée de la gestion de l'instance a omis de se demander si M. Pintea connaissait réellement l'existence de deux des trois ordonnances

decision. The respondents concede that the requirements of Rule 10.52(3)(a)(iii) of the *Alberta Rules of Court*, Alta. Reg. 124/2010, were not met with respect to these two Orders.

[3] As a result, the finding of contempt cannot stand.

[4] We would add that we endorse the *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) (online) established by the Canadian Judicial Council.

[5] The appeal is allowed, the action is restored and the costs award vacated.

Judgment accordingly.

Solicitors for the appellant: Osler, Hoskin & Harcourt, Calgary.

Solicitors for the respondents: Gowling WLG (Canada), Calgary.

Solicitors for the intervener the National Self-Represented Litigants Project: Bennett Jones, Toronto.

Solicitors for the interveners Pro Bono Ontario and Access Pro Bono: Torys, Toronto.

sur lesquelles elle a basé sa décision. Les intimés concèdent que les conditions d'application du sous-al. 10.52(3)(a)(iii) des *Alberta Rules of Court*, Alta. Reg. 124/2010, n'étaient pas réunies à l'égard de ces deux ordonnances.

[3] En conséquence, la conclusion selon laquelle il y a eu outrage au tribunal ne saurait être maintenue.

[4] Nous tenons à souligner que nous souscrivons à l'*Énoncé de principes concernant les plaideurs et les accusés non représentés par un avocat* (2006) (en ligne) établi par le Conseil canadien de la magistrature.

[5] L'appel est accueilli, l'action en justice est rétablie et la condamnation aux dépens est annulée.

Jugement en conséquence.

Procureurs de l'appelant : Osler, Hoskin & Harcourt, Calgary.

Procureurs des intimés : Gowling WLG (Canada), Calgary.

Procureurs de l'intervenant National Self-Represented Litigants Project : Bennett Jones, Toronto.

Procureurs des intervenantes Pro Bono Ontario et Access Pro Bono : Torys, Toronto.

CITATION: R. v. Liu, 2024 ONSC 2022
COURT FILE NO.: CR-23-30000629-0000
DATE: 20240405

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HIS MAJESTY THE KING	)	*Ben Snow*, Counsel for the Crown Respondent
Respondent	)	
	)	
– and –	)	
	)	
GUO-XIONG LIU	)	*Brian Brody*, Counsel for the Applicant Liu
Applicant	)	
	)	
	)	**HEARD: March 22, 2024**
	)	

M.A. CODE J.

REASONS FOR JUDGEMENT ON SECTION 11(B) *CHARTER* APPLICATION

A. OVERVIEW

[1] The Applicant Guo-Xiong Liu (hereinafter, Liu) is charged in an Indictment alleging sexual interference, invitation to sexual touching, possession of child pornography, sexual assaults, and extortion. The information charging these offences was sworn on February 21, 2019 and the Indictment is presently set to be tried in this Court on June 10, 2024. The case is scheduled as a seven day jury trial which is anticipated to conclude on June 18, 2024.

[2] Liu brought a pre-trial Application seeking to stay the trial proceedings on the basis of an alleged violation of his s. 11(b) *Charter* right to trial within a reasonable time. It can be seen that the total delay in the case is 1944 days (or about 64 months, or five years and four months). Needless to say, this total delay is well beyond the *Jordan* presumptive ceiling of 30 months. See: *R. v. Jordan* (2016), 335 C.C.C. (3d) 403 (S.C.C.); *R. v. Cody* (2017), 349 C.C.C. (3d) 488 (S.C.C.).

[3] The parties substantially agreed that significant parts of the total delay which occurred in the Ontario Court of Justice must be deducted because of the Covid-19 pandemic, which is an "exceptional circumstance" under the *Jordan* framework. The parties also substantially agreed, by the end of oral argument, that some part of the delay that occurred in the Superior Court of Justice

must be deducted as "defence delay" under the *Jordan* framework. In the result, the case ends up being very close to the 30 month presumptive ceiling.

[4] After hearing a full day of oral argument on March 22, 2024, I reserved judgement on the s. 11(b) Application. These are my reasons for judgement.

B. FACTS

[5] The parties filed a substantial documentary record which included all of the relevant transcripts, numerous emails between counsel and the Trial Coordinators, and other relevant documents such as the JPT form and the Trial Confirmation forms. The Crown also summarized the allegations against Liu as involving alleged sexual abuse of his niece, from a time when she was four or five years old until she was 16 years old. Liu was in his 20s and 30s at the time. He is alleged to have taken sexual photographs of her when she was six years old and then to have used the photographs to extort various sexual acts in the following years. The gravity of these allegations is relevant to the s. 11(b) Application only because it helps to explain why the case was given a "priority" designation when it was being scheduled in this Court.

[6] There are five specific periods of delay that are in dispute. The first two are relatively short. The last three are much longer. These five periods will be analysed in detail in the next section of these Reasons, when characterizing the cause of particular delays. By way of overview, the history of the proceedings can be summarized as falling into five broad blocks of time, as follows:

- First, there was an intake period of just over six months, from February 21, 2019 until August 27, 2019. During this period the Crown made disclosure, the accused retained counsel (and changed counsel), a Crown pre-trial was held, a Judicial Pre-Trial (JPT) was held, and a date was set for the preliminary inquiry. The only dispute concerning this initial period is whether the change in defence counsel caused any delay;

- Second, there was substantial delay in completing the preliminary inquiry because of the Covid-19 pandemic. The parties had scheduled a one day preliminary inquiry at the JPT on August 27, 2019. The scheduled date was April 14, 2020. This was about seven and a half months after the JPT, which is reasonably expeditious. Had the preliminary inquiry proceeded as scheduled, the Ontario Court of Justice part of the case would have concluded in less than 14 months (which is under the applicable 18 month *Jordan* presumptive ceiling for this stage of the proceedings). However, the Ontario Court of Justice closed on March 15, 2020, because of the pandemic. As a result, the preliminary inquiry did not proceed on its scheduled April 14, 2020 date. The Ontario Court of Justice slowly reopened later in the year, a new JPT was held on December 7, 2020, and new preliminary inquiry dates were set for September 15 and 16, 2021 (the anticipated length of the preliminary inquiry had now expanded to one and a half days). The preliminary inquiry proceeded as scheduled on the new dates, the complainant testified for two full days, and the accused was committed for trial. This entire second period of delay was just over two years, from the first JPT on August 27, 2019 until the committal for trial on September 16, 2021. The parties agree that most of this period should be characterized as a "discrete event" under the *Jordan* "exceptional circumstance" category, due to the pandemic. That "discrete event" extends from the first preliminary inquiry date on April 14, 2020 until the date of committal on September 16, 2021. The only dispute about this

17 month "discrete event" is whether there was 36 days of unreasonable Crown delay during this period when the parties were rescheduling a post-Covid JPT (the assigned Crown had been appointed a judge and the new assigned Crown rescheduled the JPT);

- Third, the first period of delay in the Superior Court of Justice was just over a year, extending from the committal on September 16, 2021 until the trial date on October 3, 2022. During this period, a JPT was held before Himel J. on October 14, 2021. Five days later, on October 19, 2021, the case was scheduled in Practise Court as a seven day jury trial starting on October 3, 2022. There is considerable dispute between the parties as to whether defence counsel's unavailability contributed to this period of delay and, if so, by how much;

- Fourth, the second period of delay in the Superior Court of Justice was also a year, from October 5, 2022 when the first scheduled trial did not proceed, until October 3, 2023 which became the second scheduled trial date. The reason why the trial did not proceed is clear. The parties appeared on three consecutive days, from October 3 to 5, 2022, and Kelly J. advised that there were no judges available to preside over the trial that week. Considerable efforts were made to reschedule the case, including in the following week when the Court and Crown were both available. At this point, defence counsel's unavailability became a significant issue, which will be discussed in some detail in the next section of these Reasons. In the end, a second trial date was set for October 3, 2023; and

- Fifth, the third and last period of delay in the Superior Court of Justice was just over eight months. This period extended from October 5, 2023, when the second scheduled trial did not proceed, until June 10, 2024 which now became the third scheduled trial date. Once again, the reason why the trial did not proceed is clear. The parties appeared on three consecutive days, from October 3 to 5, 2023, and Forestell J. advised that there were no judges available that week to preside at the trial. Once again, considerable efforts were made to reschedule the case, including in the following weeks and months when numerous dates were offered by the Crown and the Court. As on the prior occasion, defence counsel's unavailability because a serious issue. The case is still scheduled as a seven day jury trial and so it is now anticipated to conclude on June 18, 2024.

C. ANALYSIS

[7] The *Jordan* framework for analysing s. 11(b) delay is well-known and I need not recite it in these Reasons. Each of the five periods of delay that are in dispute in this case raise discrete factual and legal issues. I will discuss those issues in the next five sub-sections of these Reasons. As noted previously, the first two disputed periods are relatively short. The last three periods are far more significant.

(i) The change in counsel during the intake period

[8] There were five court appearances during the initial six month intake period. Mr. Lee appeared as counsel for the Applicant Liu on the first three appearances. No disclosure was available on the first appearance. Mr. Lee picked up two packages of disclosure on the second and third appearances. He was in the process of reviewing the disclosure and scheduling a Crown pre-

trial with the assigned Crown, Mr. Fraser, at the time of the third appearance. Shortly after this appearance, the Applicant Liu changed counsel and Mr. Brody was retained, prior to the fourth court appearance. At that fourth appearance, counsel from Mr. Brody's office advised the Court that their firm was now on the record, that they had already conducted a Crown pre-trial with Mr. Fraser, and that they had already scheduled a JPT for August 27, 2019. The matter was then put over to the fifth court appearance, for the scheduled JPT. This was the last appearance during the six month intake period.

[9] The Crown submits that the change in counsel caused some delay and seeks to quantify that "defence delay" as 42 days. This is the time between the third appearance on May 16, 2019, when Mr. Lee last appeared on the record, and the fourth appearance on June 27, 2019, when Mr. Brody's firm first appeared.

[10] It is well established in the s. 11(b) case law that a change in counsel can be a cause of delay, usually because it leads to an adjournment in order to allow the new counsel to prepare and/or to become available. In these circumstances, the period of this adjournment is deducted from the total delay and is characterized as "defence delay". See, eg: *R. v. Jordan*, *supra* at para. 120; *R. v. Cody*, *supra* at para. 40; *R. v. Gandhi*, 2016 ONSC 5612 at paras. 42-45. I am not persuaded that the change in counsel in this case actually caused any delay. When Mr. Brody's firm came on the record at the fourth appearance, he did not seek an adjournment in order to obtain the Crown disclosure from Mr. Lee's file, in order to review that disclosure, or in order to arrange a Crown pre-trial. Indeed, Mr. Brody's law firm had already taken all these steps and had taken the further step of scheduling a JPT. During oral argument, it became clear that the Crown's real criticism of the initial intake process was that the first lawyer, Mr. Lee, had been unreasonably slow in picking up and reviewing disclosure and in scheduling a Crown pre-trial. I have read the transcripts of Mr. Lee's three court appearances and I cannot properly assess this issue on the present record.

[11] In the result, there should be no deduction for "defence delay" due to the change in counsel. The entire six month intake period, although not a model of expedition, should be included in the 30 month *Jordan* presumptive ceiling.

(ii) <u>Delay in scheduling the post-Covid JPT due to Mr. Fraser's judicial appointment</u>

[12] As summarized above, the parties are in substantial agreement as to the proper s. 11(b) characterization of the second block of time in the Ontario Court of Justice. It totals just over two years, from the August 27, 2019 date of the JPT until the September 16, 2021 date of the committal for trial. The first seven and a half months of this period, from the JPT until the initial April 14, 2020 date set for the preliminary inquiry, is undoubtedly part of the 30 month *Jordan* presumptive ceiling. However, the remaining 17 month period is a "discrete event" because the pandemic intervened and prevented the preliminary inquiry from proceeding, from its first scheduled date on April 14, 2020 until its second scheduled date on September 16, 2021. See: *R. v. Agpoon*, 2023 ONCA 449. The only dispute is whether 36 days should be carved out of this "discrete event" because the Crown unreasonably delayed the scheduling of the post-Covid JPT. Mr. Brody's submission to this effect is factually detailed and it relates to the timing of Mr. Fraser's judicial appointment and the timing of the post-Covid JPT.

[13] I have read the relevant emails between counsel. The Ontario Court of Justice required a new JPT for cases like the present one that had not proceeded during the pandemic and that had to be rescheduled. These were substantive post-Covid JPTs, and not just *pro forma* rescheduling JPTs. The Ontario Court of Justice now had a serious pandemic backlog and efforts were being made to either resolve the delayed cases or to shorten and streamline these cases. Mr. Fraser sent an email on October 5, 2020, suggesting dates for this new JPT. Mr. Brody replied the next day, on October 6, 2020. He accepted one of Mr. Fraser's suggested dates, namely, October 27, 2020. Three days later, on October 9, 2020, Mr. Fraser was appointed to the Ontario Court of Justice. A series of emails ensued, between October 13 and 16, 2020, in which Mr. Fraser advised of his judicial appointment and the need to assign a new Crown, and the new assigned Crown advised that he was available to attend the JPT "in early December." The parties then agreed on December 2, 2020 as the date for the post-Covid JPT.

[14] Mr. Brody submits that the 36 days between the October 27, 2020 JPT date, that counsel had agreed to prior to Mr. Fraser's appointment, and the December 2, 2020 JPT date that counsel agreed to after Mr. Fraser's appointment, is unreasonable or unjustified Crown delay. Mr. Brody submits that a new Crown should have been able to attend a JPT on the previously agreed October 27, 2020 date. The Crown, on the other hand, submits that Mr. Fraser's judicial appointment was an unforeseen "discrete event" that justifies this 36 day period of delay. Mr. Snow, in his submissions on behalf of the Crown, stresses the importance of having an <u>assigned</u> Crown attend the new JPT, after first learning the file, in order to be able to engage in substantive resolution and/or streamlining discussions at the JPT.

[15] I agree with the Crown. The main premise of Mr. Brody's position is that <u>any</u> Crown could and should have been prepared to attend an October 27 JPT on 18 days notice, after Mr. Fraser's judicial appointment on October 9, 2020. In my view, it was necessary in the exigent circumstances of the pandemic backlog, to have an assigned Crown who was fully briefed on the case attend the JPT, in order to make substantive decisions about how to resolve or streamline the case. Mr. Fraser's judicial appointment was an unforeseen "discrete event" that justified this short 36 day period of delay, by allowing sufficient time to assign a new Crown who could read the file and schedule the JPT on a reasonably early date that was available in the newly assigned Crown's calendar. See: *R. v. Cody*, *supra* at paras. 48-49.

[16] In the result, the entire 17 month period from April 14, 2020 (the first scheduled preliminary inquiry date) until September 16, 2021 (the second scheduled preliminary inquiry date) should be characterized as an "exceptional circumstance", due to the Covid-19 pandemic and due to Mr. Fraser's judicial appointment. On the other hand, the period from February 21, 2019 (when the information was sworn) until April 14, 2020 (when the pandemic prevented the preliminary inquiry from proceeding), is all included in the 30 month *Jordan* presumptive ceiling. This period is approximately 13 months and three weeks. It means that the case was under the 18 month *Jordan* ceiling for Ontario Court of Justice proceedings at the time of committal.

(iii) <u>The first period of delay in the Superior Court of Justice</u>

[17] The parties initially proceeded expeditiously in this Court by arranging a JPT before Himel J. on October 14, 2021, which was less than a month after committal. It is noted on the JPT Form that the parties estimated there had been about 13 months of justifiable or deductible delay in the

Ontario Court of Justice. Accordingly, they estimated that the normal 30 month *Jordan* presumptive ceiling (which would have ended on August 21, 2021, if there were no justifiable deductions) should be extended to September 21, 2022. It can be seen from my above analysis of delay in the Ontario Court of Justice that the period of "discrete event" delay caused by the pandemic and by Mr. Fraser's judicial appointment was in fact 17 months. Counsel cannot be faulted for their conservative estimate of 13 months of justifiable or deductible delay, given that they did not have the benefit of the post-pandemic jurisprudence. In particular, *R. v. Agpoon*, *supra* was not decided until 2023. As a result of counsel's conservative estimate, to the effect that September 21, 2022 was the "Net *Jordan* date", Himel J. went on to note on the JPT Form that "depending on trial date, defence may bring s. 11(b)." In other words, it was known from the time of the JPT that the case was in potential s. 11(b) *Charter* jeopardy, depending on the scheduled trial date.

[18] The record is clear that the Crown took this potential s. 11(b) jeopardy seriously and sought a "priority date" from the Court, "given delay issues." This is how Ms. Garrity put it, when scheduling the trial in Practise Court. Ms. Garrity is the Superior Court administrative Crown for the Scarborough Crown Office and her efforts in this matter were exemplary. She stated the above, on the record before Brown J. when setting the trial date. She went on to state that the Trial Coordinator's Office had assigned "our priority slot" for the case, namely, March 14, 2022. However, Mr. Brody was not available on this date. His earliest available date was July 11, 2022. After that, he had availability from late September and into October 2022. I have reviewed the Trial Confirmation Form and the email correspondence between the Crown, Mr. Brody, and the Trial Coordinator's Office and they all confirm the above statements made by Ms. Garrity. The emails also state that the Court's earliest "non-priority slot would be December 5, 2022." These references to "priority dates" and "priority slots" and "non-priority slots" reflect the scheduling practices that the Court adopted after the pandemic, in order to cope with the very significant post-pandemic backlog that had built up. It was a form of "triage" in which certain particularly serious cases, and/or particularly delayed cases, and/or in custody cases, were offered the earliest trial dates. The Court of Appeal referred to these practices with approval in *R. v. Agpoon*, *supra* at paras. 32-34. It is telling that the earliest "non-priority" date for the case was December 5, 2022, which was more than 14 months after Liu's committal. This "non-priority" date was almost nine months later than the Court's earliest "priority" date of March 14, 2022. In other words, the "triage" practice of offering early dates to certain "priority" cases had a dramatic impact on available trial dates.

[19] Mr. Brody's earliest available date for a seven day jury trial was July 11, 2022. This was a date in the summer sittings, when fewer judges are available because of summer holidays. The Trial Coordinator's Office advised that "the Court cannot offer a summer date for this matter". The Trial Coordinator went on to state that, "The next available date in a priority slot that would be in line with the availability provided by counsel would be October 3, 2022 for seven days jury." Accordingly, the trial date was set for October 3, 2022.

[20] The delay between committal on September 16, 2021 and the October 3, 2022 trial date is about 12 and a half months. During the course of oral argument on the s. 11(b) Application, Mr. Brody eventually conceded that some portion of this period should be characterized as "defence delay", because of his unavailability on the early "priority" date of March 14, 2022, when the

Court and the Crown were both ready to proceed. The only issue was how much of this period should be characterized as "defence delay". I agree with this concession.

[21] The s. 11(b) law in this area, concerning defence unavailability, has become subtle and complex. In both *Jordan* and *Cody*, the Court stated the following: "the defence will have directly caused the delay if the Court and the Crown are ready to proceed, but the defence is not. The period of delay resulting from that unavailability will be attributed to the defence" (*Jordan*, *supra* at para. 64); and "where the Court and Crown are ready to proceed, but the defence is not, the resulting delay should also be deducted" (*Cody*, *supra* at para. 30). In the subsequent case law, applying this principle, a line of authority held that defence counsel's unavailability on an earlier date offered by the Court and the Crown meant that all of the ensuing delay until the date when all parties were available was "defence delay". See, e.g. *R. v. Mallozzi*, 2018 ONCA 312; *R. v. Safdar* (2021), 403 C.C.C. (3d) 91 at paras. 44-45 (Ont. C.A.). The simple logic of these authorities was that, but for defence counsel's unavailability on the earlier date, none of the ensuing delay until the actual date when all parties were available would have occurred. It was, therefore, "resulting delay" pursuant to *Jordan* and *Cody*. In the present case, applying the principle from *Mallozzi* and *Safdar*, the approximately five and a half months of delay, from April 14, 2022 until October 3, 2022, would all be "defence delay".

[22] In my view, the *Mallozzi* and *Safdar* approach to delay caused by defence counsel's unavailability appears to have been overtaken by more recent authorities. A more nuanced "contextual approach" has developed in which, "All relevant circumstances should be considered to determine how delay should be apportioned." It could be argued that this apparent change in the law detracts from the clarity, simplicity, and predictability that *Jordan* and *Cody* intended. See: *R. v. Hanan* (2023), 426 C.C.C. (3d) 1 at para. 9 (S.C.C.); *R. v. Hanan* (2022), 412 C.C.C. (3d) 233 at paras. 47-59 (Ont. C.A.); *R. v. Boulanger* (2022), 411 C.C.C. (3d) 279 at paras. 8-10 (S.C.C.); *R. v. Albinowski* (2018), 371 C.C.C. (3d) 190 at para. 46 (Ont. C.A.); *R. v. Bowen-Wright*, 2024 ONSC 293 at paras. 38-43. In the latter case, my colleague Schreck J. helpfully summarized some of the more important factors to consider when assessing "resulting delay" caused by defence counsel's unavailability, under this modern "contextual approach".

[23] In this case, the March 14, 2022 "priority date" offered by the Crown and the Court was exactly five months after the JPT that was held before Himel J. on October 14, 2021. Defence counsel had advised Himel J. at the JPT that a s. 11(b) Application may be brought, "depending on the trial date". As a result, the Crown and the Court made significant efforts to offer a "priority slot" to this case, which gave it real precedence in the pandemic backlog, because it was a serious case and because it was potentially in some s. 11(b) jeopardy. At the time of the JPT, in the fall of 2021, there were very few jury trials proceeding in the Superior Court in Toronto, because of pandemic restrictions. Indeed, jury trials were once again completely suspended on December 17. 2021. Over two months later, on February 28. 2022, jury trials resumed in Toronto. This was exactly two weeks before the "priority date" of March 14, 2022 that was offered to this case for a jury trial. See: *R v. Agpoon*, *supra* at paras.27-29 (and the attached Appendix); *R. v. Buick and Marsh*, 2023 ONSC 42 at paras. 39-36; *R. v. Andrew*, 2024 ONSC 607 at paras. 12-17; *R. v. Nikiforos*, 2024 ONSC 456 at paras. 12 and 20. All of these cases discuss the severely restricted access to jury trials in Toronto during this period, due to the pandemic. Mr. Brody's earliest available date was July 11, 2022, during the summer sittings when fewer judges were available. There was nothing stated on the record by Mr. Brody as to why there was no availability in his

calendar for this period of about nine months, from October 14, 2021 until July 11, 2022. Mr. Brody's approach to "availability" in his calendar was to become clearer, once the October 3, 2022 trial date was reached, as will be discussed below. More importantly, Mr. Brody advised me that he is a member of a law firm in which there are three criminal litigators (some of whom appeared on this case from time to time in various roles). Nothing was stated on the record as to whether Mr. Brody and his law firm were willing to make efforts to rearrange their schedules in order to give this case priority, given its gravity and given its s. 11(b) jeopardy. As Schreck J. stated in *Bowen-Wright*, *supra* at para. 36, "Counsel's calendars are not written in stone. Matters collapse and availability changes." I agree with Schreck J. Especially in a law firm with three criminal litigators, there is usually flexibility between these three calendars, which often allows criminal defence firms to give a particular case priority. In my view, there is nothing in the record to indicate that Mr. Brody had understood and had incorporated the proactive, cooperative, and preventative change in culture that is expected and required in the post-*Jordan* world. See: *R. v. Jordan*, *supra* at paras. 5, 40-41, 86, and 137-139; *R. v. Cody*, *supra* at paras. 31-35; *R. v. Albinowski*, *supra* at para. 50; *R. v. Bowen-Wright*, *supra* at para. 22.

[24] In conclusion concerning this first period of delay in the Superior Court, the sole cause of the delay between March 14, 2022 (when the Court and the Crown were available on a "priority date") and July 4, 2022 (when the summer sittings began and the Court had less availability), was defence counsel's unavailability. During the July and August summer months, and during September 2022, the Court was unavailable. There was no explanation for Mr. Brody's nine month period of unavailability or for his silence concerning the post-*Jordan* need to proactively cooperate and prevent delay by at least trying to rearrange the law firm's calendars, especially given the challenges of the pandemic backlog and given the need to prioritize this case. In all the above circumstances, applying the approach set out in *Hanan* and *Boulanger*, I would characterize the three and a half month period from March 14, 2022 until July 4, 2022, as "defence delay". The rest of the twelve and a half month period between committal on September 16, 2021 and the October 3, 2022 trial date should be included in the 30 month *Jordan* presumptive ceiling.

[25] In the result, by the time the case reached its first trial date on October 3, 2022, the total *Jordan* delay since the information was sworn on February 21, 2019 was approximately 43 and a half months. However, approximately 17 months was due to the "discrete event" delay in the Ontario Court of Justice and approximately three and a half months was due to "defence delay" in the Superior Court. These two periods must be deducted, leaving net *Jordan* delay of about 23 months. In other words, the case was still under the 30 month *Jordan* presumptive ceiling at this stage when it reached the first trial date on October 3, 2022.

(iv) <u>The second period of delay in the Superior Court of Justice</u>

[26] There is no ambiguity about what happened when this case reached its first scheduled trial date on October 3, 2022. The parties were both ready to proceed. They appeared in what has become known as "Trials in Holding Court". Kelly J., a former leader of the criminal team, was presiding. The role of this Court is to assemble all the cases scheduled for trial in that week and determine which cases are ready for trial, which cases are discussing resolution, and which cases are not ready to proceed for any number of reasons (for example, due to unavailable witnesses, sickness of counsel, or the Crown simply reassessing its case). This phenomenon is known as the "collapse rate" and it has always existed in the criminal courts, at least in my experience over the

last 45 to 50 years. After assessing the "collapse rate", the usually experienced judge who is presiding in this Court (which starts at 9:00 a.m.) assigns those cases that are ready to proceed and that have not already been assigned to available judges, sends the cases that are discussing resolution to a further JPT, and orders the remaining cases to return the next day (when they may resolve or be unable to proceed, or when a further judge or judges may become available). This process repeats itself, usually over the first three days of every week.

[27] The corollary of the "collapse rate" on the day of trial, is that trial lists have historically been overbooked. There are almost always excess cases scheduled for trial in a given week because the reality is that a certain number of cases invariably "collapse", either on the trial date, shortly before the trial date, or shortly after the trial date. As a result, trial scheduling involves some art and some science. Trial Coordinators and scheduling judges try to predict the likely "collapse rate". In some weeks these predictions are accurate and in other weeks they are inaccurate. A properly functioning Court will have enough flexibility, in terms of available judges, so that a judge can be called upon to take up a case that has not collapsed and that has not been assigned. When the Court has no such flexibility, because of a shortage of judges, a case that is ready to proceed and that has not been assigned, will not be reached. In other words, the Court must have enough judges to try the cases that do not "collapse".

[28] On Monday, October 3, 2022, Kelly J. inquired about "the *Jordan* status" of the Liu case and asked, "are there *Jordan* issues?" Mr. Brody replied, as follows: "As of right now, no … But they're, *Jordan* is always an issue … But at the moment, we're within the 30 months". Kelly J. advised, "there's not a judge available now" but asked the parties to return at 11:00 a.m. to see if other assigned cases had collapsed. When the parties returned later, Kelly J. advised, "There's still no judge available for your matter" and asked the parties to return the next day.

[29] On Tuesday, October 4, 2022, the current criminal team leader, Forestell J. was presiding. She advised the parties as follows: "We do not yet have a judge for you, I'm afraid. We are doing our very best to see if someone can be located either in this jurisdiction or another. And so I apologize for the inconvenience to you, but I'm going to have you come back again tomorrow morning."

[30] On Wednesday, October 5, 2022, Kelly J. was presiding. There were extensive discussions on the record on this date. I will set them out in some detail because they are important. Kelly J. advised that either she or Forestell J. could start the Liu trial if there was a re-election. Mr. Brody advised that there was no possibility of a re-election. Kelly J. then advised that "there is no court available today." Mr. Snow stated, "The Crown is eager to have it proceed. I hope Mr. Brody is as well. Our witnesses were available. They will remain available next week even, if there were any hope." Kelly J. asked the parties to speak to the Trial Coordinator "to see whether or not they can accommodate you starting [next week] on Tuesday." At this point, Mr. Brody stated, "I have serious 11(b) concerns" and advised that the case was "42 months old". Kelly J. asked, "Why weren't these [s. 11(b) issues] raised on Monday, when things were being assigned?" Mr. Brody explained that he had simply stated that "as of right now, if the trial proceeds, we're under the ceiling." At this point, Kelly J. stated somewhat forcefully, "I think that maybe you should get in the queue for Tuesday then [next week], for a trial." At this point, Mr. Brody stated that he had "other matters". Kelly J. again intervened somewhat forcefully and told counsel to speak to the Trial Coordinator and see whether there was a judge available next week. She also asked Mr.

Brody to "check your schedule and see if you can accommodate this … Let's see if that's available first [a judge next week]. And then we'll talk about whether or not things can be rearranged on your schedule." [Emphasis added].

[31] After speaking to the Trial Coordinator, the parties reappeared before Kelly J. On behalf of the Crown, Mr. Snow advised as follows: "We did hear back that they would be available to set this down again for seven days starting next Tuesday, October 11". Mr. Snow stated that the Crown and its witnesses would be available next week. Mr. Brody then stated the following: "To start a seven day trial on the sixth day of the scheduled trial would cause a lot of chaos in my schedule. Specifically, I have a very serious sex assault at the end of this month involving two young complainants." Kelly J. challenged Mr. Brody on this point, stating "What's the end of the month though? If you start it [the Liu case] on October 11 … you'd be done by the 19." Mr. Brody agreed but stated, "It's a matter of preparation [of the case at the end of the month]." Mr. Brody also stated, "there's no guarantee" the Liu trial would be reached next week. Kelly J. replied, "I'd make sure that you were given some priority." Mr. Brody continued to stress concerns about preparing his other sexual assault case scheduled for the end of the month. He conceded that it was scheduled for trial on October 31st and if the Liu trial ended on October 19th there would still be eleven or twelve days to prepare for the next trial. His only other scheduled case during this period was a "drinking and driving" matter that "could certainly be rescheduled". Nevertheless, he insisted that his preparation of the other sexual assault trial scheduled for October 31st would be prejudiced. He stated: "I have yet to even begin to prepare him or meet with him [the other client]. I have three scheduled prep meetings with him starting on the 12th, all the way up until his trial date … I would have to cancel essentially three preparation meetings with my client who has an incredibly serious matter at the end of the month … if I started this trial [the Liu matter], I'm afraid that I would be neglected in my preparation for a very important matter coming up at the end of the month. [Emphasis added].

[32] At this point, Kelly J. directed the parties to appear in Practice Court in order to obtain a new trial date. What immediately ensued was further efforts by the Crown to secure early trial dates. In a series of emails between October 5 and 7, 2022, Ms. Garrity obtained a number of "priority dates" from the other Superior Court administrative Crowns in the other Toronto boroughs. These dates were in October, November, and December 2022 and in February 2023. Mr. Brody responded by stating simply, "Not available for any of those dates." He followed up by asking, "Is the court available for those dates?" Ms. Garrity responded, "To the best of my knowledge the dates are available to the court." She also offered to explicitly confirm this for Mr. Brody and she received an email back from the Trial Coordinator confirming that the offered dates were available. There was nothing in Mr. Brody's email explaining why he was unavailable or suggesting that he and his law firm were willing to try to rearrange their schedules, in order to accommodate an early trial date in the Liu case. [Emphasis added].

[33] On October 18, 2022, the parties appeared in Practice Court before Presser J. At this appearance, Ms. Garrity confirmed on the record that the early trial dates in October, November, and December of 2022 and February of 2023 had been offered to Mr. Brody but that the "earliest date … available to Mr. Brody's schedule" was October 2, 2023. The Trial Confirmation Form similarly states that defence counsel's "first available date" was October 2, 2023. The parties returned to Practice Court a month later, on November 15, 2022, to again address the possibility of earlier trial dates. Ms. Garrity stated, "I was in communication with Mr. Brody to see if he could

provide earlier dates, because this October [2023] date was set based on his schedule, and he's advised me that he does not have any earlier dates." Counsel from Mr. Brody's office confirmed, "my instructions are similar to what my friend stated, Mr. Brody does not have earlier dates currently." On both of these appearances in Practice Court, there was once again no explanation for Mr. Brody's unavailability and no suggestion made that Mr. Brody and his law firm would be willing to try to rearrange their schedules in order to accommodate an early trial date in the Liu case. [Emphasis added].

[34] On the above factual record, there are two legal issues in dispute: first, the characterization of delay due to a shortage of judges; and second, delay due to defence counsel's unavailability. This second legal issue in dispute turns on whether any portion of the 12 month period of delay from October 5, 2022 (when the first trial date did not proceed) until October 2, 2023 (when the second trial date was scheduled to proceed) should be characterized as "defence delay". The relevant legal principles relating to defence counsel's unavailability during this period have already been set out above, based on more recent cases like *Hanan*, *Boulanger*, *Albinowski*, and *Bowen-Wright*. I need not repeat them.

[35] Many of the circumstances that are relevant to the assessment of defence counsel's unavailability during this second period of delay in the Superior Court are similar to the circumstances previously discussed above in relation to the first period of delay in the Superior Court. However, there are also important differences. First of all, Mr. Brody's earlier period of unavailability was for a somewhat shorter nine month period. On this subsequent occasion, his unavailability was for a longer twelve month period. In this regard, see *R. v. Bowen-Wright*, *supra* at para. 42. Second, Mr. Brody offered at least one date on the earlier occasion (July 11, 2022) that was within the 30 month *Jordan* presumptive ceiling, albeit the date offered was during the summer sittings and it was unavailable to the Court. On this subsequent occasion, Mr. Brody offered no dates that were within the 30 month ceiling. In other words, the case was now in greater s. 11(b) jeopardy and Mr. Brody's lack of availability was becoming worse. Once again, there was no hint or suggestion that Mr. Brody and his law firm were willing to participate in the new post-*Jordan* culture of trying to proactively and cooperatively reduce and prevent delays in the justice system. In this regard, Mr. Brody's conduct stands in marked contrast to the conduct of defence counsel in *R. v. Bowen-Wright*, *supra* at para. 46, of defence counsel in *R. v. Alli*, *infra* at paras. 5-6 and 11, and of defence counsel in *R. v. Constantino*, *infra* at paras. 58 and 143, who all actively made efforts to prevent looming trial delays in cases which similarly involved unavailable judges. Furthermore, the Court was now offering a significant number of early trial dates and Mr. Brody was unavailable on all of these dates, with no explanation for his unavailability. In this regard, see *R. v. Albinowski*, *supra* at paras. 31-35.

[36] The one new factor that is most damaging to the Applicant Liu is that there is now evidence in the record concerning the reasons for Mr. Brody's unavailability (at least on the one occasion where he addressed this issue). Kelly J. and the Crown worked diligently to make a judge available to commence the Liu trial on October 11 and to conclude the trial by October 19, 2022. Mr. Brody rejected this offer because he was of the view that 11 or 12 days out of court after the anticipated end of the Liu trial would be insufficient time to prepare for his next sexual assault trial, which was scheduled to begin on October 31, 2022. Kelly J. did not accept this explanation, nor do I. Mr. Brody's submissions before Kelly J. were patently unreasonable. He described the trial preparation schedule that would result from Kelly J.'s proposed new trial date for the Liu case as "chaos". He

also stated that he would have to "cancel" his preparation meetings with his client in the upcoming October 31 trial and that his trial preparation would be "neglected". I challenged Mr. Brody, during oral argument, as to the good faith of the position he took before Kelly J. He could not add any new insight concerning why he claimed to be "unavailable" for the present trial, if it was rescheduled during the October 11 to 19, 2022 time period. I am satisfied that 11 or 12 full days out of court, after the conclusion of the Liu trial, would have allowed sufficient time to reschedule Mr. Brody's three trial preparation meetings with his client and it would have allowed Mr. Brody to be fully prepared for his client's sexual assault trial. There was simply no reasonable explanation for Mr. Brody's refusal to accept the October 11, 2022 trial date offered by Kelly J. and the Crown.

[37] All of the above circumstances satisfy me that Mr. Brody's conduct at this stage exhibited a "marked indifference toward delay" and amounted to "illegitimate defence conduct", as those terms were explained by the unanimous Court in *R. v. Cody, supra* at paras. 31-35:

> The determination of whether defence conduct is legitimate is "by no means an exact science" and is something that "first instance judges are uniquely positioned to gauge" (*Jordan*, at para. 65). It is highly discretionary, and appellate courts must show a correspondingly high level of deference thereto. While trial judges should take care to not second-guess steps taken by defence for the purposes of responding to the charges, they must not be reticent about finding defence action to be illegitimate where it is appropriate to do so.
>
> Defence conduct encompasses both substance and procedure — the decision to take a step, *as well as the manner in which it is conducted*, may attract scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to the *Jordan* ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11(*b*) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.
>
> As well, inaction may amount to defence conduct that is not legitimate (*Jordan*, at paras. 113 and 121). Illegitimacy may extend to omissions as well as acts (see, for example in another context, *R. v. McQuaid*, [1998] 1 S.C.R. 244, at para. 37). Accused persons must bear in mind that a corollary of the s. 11(*b*) right "to be tried within a reasonable time" is the responsibility to avoid causing unreasonable delay. Defence counsel are therefore expected to "actively advanc[e] their clients' right to a trial within a reasonable time, collaborat[e] with Crown counsel when appropriate and . . . us[e] court time efficiently" (*Jordan*, at para. 138).
>
> This understanding of illegitimate defence conduct should not be taken as diminishing an accused person's right to make full answer and

> defence. Defence counsel may still pursue all available substantive and procedural means to defend their clients. What defence counsel are not permitted to do is to engage in illegitimate conduct and then have it count towards the *Jordan* ceiling. In this regard, while we recognize the potential tension between the right to make full answer and defence and the right to be tried within a reasonable time — and the need to balance both — in our view, neither right is diminished by the deduction of delay caused by illegitimate defence conduct.
>
> We stress that illegitimacy in this context does not necessarily amount to professional or ethical misconduct on the part of defence counsel. A finding of illegitimate defence conduct need not be tantamount to a finding of professional misconduct. Instead, legitimacy takes its meaning from the culture change demanded in *Jordan*. *All* justice system participants — defence counsel included — must now accept that many practices which were formerly commonplace or merely tolerated are no longer compatible with the right guaranteed by s. 11(*b*) of the *Charter*. [Italics in the original; underlining added for emphasis].

[38] Turning to the second legal issue in dispute in relation to this period of delay, namely, delay due to a shortage of judges, this is the one new factor that favours the Applicant Liu. In my view, the immediate precipitating cause of this second period of delay in the Superior Court was the lack of available judges in the week of October 3, 2022. There are unjustified systemic reasons for this shortage of judges. The failure of the federal government to fill vacancies on the Superior Court, in a timely way, has been discussed by my three colleagues Forestell J. in *R. v. Alli*, 2023 ONSC 5829, Schreck J. in *R. v. Bowen-Wright*, *supra*, and P. Campbell J. in *R. v. Constantino*, 2024 ONSC 491. I adopt their reasoning on this point and have little to add.

[39] The Supreme Court of Canada decided *Jordan* in 2016 and made it clear that the government's neglect of essential "resource issues" related to s. 11(b) was "constitutionally impermissible". As the majority of the Court put it (*Jordan*, *supra* at para. 117):

> We are aware that resource issues are rarely far below the surface of most s. 11(b) applications. By encouraging all justice system participants to be more proactive, some resource issues will naturally be resolved because parties will be encouraged to eliminate or avoid inefficient practices. At the same time, the new framework implicates the sufficiency of resources by reminding legislators and ministers that unreasonable delay in bringing accused persons to trial is not merely contrary to the public interest: it is constitutionally impermissible, and will be treated as such. [Emphasis added].

[40] The Minister of Justice must have known that the new *Jordan* framework for s. 11(b) analysis was less flexible and less forgiving than the old *Askov* and *Morin* framework and that the new presumptive ceilings gave the courts much less margin for error. At the same time, rapid unprecedented population growth and increases in certain serious crimes placed increased demands on the Superior Court, particularly in large urban centres like Toronto. Finally, the

significant pandemic backlog created an entirely new pressure on the workload of the court. The government must have been aware of these significant new pressures. In all these circumstances, the intransigent ongoing failure to fill judicial vacancies in a timely way is inexplicable and inexcusable. As stated above, the immediate precipitating cause of the delays that occurred from October 3 to 5, 2022, was the systemic failure of the federal Cabinet to appoint judges. As I understand the current state of the law, this one factor, standing alone, would require apportioning of responsibility for the 12 month period of delay from October 5, 2022 until October 2, 2023. See: *R. v. Boulanger*, *supra* at paras. 8-9; *R. v. Hanan*, *supra* at para. 7 (S.C.C.); and *R. v. Hanan*, *supra* at paras. 57-59 (Ont. C.A.). Having said that, Mr. Brody could have immediately mitigated almost all of this delay by reasonably agreeing to Kelly J.'s and the Crown's efforts to reschedule the trial for October 11, 2022.

[41] In all the above circumstances, a "fair and reasonable" apportionment of this 12 month period of delay in the Superior Court, as required by *Boulanger* and *Hanan*, is to attribute one third or four months to the systemic failure of the federal government and two thirds or eight months to "defence delay". In the result, by the time the case reached its second trial date on October 2, 2023, the total *Jordan* delay since the information was sworn on February 21, 2019 was now just over 55 months. However, the 17 month "discrete event" in the Ontario Court of Justice and the two periods of "defence delay" in the Superior Court (three and a half months and eight months), meant that the net *Jordan* delay was now approximately 27 months. In other words, the trial could still have proceeded within the 30 month *Jordan* presumptive ceiling at the time when it reached the second trial date on October 2, 2023.

(v) The third and last period of delay in the Superior Court of Justice

[42] The second trial date had originally been scheduled for Monday, October 2, 2023. However, judges of the Court were directed not to sit that day, in order to respect the National Day for Truth and Reconciliation. In addition, the following Monday, October 9, 2023 was Thanksgiving Day. As a result, both weeks scheduled for the Liu trial were short four day weeks. The seven day trial was effectively scheduled to run from Tuesday, October 3, 2023 until Thursday, October 12, 2023.

[43] The parties appeared on Tuesday, October 3, 2023 before Forestell J. who was presiding in "Trials in Holding Court". She advised as follows: "as with the last matter, we do not have a judge for you today. We are hopeful that maybe we'll have a judge by tomorrow." She asked the parties to appear the next day.

[44] On Wednesday, October 4, 2023, Forestell J. advised the parties: "we do not have a judge for this case." Mr. Brody then stated the following: "I can advise that this is the second time this matter's been up … my perspective is that tomorrow [Thursday] would be sort of the cut-off date, being that it's a seven day trial …. If it would start on Friday even at best, there's no way that I think it would finish by the end of next week. And then I have trials the week after … I'm hoping that we can get a courtroom tomorrow." On behalf of the Crown, Mr. Snow stated that he was "eager to have this matter heard … there is some delay jeopardy, given how outdated it's become. It's a very serious matter with a complainant who wishes to have it heard in court." Forestell J. replied that she was "very conscious of the delay and the impact it's having on all the participants. Unfortunately, we simply don't have enough judges to hear these cases." She noted that there were

three juries out deliberating in the Court House and she hoped that one of these judges might become available tomorrow. [Emphasis added].

[45] On Thursday, October 5, 2023, the parties again appeared before Forestell J. She advised: "we don't have a judge available. I'm very sorry." Mr. Brody advised that there would likely be a s. 11(b) Application because "this is now the second trial date that hasn't been reached." Mr. Snow stated that the Crown would "prioritize this" and was "prepared to go into the trials in holding … next Tuesday … we'll do everything we can to offer dates this fall and to prioritize this." Mr. Brody replied: "I'm going to try to do the same. Obviously, my goal is not to bring a s. 11(b) Application. My goal is to have this trial heard in a timely fashion. However … the courts have talked about perpetual availability. Obviously, I can't be available in a week or two from now, I have a schedule that requires … my attention to other clients. However, again, I will do everything that I can to try and accommodate this trial as quickly as possible. And I guess that's something that my friend and I can do between the two of us." The case was then remanded to Tuesday, October 10, 2023 in Practice Court. [Emphasis added].

[46] Over the next three days, prior to the scheduled Practice Court appearance, the parties exchanged an important series of emails about the new trial date, as follows:

- On the afternoon of the final appearance before Forestell J., on October 5, 2023, Ms. Garrity advised Mr. Brody that the Crown was available during three large blocks of time in October to November 2023, in November to December of 2023, and in January of 2024. Each block of time was about a month. Ms. Garrity also stated, "I understand that there is court availability for all of these weeks" subject to "final approval" with the Trial Coordinator;

- Mr. Brody replied that same day: "I'm not available on any of those dates. Defence lawyers are not to be held in perpetual availability. We'll have to canvass dates further down the road, as well as an 11(b) date" [Emphasis added];

- Mr. Brody followed up with another email that same day asking about Crown counsel's availability: "Are you telling me that Ben Snow is available for all of those dates?"

- Ms. Garrity replied that Mr. Snow's "schedule will be reorganized to accommodate the dates offered" and that the case "would be reassigned" for one particular December date if Mr. Snow was not available;

- Mr. Brody then replied, "I am not available for those dates." This was the last email on October 5, 2023 [Emphasis added];

- The next day, October 6, 2023, Ms. Garrity sent an email to Mr. Brody advising of a large number of additional dates when the Crown was available. They were all "further down the road", as Mr. Brody had requested. The five additional blocks of time were as follows: two weeks in early February 2024; two weeks in early March 2024; nine days in late April and early May 2024; two weeks in late May 2024; and 25 days in June 2024. Ms. Garrity stated: "To the best of my knowledge, there is court time available on all of these dates at this time";

- Mr. Brody replied that same day asking the following: "Are you telling me that the Court has now been unavailable on two occasions to hear this matter and now will be available that many dates for the third trial? I want confirmation that the court is available for all of those dates" [Emphasis added];

- In response, Ms. Garrity exchanged emails the next day (October 7, 2023) with the Trial Coordinator confirming the Court's availability in the five additional blocks of time between early February and late June 2024. These emails also confirmed the Court's availability in the three earlier blocks of time between mid-October 2023 and late January 2024;

- Mr. Brody was copied on these October 7, 2023 emails. Although the emails were in response to his request for "confirmation" that the Court was available during the eight blocks of time being offered by the Crown, he did not respond during October 7, 8, or 9, 2023 [Emphasis added].

[47] On October 10, 2023, the parties appeared in Practice Court, pursuant to Forestell J.'s remand, in order to set a new date for trial. Spies J. was presiding. Ms. Garrity advised that she had confirmed with Mr. Brody, pursuant to his request, that "all of the dates that I had provided to him … were also available to the court." She then stated, "we're not in a position to be able to set the trial date today because we have not received Mr. Brody's available dates." Counsel appearing for Mr. Brody stated, "Yes, and that's all correct." Accordingly, the case was remanded for another week in order to obtain Mr. Brody's available dates and then set the new trial date in Practice Court [Emphasis added].

[48] A further chain of emails ensued on October 10, 2023, shortly after the above appearance in Practice Court. The Trial Coordinator again offered an early trial date on November 14, 2023. Mr. Brody replied, "I'm available on August 26, 2024. I would also like an 11(b) date." Ms. Garrity responded, stating that the Crown was available on Mr. Brody's suggested August 26, 2024 date, although it was in the summer sittings. Ms. Garrity also offered a number of dates for the s. 11(b) Application. There was also discussion about potential dates in the fall of 2024. Finally, Mr. Brody sent an email stating, "I believe I will have the week of June 10th [2024] available." This eventually led to an exchange of emails on October 17, 2023 in which both Mr. Brody and the Crown confirmed their availability for trial on June 10, 2024 as the new trial date [Emphasis added].

[49] The Trial Confirmation Form is generally consistent with the above history. It states that the Crown's first available date was October 10, 2023, that the Court's first available date was November 27, 2023, and that Mr. Brody's first available date was June 10, 2024. [Emphasis added].

[50] This final period of delay in the Superior Court, from October 5, 2023 (when the second scheduled trial date did not proceed) until June 10, 2024 (the new trial date), is just over eight months. The legal principles that apply to the proper characterization of this period of delay have been set out above, when analysing the two previous periods of Superior Court delay. Many of the same circumstances that characterized the two earlier periods of Superior Court delay continued to apply. However, there were also some differences.

[51] The first important difference is that the systemic failure of the federal government to fill judicial vacancies in a timely way had now continued for another full year. In other words, the government had knowingly allowed the Court to continue without its full judicial complement during an unprecedented crisis of rapid population growth, increasing numbers of certain serious crimes, and a pandemic backlog. The judgement of Forestell J. in *R. v. Alli*, *supra* at paras. 18-25, was written in late 2023 and it was released on December 11, 2023. She described the situation in the Court between April and December 2023, that is, during this same final period of delay that is at issue in the Liu case. She stated the following, which I adopt:

> This jurisdiction has a very high volume of serious and complex cases. The volume of cases in this jurisdiction has increased appreciably in recent years. As noted by Molloy J. in *R. v. R.D.*, Toronto has a higher percentage of complex trials and long trials than other jurisdictions. There are more homicide trials in Toronto than in any other jurisdiction in Canada. There are also more large 'project' cases in Toronto than in other jurisdictions. The 'project' cases can involve hundreds of accused and multiple, complex applications. The length and complexity of trials has increased with no increase in the number of judges and no increase in the number of courtrooms.
>
> In addition, this jurisdiction continues to deal with a backlog of cases created by the suspension of jury trials for a total of approximately 11 months during periods of the COVID-19 pandemic. While the last jury suspension ended about twenty months ago, the completion of backlogged trials in addition to the normal caseload has created ongoing systemic delay.
>
> …
>
> In April of 2023 when this trial was not reached because there was no judge available to hear it, this jurisdiction had seven judicial vacancies. There are still seven vacancies in this jurisdiction. The number of vacancies has remained essentially unchanged for at least a year.
>
> On May 3, 2023, 20 days after this trial was not reached because of a lack of judicial resources, Chief Justice Wagner expressed his concern about the chronic shortage of federally appointed judges. He pointed out that courts were operating with 10 to 15 per cent of their judicial positions vacant. These comments are applicable to this jurisdiction.
>
> Had the judicial positions in Toronto been filled, this case and others would not have been delayed.
>
> …
>
> Judges of this Court are working at capacity. It is common for judges on the criminal team in Toronto to work through scheduled non-sitting weeks and even through vacation weeks to attempt to ensure that trials

> are heard in a timely fashion. All participants in the process have done everything possible to avoid delay. This case has taken longer than it should have because this court lacked the judicial resources to hear the case in a timely manner. [Emphasis added].

[52] In my view, it was unacceptable for the federal government to have ignored the May 2023 written warning from the Chief Justice of Canada, set out above in *R. v. Alli*, *supra*. This kind of stubborn institutional refusal to respond to a crisis in the justice system is inexcusable and it is "constitutionally impermissible", as the Supreme Court put it in *Jordan*, *supra* at para. 117.

[53] The second possible difference from the earlier periods of delay is that Mr. Brody was now using the language of the new post-*Jordan* culture, at least during one appearance before Forestell J. on October 5, 2023. I have underlined the more important passages above, for emphasis, where Mr. Brody agreed with the Crown to "prioritize" the case and to do "everything that I can to try to accommodate this trial as quickly as possible." Unfortunately, Mr. Brody's actions were <u>not</u> consistent with these words. The tone and content of his scheduling emails with the Crown was aggressive, adversarial, rigid, and uncooperative. They also give the appearance of a lawyer who was trying to build a s. 11(b) record, as opposed to a lawyer who was trying to prevent delay. He was preoccupied with proof or "confirmation" of the court's availability. He was firmly "unavailable" on the numerous blocks of time that were offered by the Court and the Crown for an early trial. He never responded with a willingness to try to rearrange his schedule, for example, by working with the members of his law firm and with all their calendars, in order to give the Liu case priority. He never explained why he was consistently and firmly "unavailable" for another lengthy eight month period of time. The closest he came to any such explanation was when he told Forestell J., "I have trials the week after", in reference to the week of October 16, 2023. He did not elaborate as to whether these "trials" were, for example, drinking and driving cases that could easily be adjourned if he had started a serious Superior Court jury trial on October 10, 2023 and that trial was continuing, which is what the Crown was suggesting. Once again, Mr. Brody's conduct stands in stark contrast to those cases where defence counsel's unavailability on a particular date has been found to be reasonable. For example, in *R. v. Safdar*, *supra* at para. 50, Feldman J.A. stated the following on behalf of the Court:

> In my view, based on the trial judge's factual findings, he was entitled to conclude that this period of delay was not solely or directly caused by the defence. First, and importantly, the April dates were offered as continuation dates in the midst of the ongoing trial. The inadequacy of the trial estimate was therefore part of the cause of the delay. Second, these dates were offered on relatively short notice. T<u>hird, as the trial judge found, defence counsel had agreed to all other dates that were offered, including other dates offered with little notice. The April dates were the only exception. Finally, defence counsel had legitimate reason to decline these continuation dates. One counsel was booked on a serious Superior Court matter for a client who was in custody, while another was scheduled for medical treatment</u>. The trial judge appropriately recognized that counsel could not, in good faith, "compromise one client's interests for another". [Emphasis added].

[54] In my view, Mr. Brody's conduct continued to display the kind of "marked inference to delay" and "illegitimate defence conduct", as described by the Supreme Court in *Cody*, *supra* at paras. 31-35. That conduct contributed significantly to this final eight month period of delay in the Superior Court, together with the federal government's ongoing and aggravated failure to appoint judges in a timely way.

[55] Applying the "contextual approach" to apportioning this period of delay, as described in *Hanan* and in *Boulanger*, I would divide it equally between the above two causes of delay. In other words, one half or about four months should be deducted from the total *Jordan* delay as "defence delay". The remaining half or approximately four months of delay should be included when calculating compliance or non-compliance with the 30 month *Jordan* presumptive ceiling. As a result, the net *Jordan* delay when the presently scheduled trial concludes will be approximately 31 months.

D. CONCLUSION

[56] When analysing the above five periods of delay in this case, I have used rough approximations of the net *Jordan* delay, as each of the five periods progressed. These approximations have been expressed in months. It can be seen that the result of this analysis is that the net *Jordan* delay will be approximately 31 months when the presently scheduled trial concludes on June 18, 2024.

[57] Given that the approximate period of net delay is just over the 30 month *Jordan* ceiling, out of an abundance of caution, I have done a more detailed calculation of the net delay using days rather than months. That more detailed calculation is as follows:

- The first period of delay is the intake period. It extended from February 21 until August 27, 2019. As explained above (at paras. 8-11), this entire period is included in the 30 month *Jordan* ceiling. It is a total of 188 days;

- The second period of delay is the time spent in the Ontario Court of Justice, between the JPT on August 27, 2019 until committal for trial on September 16, 2021. As explained above (at paras. 12-16), this period of delay is separated into two distinct parts. The time from the JPT on August 27, 2019 until the April 14, 2020 date set for the preliminary inquiry is included in the 30 month *Jordan* presumptive ceiling. It is a total of 231 days. The remainder of this period, from April 14, 2020 (when the preliminary inquiry did not proceed) until the committal on September 16, 2021, is "discrete event" delay due to the pandemic and it is not included in the 30 month *Jordan* presumptive ceiling;

- The third period of delay is the time spent in the Superior Court of Justice, between the committal on September 16, 2021 and the first trial date on October 3, 2022. As explained above (at paras. 17-25), after deducting the "defence delay" between March 14, 2022 and July 4, 2022, this period should be included in the 30 month *Jordan* presumptive ceiling. It is a total of 271 days;

- The fourth period of delay is the time spent in the Superior Court of Justice between October 3, 2022 (when the first trial date did not proceed) and the second trial date on

October 2, 2023. As explained above (at paras. 26-41), this 364 day period was apportioned such that two thirds was "defence delay". As a result, one third of this period is included in the 30 month *Jordan* presumptive ceiling. It is a total of 121 days; and

- The fifth period of delay is the time spent in the Superior Court of Justice between October 3, 2023 (when the second trial date did not proceed) and June 18, 2024 (when it is anticipated the third scheduled trial period will conclude). As explained above (at paras. 42-55), this 260 day period was apportioned such that one half was "defence delay". As a result, one half of this period is included in the 30 month *Jordan* presumptive ceiling. It is a total of 130 days.

[58] The five periods of delay set out above, that are included in the 30 month *Jordan* presumptive ceiling, total 941 days. This is clearly over the 30 month presumptive ceiling, which is 913 days. As a result, the s. 11(b) Application is allowed and the trial proceedings in this case are stayed pursuant to s. 24(1) of the *Charter*.

[59] I cannot leave this Application without saying, in conclusion, that it is an embarrassment to the administration of justice that this serious "priority" case, involving alleged sexual abuse of a child, cannot be tried in accordance with the constitutional standard of trial "within a reasonable time".

M.A. Code J.

Released: April 5, 2024

CITATION: R. v. Liu, 2024 ONSC 2022
COURT FILE NO.: CR-23-30000629-0000
DATE: 20240405

ONTARIO

SUPERIOR COURT OF JUSTICE

HIS MAJESTY THE KING

Respondent

– and –

GUO-XIONG LIU

Applicant

REASONS FOR JUDGMENT
ON SECTION 11(B) *CHARTER* APPLICATION

M.A. Code J.

Released: April 5, 2024

CITATION: *R. v. Bowen-Wright*, 2024 ONSC 293
COURT FILE NO.: CR-23-50000298-0000
DATE: 20240115

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
HIS MAJESTY THE KING	*Respondent*	*I. Islow,* for the respondent
– and –		
GIVONN BOWEN-WRIGHT	*Applicant*	*R. Handlarski,* for the applicant
		HEARD: December 5, 2023

RULING
(Application Pursuant to ss. 11(*b*) and 24(1) of the *Canadian Charter of Rights and Freedoms*)

SCHRECK J.:

[1] On May 29, 2023, Givonn Bowen-Wright attended the Superior Court of Justice ("SCJ") in Toronto to begin his trial on firearm possession charges. As is often the case in this jurisdiction, the trial could not proceed because no judge was available. Despite the best efforts of counsel for the Crown and Mr. Bowen-Wright, the trial could not be rescheduled until the first week of December, and was scheduled to end about 30 months and 43 days after Mr. Bowen-Wright was first charged. As this period exceeds the 30-month ceiling for trials in the SCJ established in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, Mr. Bowen-Wright has applied to have the proceedings stayed on the basis that his s. 11(*b*) *Charter* right to a trial within a reasonable time has been infringed.

[2] The Crown opposes the application and submits that there were periods of defence delay, in particular arising out of the defence counsel's unavailability during the fall of 2023. Once the defence delay is deducted, the Crown submits, the net delay is below the ceiling. In the alternative, the Crown submits that any delay over the ceiling is justified on the basis that this was a particularly complex case.

[3] The central issue on this application is the treatment of defence unavailability where a trial has to be adjourned through no fault of the defence. In this case, both the Crown and the defence had availability at various periods between the end of May and December, but the December date was the earliest on which both parties and the court were available. Nonetheless, the Crown submits that because it was available as early as September, all subsequent delay should be attributed to the defence, even though the defence had available dates earlier than that.

[4] As the Supreme Court of Canada made clear in *Jordan,* at para. 111, the days of determining s. 11(*b*) applications by engaging in "complicated micro-counting" are over. Courts must instead conduct a global assessment based on a "bird's eye-view" of the case: *Jordan,* at para. 97. In this case, the trial did not proceed as scheduled because, as is frequently the case in this jurisdiction, no judge was available. This is not an acceptable state of affairs which can be remedied by expecting defence counsel to make themselves available on short notice. Counsel for both parties did everything they could to protect Mr. Bowen-Wright's s. 11(*b*) rights, which were imperilled solely because of institutional shortcomings. The fact that they were unable to do so is not the fault of the defence, nor was this a particularly complex case. The delay in this case was unreasonable. The charges are stayed.

I. FACTS

A. Arrest – The Murder Charge and Appearances in the Ontario Court of Justice

[5] The applicant was arrested on April 26, 2021 and charged together with three co-accused with second degree murder and various firearm possession charges. He appeared in the Ontario Court of Justice ("OCJ") several times over the course of a few months while the defence awaited disclosure. A judicial pre-trial ("JPT") was held on September 3, 2021. On September 23, 2021, the parties scheduled a preliminary inquiry to commence on May 30, 2022.

[6] On the first day of the preliminary inquiry, Crown counsel advised the court that he had concluded that there was no reasonable prospect of conviction on the murder charge or any of the other charges faced by the co-accused. As a result, those charges were withdrawn, leaving the applicant charged alone with the firearm possession offences. As he was no longer eligible to have a preliminary inquiry, the matter was adjourned to June 22, 2022 so that the applicant could consider how to elect his mode of trial. He ultimately elected to have his trial in the SCJ before a judge and jury.

B. Initial Appearances in the Superior Court

[7] The applicant's first appearance in the SCJ was on July 15, 2022, at which time the matter was adjourned to August 12, 2022 as a JPT had been scheduled for July 22.

[8] On August 12, 2022, an agent appearing on behalf of the applicant's counsel requested that the matter be adjourned for three weeks to seek instructions on whether to re-elect the mode of trial:

> AGENT: Your Honour, [defence counsel] has been on vacation for the past two weeks. He needs to discuss the potential of the election.

> So I have instructions to request to adjourn this matter for three weeks to September 2nd to allow for that discussion.
>
> CROWN COUNSEL: That's agreeable, thank you.

The matter was accordingly adjourned to September 2, 2022. As will be seen, the respondent takes the position that this was not a legitimate request and that this period of time ought to be deducted as defence delay.

[9] On September 2, 2022, a seven-day trial before a judge and jury was scheduled to begin on May 29, 2023.

C. Adjournment of the May Trial

[10] On May 29, 2023, the parties appeared before Goldstein J., who advised the parties that there was no judge available to conduct the trial. The parties were advised that this was "the next matter in priority" and it was adjourned to the following day.

[11] On May 30, 2023, the parties advised Goldstein J. that the applicant was prepared to re-elect his mode of trial and that they had agreed on a number of facts and now believed that the trial could be done in three days. Goldstein J. advised them that there were still two trials for which no judge was available and that it was very unlikely that the matter would be reached. The matter was adjourned to June 2, 2023 on the understanding that the parties would be contacted if a judge became available that week. This did not occur.

D. Efforts to Find New Dates

[12] On the same day that the trial was adjourned, counsel began corresponding about finding new trial dates. Defence counsel advised the Crown that he expected another matter of his to resolve, in which case he would be available during the weeks of June 12 and June 19.

[13] Later that day, Crown counsel proposed the weeks of September 18 and October 2 and inquired whether defence counsel had any available dates in July or August. Defence counsel replied that he was unavailable during the weeks of September 18 and October 2, but was available the week of July 31. The Crown does not appear to have responded to the suggestion of the July date.

[14] On June 2, 2023, defence counsel advised the Crown that he was now available during the weeks of June 12 and 19. On June 6, Crown counsel responded in an e-mail as follows:

> The TC [Trial Coordinator] will not permit us to set this matter the week of June 19-23/23. As I understand it has been very challenging getting matters on recently. Please advise whether you have any other dates in the fall. The previous dates provided (Sept 18/23 [7

> days]; Oct 2/23 [5 days]) were specific to Toronto West but we will canvass with the other Boroughs if you have other dates to suggest.[1]

Defence counsel responded the same day:

> I have no other dates in the fall. The next dates I have are February 5, 2024, to February 16, 2024. I am going to write an e-mail to the trial coordinator to explain the situation. I had a two-week trial that collapsed in that timeframe. Unless they have already filled that slot, it is difficult for me to understand why the trial cannot be that week.
>
> I am not sure I mentioned this date before, but I can also do August 21, 2023 to August 25, 2023. Any chance this can work?

Crown counsel responded that the week of August 21 did not work because of "witness issues" and said, "I'm going to suggest we start canvassing other dates. If you get traction with the Trial Coordinator, we can circle back." On June 6, 2023, the Trial Co-Ordinator confirmed that the June dates were not available.

[15] On June 15, 2023, Crown counsel advised defence counsel that she had checked the Etobicoke trial calendar and could offer the week of September 18, 2023 (which had been offered earlier) as well as weeks in late December 2023 and January to March 2024. Defence counsel responded that the only week he was available was February 19, 2024 and that "I currently do not have any availability in the fall, but will be in touch with you if anything collapses."

[16] On June 16, 2023, the parties appeared before Presser J. and explained the efforts that had been made to find trial dates. Crown counsel stated:

> So Ms. Culp [Crown counsel who had been corresponding with defence counsel] had indicated that she tried to make the summer dates work. Unfortunately, there was nothing that worked for the Crown's schedule and Mr. Handlarksi's [defence counsel] schedule. She is suggesting that we bring this back some time in the early fall, maybe early September to see whether anything has opened up. And the Crown will do their best to try and find earlier dates that work for everybody.

A trial was scheduled to begin on February 20, 2024 and the matter was adjourned to September 15, 2023 to canvass earlier dates.

E. Selection of the New Trial Date

[1] At the time, there were four Crown Attorney's offices in Toronto: Etobicoke (which was prosecuting the applicant's matter), North York, Scarborough and Downtown. Trial time in the SCJ was allotted to each, as well as the Federal Crown.

[17] On September 13, 2023, Crown counsel advised defence counsel that the weeks of October 23, October 30, November 14 and December 4 (all of which would have the trial end after the *Jordan* ceiling date of October 26) had become available. Defence counsel responded that he had "just had a matter collapse" and was available on the week of December 4. The trial was accordingly scheduled to begin on that date on the next court appearance on September 15, 2023.

II. ANALYSIS

A. Overview of Applicable Legal Principles

(i) The Jordan Analysis

[18] Since 2016, applications pursuant to s. 11(*b*) of the *Charter* have been governed by the approach set out in *R. v. Jordan*, which is centred on the concept of a presumptive ceiling, that is, a period of time after which delay is presumably unreasonable unless the Crown can justify the length of time the case has taken to come to trial. In this court, that ceiling is 30 months. The period to which the ceiling must be compared is the time from when the charge is first laid until the end of the trial, less any defence delay: *Jordan*, at paras. 63-64.

[19] If the net delay after defence delay is deducted exceeds the ceiling, the delay is presumptively unreasonable unless the Crown can demonstrate that there are exceptional circumstances, which include discrete, unforeseen events and particularly complex cases: *Jordan,* at para. 71.

[20] If the net delay is below the ceiling, the delay is presumptively reasonable unless the defence can show that it took meaningful steps demonstrating a sustained effort to expedite the proceedings and that the case took markedly longer than it reasonably should have: *Jordan,* at paras. 82-91.

(ii) Shared Responsibility

[21] The Supreme Court of Canada had very specific objectives in establishing the new framework in *Jordan.* The Court wished to address a "culture of complacency towards delay" that permeated the criminal justice system, which had "come to tolerate excessive delays": *Jordan*, at paras. 4, 40-41. It made it clear that the attitude and conduct of parties and courts had to change (at para. 107):

> … [T]he ceiling will not permit the parties or the courts to operate business as usual. The ceiling is designed to encourage conduct and the allocation of resources that promote timely trials. The jurisprudence from the past decade demonstrates that the current approach to s. 11(*b*) does not encourage good behaviour. Finger pointing is more common than problem solving.

[22] Preventing delay is a shared responsibility. Crown counsel, defence counsel and the courts all have a role to play and are expected to cooperate with a view to ensuring that trials occur within

a reasonable time: *Jordan*, at paras. 86, 137-139. The legislative and executive branches of government also have a role to play, as was made clear in *Jordan,* at para. 117:

> We are aware that resource issues are rarely far below the surface of most s. 11(*b*) applications. By encouraging all justice system participants to be more proactive, some resource issues will naturally be resolved because parties will be encouraged to eliminate or avoid inefficient practices. At the same time, the new framework implicates the sufficiency of resources by reminding legislators and ministers that unreasonable delay in bringing accused persons to trial is not merely contrary to the public interest: it is constitutionally impermissible, and will be treated as such.

(iii) Defence Delay

[23] As will be seen, the concept of defence delay plays a central role in this application. It was explained in *R. v. Cody,* 2017 SCC 31, [2017] 1 S.C.R. 659, at paras. 28-30:

> In broad terms, the second component is concerned with defence conduct and is intended to prevent the defence from benefitting from "its own delay-causing action or inaction" (*Jordan*, at para. 113). It applies to any situation where the defence conduct has "solely or directly" caused the delay (*Jordan*, at para. 66).
>
> However, not all delay caused by defence conduct should be deducted under this component. In setting the presumptive ceilings, this Court recognized that an accused person's right to make full answer and defence requires that the defence be permitted time to prepare and present its case. To this end, the presumptive ceilings of 30 months and 18 months have "already accounted for [the] procedural requirements" of an accused person's case (*Jordan*, at para. 65; see also paras. 53 and 83). For this reason, "defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay" and should not be deducted (*Jordan*, at para. 65).
>
> The only deductible defence delay under this component is, therefore, that which: (1) is solely or directly caused by the accused person; and (2) flows from defence action that is illegitimate insomuch as it is not taken to respond to the charges. As we said in *Jordan*, the most straightforward example is "[d]eliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests" (*Jordan*, at para. 63). Similarly, where the court and Crown are ready to proceed, but the defence is not, the resulting delay should also be deducted (*Jordan*, at para. 64).

B. Overall Delay and Positions of the Parties

[24] The applicant was charged on April 26, 2021 and his trial was scheduled to end on December 8, 2021. The parties agree that the total delay is 956 days, which exceeds the 30-month ceiling by 1.4 months, or 43 days.[2]

[25] The parties do not agree on whether there was defence delay. The applicant takes the position that there was none. The respondent submits that there were two periods of defence delay: 21 days resulting from a defence adjournment request on August 9, 2022 for the applicant to consider whether to re-elect and 77 days following the rescheduling of the trial due to defence unavailability.

[26] If the applicant is correct, the net delay exceeds the ceiling. The Crown submits that if this is the case, the delay is justified based on the complexity of the case.

[27] If the respondent is correct, the net delay is below the ceiling. The applicant submits that if this is the case, the delay is nonetheless unreasonable because he made sustained efforts to expedite the proceedings and the matter took markedly longer than it reasonably should have.

C. Defence Delay – The Adjournment Request to Obtain Instructions

[28] As noted, the respondent submits that 21 days should be deducted for the period between August 9, 2022 and September 22, 2022, an adjournment requested by the defence in order to obtain instructions as to electing the mode of trial.

[29] The respondent's submission that this was an illegitimate defence request appears to be based on a handwritten note made by the JPT judge on the JPT form that was completed on July 22, 2022. At the top corner of the first page of the form, the JPT judge had written and underlined "Practice Ct. Aug 12/22." Immediately below this, she wrote, "will get instructions to elect 5 day judge or set 7 day jury." The respondent submits that this should be taken to mean that defence counsel had undertaken to get instructions on the election prior to the August 12, 2022 practice court appearance and because he did not do so, the adjournment he requested for that purpose should be deducted as defence delay.

[30] There are two reasons why I do not accept the respondent's submission. First, while the JPT judge noted that the next court appearance was on August 12 and also noted that the defence would obtain instructions on re-election, it is not clear that the two are related. I am not prepared to infer from these notations that defence counsel made an undertaking to obtain instructions by that date. The possibility of re-election is always discussed at JPTs because trials by judge alone are more expeditious and less time consuming than jury trials. The note on the JPT form indicates

[2] In accordance with *R. v. Shaikh*, 2019 ONCA 895, 148 O.R. (3d) 369, at fn.1, I have converted days to months and *vice versa* by treating each month as consisting of 30.417 days, which is approximately 365 divided by 12. Month figures are rounded to one decimal point and days are rounded to whole days.

that the issue was discussed and counsel indicated that he would obtain instructions, but it is not clear that he said that he would do so by August 12.

[31] Second, it is not clear on this record that an earlier trial date would have been set if the defence had made a decision about the election earlier. The JPT notes suggest that the election had a bearing on the length of the trial, but it is not clear that it had any bearing on its timing.

[32] As discussed later in these reasons, the defence behaved responsibly throughout the proceedings and made repeated efforts to prevent delay. The adjournment was requested on the second appearance in the Superior Court in a case that had dramatically shifted from a murder charge to a firearm possession charge only a few months earlier. Given this history, I am not prepared to conclude that this request for a brief adjournment to consider the applicant's election was not "defence actions legitimately taken to respond to the charges." The election is an important step in the proceedings and an accused who takes times to consider it should not risk losing his right to a trial within a reasonable time: *R. v. Barrett*, 2022 ONSC 6334, at para. 30.

D. Defence Delay – Defence Unavailability Between September and December

(i) Overview of the Issue

[33] The second period that the respondent submits should be deducted as defence delay is between September 18, 2023, the first date offered by the Crown and the court after the trial did not proceed on May 29, and the trial date of December 4, 2023, a period of 77 days. The Crown submits that this entire period is defence delay based on *dicta* in *Jordan* and other cases that "the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not": *Jordan*, at para. 64; *R. v. Williamson*, 2016 SCC 28, [2016] 1 S.C.R. 741, at para. 22; *R. v. Thanabalasingham*, 2020 SCC 18, 447 D.L.R. (4th) 310, at para. 9; *R. v. Coulter*, 2016 ONCA 704, 133 O.R. (3d) 433, at para. 44; *R. v. Mallozzi*, 2017 ONCA 644, 390 C.R.R. (2d) 57, at para. 34.

[34] The respondent argues that because the trial would have been completed in the week of September 18 but for the defence's unavailability, all of the subsequent delay was caused by the defence. There are several reasons why I cannot accept this submission.

(ii) Crown and Court Unavailability

[35] First, the portion in para. 65 of *Jordan* on which the respondent relies was immediately qualified by the observation that "[h]owever, periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable." The Crown submits that I should conclude that the Crown and the court were available for the *entire* period after September 18 because defence counsel had said that he did not have availability in the fall, so there would have been no point in the Crown looking for additional dates. In my view, that is not a reasonable inference on this record.

[36] The fact that defence counsel said that he was unavailable in the fall did not relieve the Crown of the responsibility of looking for new dates. Counsel's calendars are not written in stone. Matters collapse and availability changes. Defence counsel had already offered two weeks because

another matter had resolved, and eventually accepted the December 4 date for the same reason. The Crown has far greater access to court scheduling information than did the defence.

[37] In any event, the Crown did not stop looking for dates after defence counsel said that he had no availability in fall. Rather, in September the Crown offered four additional weeks that had not been offered earlier. It is reasonable to conclude that at the time the Crown offered those weeks, those were the only weeks that were available. As a result, I can and do infer that the Crown and/or the court were not available during the weeks of September 25, October 9, October 16, November 6, November 20 and November 27. It follows that it would be unfair to attribute the entire 77-day period to the defence.

(iii) The Need for a Contextual Approach

(a) No "Bright Line" Rule

[38] Second, the *dicta* in *Jordan* must be read in light of several recent authorities, the latest of which is *R. v. Hanan*, 2023 SCC 12, rev'g 2022 ONCA 229, 161 O.R. (3d) 161. There, the Court stated, at para. 9:

> Like the majority and the dissent below, we reject the Crown's proposed "bright-line" rule according to which all of the delay until the next available date following defence counsel's rejection of a date offered by the court must be characterized as defence delay. We agree with van Rensburg J.A. and Tulloch J.A., as he then was, at para. 56, that this approach is inconsistent with this Court's understanding of defence delay. Defence delay comprises "delays caused solely or directly by the defence's conduct" or "delays waived by the defence" (*Jordan*, at para. 66). Furthermore, "periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable" (para. 64). All relevant circumstances should be considered to determine how delay should be apportioned among the participants (*R. v. Boulanger*, 2022 SCC 2, at para. 8). We share the view of the majority and dissenting judges in the Court of Appeal that, in the circumstances of this case, it is unfair and unreasonable to characterize the entire period between June and October 2019 as defence delay (paras. 59 and 136).

[39] It is now clear from *Hanan* and other cases that rather than apply a "bright line" rule, a "contextual approach" that considers all of the relevant circumstances of the case must be applied to determine how delay should be apportioned: *R. v. Boulanger*, 2022 SCC 2, 469 D.L.R. (4th) 63, at para. 8; *R. v. Albinowski*, 2018 ONCA 1084, 371 C.C.C. (3d) 190, at para. 46; *Hanan* (C.A.), at paras. 54-56, *per* van Rensburg J.A., at paras. 136-137, *per* Nordheimer J.A., dissenting; *R. v. Zahor*, 2022 ONCA 449, at paras. 101-102.

(b) Relevant Factors

[40] The factors that must be considered when applying the "contextual approach" will vary depending on the circumstances of each case. In determining what delay, if any, should be attributed to the defence because of defence unavailability, the following factors will usually be relevant:

- the reason for the need to reschedule and whether it was caused by the defence;
- the extent to which the defence was available;
- the reasons for defence unavailability;
- the extent of the notice given of the new available date.

(c) The Reasons for Rescheduling

[41] Why a trial had to be rescheduled will be important in determining how to apportion subsequent delay. Where the defence is responsible for the need to reschedule, it is more likely that delay caused by defence unavailability will be found to be "caused solely or directly by the defence's conduct."

[42] The principle established in *R. v. M.(N.N.)* (2006), 209 C.C.C. (3d) 436 (Ont. C.A.), at para. 23, that "a party who causes an adjournment is responsible for the entire period of delay until the matter can be rescheduled, unless the other party is unavailable for an unreasonable length of time" continues to apply after *Jordan*: *R. v. Picard*, 2017 ONCA 692, 137 O.R. (3d) 401, at para. 117. There is no principled reason why the same approach should not be taken where the Crown or the court causes an adjournment. In such a case, the subsequent delay should not be attributed to the defence unless the defence is unavailable for an unreasonable length of time.

[43] In this case, the issue of the defence's availability in the fall only arose because the trial did not proceed in May, an event for which the defence bears no responsibility: *R. v. Bailey*, 2023 ONSC 2814, at para. 39; *R. v. Arth*, 2022 ONCJ 216, 512 C.R.R. (2d) 233, at paras. 27-28.

(d) The Extent to Which the Defence Was Unavailable

[44] As the defence did not cause the adjournment, an application of the principle in *M.(N.N.)* results in the defence not being responsible for the subsequent delay unless the defence was "unavailable for an unreasonable length of time."

[45] In *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3, at para. 23, the court stated: "Scheduling requires reasonable availability and reasonable cooperation; it does not, for s. 11(*b*) purposes, require defence counsel to hold themselves in a state of perpetual availability." The respondent submits that *Godin*, which was decided before *Jordan*, no longer represents the law. I do not agree. Nordheimer J.A. relied on *Godin* at para. 136 of his dissent in *Hanan* and the Supreme Court of Canada specifically adopted that paragraph: *Hanan* (S.C.C.), at para. 9. See also *R. v. Safdar*, 2021 ONCA 207, 469 D.L.R. (4th) 447, at paras. 49-50; *R. v. Cohen*, 2023 ONSC 5713, at paras.

30-33; *R. v. Joseph,* 2023 ONSC 2833, at para. 33, *R. v. Aden,* 2023 ONSC 766, 523 C.R.R. (2d) 28, at para. 99; *Barrett,* at paras. 52-53.

[46] In this case, the defence was available on four different weeks on which the Crown and/or court were not: the weeks of June 12, June 19, July 31 and August 21. The Crown and the court were available on five different weeks on which the defence was not: the weeks of September 18, October 2, October 23, October 30 and November 13. However, assuming the trial would take five days, only the first two of these would have resulted in the trial finishing before the 30-month ceiling. In my view, both parties were reasonably available, and it certainly cannot be said that the defence was "unavailable for an unreasonable length of time."

(e) Reasons for Unavailability

[47] Although the record is not entirely clear, I am prepared to infer that defence counsel was unavailable throughout the fall because he had matters scheduled for other clients. When he was offered the December date, he accepted it because one of those matters had fallen through. As was observed in *Safdar,* at para. 50, counsel cannot be expected to "compromise one client's interests for another."

(f) Notice

[48] When determining the extent to which a party is reasonably available, regard must be had to the degree of notice given to that party: *Barrett,* at paras. 51-54. Counsel are much more likely to be booked up nearer in the future. In this case, immediately after the May trial was adjourned, the Crown offered only the weeks of September 18 and October 2. It was not until September 13, 2023 that the weeks of October 23, October 30 and November 14 were offered, at which point they were only a month or two in the future.

(iv) Systemic Institutional Issues

[49] *Jordan* requires the court to take a "bird's eye view" of the case. That view reveals that the trial in this matter was scheduled to end on June 6, 2023, almost five months before the *Jordan* ceiling date, but did not proceed because of institutional issues over which the defence had no control and which plague this court on an ongoing basis. Subsequently, the defence suggested four different weeks on which it could conduct the trial, none of which were acceptable to the Crown and/or the court. The Crown initially offered only two weeks. While it later offered three more, none of them would have resulted in the trial finishing before the *Jordan* ceiling date.

[50] While both parties behaved reasonably and cooperated in attempting to reschedule the trial, the fact remains that the need to reschedule was not the fault of the defence but, rather, systemic problems which continue to plague this jurisdiction. In *R. v. Alli,* 2023 ONSC 5829, another case where the trial did not proceed because no judge was available, Forestell J. stated (at paras. 21-25):

> In April of 2023 when this trial was not reached because there was no judge available to hear it, this jurisdiction had seven judicial vacancies. There are still seven vacancies in this jurisdiction. The

> number of vacancies has remained essentially unchanged for at least a year.[3]
>
> On May 3, 2023, 20 days after this trial was not reached because of a lack of judicial resources, Chief Justice Wagner expressed his concern about the chronic shortage of federally appointed judges. He pointed out that courts were operating with 10 to 15 per cent of their judicial positions vacant.[4] These comments are applicable to this jurisdiction.
>
> Had the judicial positions in Toronto been filled, this case and others would not have been delayed.
>
> There is nothing in the nature of this simple case that could be said to justify an exceptional period of delay. The Crown and the defence acted responsibly and cooperatively to move the case forward. The judge who heard the applications ensured that the ruling was delivered in time for the trial to proceed on the first scheduled trial date.
>
> Judges of this Court are working at capacity. It is common for judges on the criminal team in Toronto to work through scheduled non-sitting weeks and even through vacation weeks to attempt to ensure that trials are heard in a timely fashion. All participants in the process have done everything possible to avoid delay. This case has taken longer than it should have because this court lacked the judicial resources to hear the case in a timely manner.

[51] I am aware that *Alli* was not followed in *R. v. Martins*, 2024 ONSC 146, where the court concluded that an adjournment caused by judicial unavailability was an "unexpected discrete event" (at para. 31). That conclusion appears to have been based on an assumption that the Trial Coordinator intentionally scheduled more trials than there were judges available in order to "chip away at the backlog" caused by the COVID-19 pandemic: *Martin,* at para. 33. In doing so, the court noted that the number of judicial vacancies was approximately the same as it had been prior to the pandemic.

[52] I am respectfully unable to agree with the reasoning in *Martins* for two reasons. First, as noted, trials in this jurisdiction are routinely adjourned because of judicial unavailability, so it is difficult to see how this can be viewed as an "unexpected discrete event." Second, the Crown and the justice system have a duty to mitigate delay caused by discrete events: *Jordan*, at para. 75; *Cody*, at para. 48. Regardless of how many judicial vacancies there were before the pandemic, one

---

[3] There has been one judicial appointment to the Toronto Superior Court since the release of *Alli* on December 11, 2023.

[4] https://www.cbc.ca/news/politics/supreme-court-wagner-trudeau-judicial-vacancies-1.6836145

obvious way to reduce the backlog of cases is to make sure that judicial vacancies are filled so that trials do not get adjourned. The state has failed to do this.[5]

[53] In my view, in the circumstances of this case, it would be unfair to apportion the majority of the delay occasioned by these systemic problems to the defence, as the Crown submits I should. As noted in *Jordan*, at para. 117, delay caused by the insufficiency of resources "is not merely contrary to the public interest: it is constitutionally impermissible, and will be treated as such." The remedy for ongoing systemic delay cannot be an expectation that the members of the defence bar will compensate for it by making themselves available on short notice. To do so would be to allow delay to become part of "business as usual": *Jordan*, at para. 107.

(v) Apportioning the Delay

[54] I am not persuaded that any of the 77-day period between September 18 and December 8 should be apportioned to the defence because it was unavailable to conduct a trial within the following two and half months. If I am wrong and some portion should be apportioned to the defence, it should be no more than a third to a half of that period, or approximately 26 to 39 days. This would bring the net delay to between 30.2 and 30.6 months. On any of these scenarios, the delay exceeded the ceiling. As a result, the delay is presumptively unreasonable unless the Crown can demonstrate that there were exceptional circumstances.

E. Particularly Complex Case

[55] The Crown submits that any delay in excess of the ceiling was justified on the basis that this was a particularly complex case. Crown counsel acknowledges that there is nothing complex about the case now, but submits that it was complex in its early stages when there were four co-accused charged with second degree murder.

[56] The circumstances in which the complexity of a case creates an exceptional circumstance justifying delay in excess of the ceiling were described in *Zahor*, at para. 105:

> A case may be particularly complex where it requires a great deal of trial time or preparation time "because of the nature of the *evidence* or the nature of the *issues*": *Jordan*, at para. 77 (emphasis in original). Voluminous disclosure, a large number of witnesses, significant expert evidence, charges extending over a prolonged period of time, multiple charges, several pre-trial applications, novel or complicated legal issues, numerous significant issues in dispute, multiple co-accused tried together, and an international dimension to the case are all examples of particular complexity: *Jordan*, at para. 77; *R. v. Bulhosen*, 2019 ONCA 600, 377 C.C.C. (3d) 309, at para.

[5] Since both *Alli* and *Martins* were released after this application was argued, counsel were invited to and did provide written submissions with respect to the impact of those decisions.

79, leave to appeal refused, [2019] S.C.C.A. No. 423 (*Bulhosen*), and [2019] S.C.C.A. No. 370 (*Kompon*).

[57] While complex cases often involve serious charges, the fact that a charge is serious does not, on its own, establish complexity: *R. v. Bulhosen*, 2019 ONCA 600, 377 C.C.C. (3d) 309, at para. 49. Indeed, as observed in *Jordan*, at para. 78, "[a] typical murder trial will not usually be sufficiently complex to comprise an exceptional circumstance."

[58] The Crown bears the burden of rebutting the presumption that delay in excess of the ceiling was unreasonable. The Crown has attempted to do so in this case on the basis that there were initially four co-accused and that there was "voluminous disclosure." When I asked Crown counsel during submissions to elaborate on this, she replied that "there would have been" expert reports and cell tower evidence and pointed out that it took some time for complete disclosure to be made.

[59] A mere assertion by the Crown that the disclosure was "voluminous" is not sufficient to establish complexity. There is nothing in the record before this court to indicate the volume of the disclosure, the number of anticipated witnesses, or whether there were any legal issues that required extensive preparation. It appears that the disclosure that was provided by September 9, 2021, a little over four months after the charge was laid, was sufficient to allow the parties to schedule a preliminary inquiry. The preliminary inquiry was scheduled to take only seven days, and did not actually take place as the Crown withdrew the murder charge.

[60] This case bears none of the hallmarks of complexity. As a result, the Crown has failed to justify the delay in excess of the ceiling.

F. Delay Below the Ceiling

[61] Given my conclusion that the delay in this case exceeded the ceiling, it is unnecessary for me to consider whether this was one of the rare and clear cases where delay below the ceiling was unreasonable. However, I would note that the defence did appear to make sustained efforts to expedite the proceedings, and but for the systemic issues, the trial would have proceeded on May 29, 2023: *Alli,* at para. 26.

III. DISPOSITION

[62] The application is granted. There will be an order pursuant to ss. 11(*b*) and 24(1) of the *Charter* staying the proceedings.

Justice P.A. Schreck

Released: January 15, 2024

CITATION: *R. v. Bowen-Wright*, 2024 ONSC 293
COURT FILE NO.: CR-23-50000298-0000
DATE: 20240115

ONTARIO

SUPERIOR COURT OF JUSTICE

HIS MAJESTY THE KING

– and –

GIVON BOWEN-WRIGHT

RULING

P.A. Schreck J.

Released: January 15, 2024

R. v. Campbell

Alberta Judgments

Alberta Court of Queen's Bench

Judicial Districts of Calgary and Edmonton

McDonald J.

Judgment: November 15, 1994.

[1994] A.J. No. 866 | [1995] 2 W.W.R. 469 | 25 Alta. L.R. (3d) 158 | 160 A.R. 81 | 25 W.C.B. (2d) 397

Between Her Majesty the Queen, respondent, and Shawn Carl Campbell, applicant And between Her Majesty the Queen, respondent, and Ivica Ekmecic, applicant And between Her Majesty the Queen, respondent, and Percy Dwight Wickman, applicant

(227 pp.)

Case Summary

Statutes, Regulations and Rules Cited:

Act of Settlement, 1701, 12 & 13 William III, c. 2. Alberta Regulation 116/94. An Act for the Further Limitation of the Crown, and better securing the Rights and Liberties of the Subject, relating to the Commissions and Salaries of Judges, 1760, 1 Geo. III, c. 23. Canadian Charter of Rights and Freedoms, 1982, s. 7, 11(a), 11(b), 11(c), 11(d), 14, 24. Civil Procedure Acts Repeal, 1879, c. 59. Constitution Act, 1867, ss. 96, 99, 100. Courts Act, 1971, c. 23, s. 18(2). Courts of Justice Act, S.O. 1984, c. 11, s. 56(1). Criminal Code, ss. 90(1), 145(5). Environmental Protection Act. Highway Traffic Act. Income War Tax Act, S.C. 1932, c. 44. International Bar Association Code of Minimum Standards, "the Jerusalem Code", s. 4 Judges Act, *R.S.C. 1985, c. J-1, ss. 25*(1), 29.1, 55. Management Employees Pension Plan Regulation, A.R. 366/93, s. 75. Narcotic Control Act. Oaths of Office Act, R.S.A. 1980, c. O-1, s. 3. Pension Act. Provincial Courts Act, R.S.O. 1980, c. 398, ss. 5(4), 10(4), 12. Provincial Court Judges Act, S.A. 1981, c. P-20.1, ss. 1(a), 1(b), 2(1), 2(5)(b), 6(1), 6(2), 7(1), 7(2), 7(3), 10(1), 10(1)(a), 10(1)(b), 10(1)(c), 10(1)(d), 10(1)(e), 10(2), 10(3), 10(4), 11, 11(1), 11(1)(b), 11(1)(c), 11(1)(e), 11(2), 11(3), 11(4), 11(5), 11(6), 13, 13(1)(a), 13(1)(b), 17, 17(1). Provincial Judges and Masters Statute Law Amendment Act, S.O. 1983, c. 78, s. 35. Provincial Judges and Masters in Chambers Pension Plan Regulation, A.R. 265/88, s. 25. Provincial Judges and Masters in Chambers Pension Plan Amendment Regulation, A.R. 29/92. Supreme Court Act, 1981, c. 54, s. 12(3). United States Constitution, Art. 3. Universal Declaration on the Independence of Justice, s. 2.21, 2.2(1)(a). Young Offenders Act.

Courts — Judges — Independence of judiciary — Financial security — Disqualification — Bias.

Motions for stays of various criminal charges against three accused on the basis of reasonable apprehension of bias. Defence counsel in several routine criminal matters submitted that an Alberta Order-in-Council rolling back judges' salaries by five percent compromised the independence of the judiciary and therefore deprived the accused persons of the right to be tried before "an independent tribunal" as guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms. The provincial judges in question referred the matter to the Queen's Bench Court. HELD: Applications dismissed.

The independence of the judiciary rested on three essential conditions: Security of tenure, financial security and institutional or administrative independence. The "purposive" analysis required for Charter section 11(d) meant that the Order-in-Council reducing judges' salaries violated the constitutional guarantee of judges' financial security, and was therefore of no force and effect. This guarantee applied to both federally and provincially appointed judges.

There was a "constitutional obligation" to maintain judges' financial security by increasing their salaries to correspond with the cost of living and by maintaining their pensions as well. Moreover, certain sections of the Alberta Provincial Court Judges Act (PCJA) dealing with supernumerary judges, the judicial council and statutory grounds for removal of judges were of no force and effect because they infringed the "security of tenure" requirement for judicial independence under Charter section 11(d). As well, certain powers of the Attorney General in the PCJA to designate days of sitting and residence of a judge were declared invalid and a violation of Charter section 11(d) because they restricted the "institutional independence" of the judiciary. Since the court had declared invalid both the offending statute sections and Order-in-Council, judicial independence was no longer compromised and the accused persons at Bar could therefore receive trial before an independent tribunal pursuant to Charter section 11(d).

R.F. Taylor and P.B. Michalyshyn, for the Crown. J.A. Legge, for the Accused, Campbell and Ekmecic. P.B. Gunn, B.S. Pannu and L.H.L. Nelson, for the Accused Wickman.

Table of contents and Executive summary of the Reasons for Judgment of the Honourable Mr. Justice D.C. McDonald.

(This does not form part of the judgment, and its contents should not be regarded as a pronouncement by the court. The contents are intended only to be an aid to the reader.)

A. The Origins of the Present Motion in the Cases of R. v. Campbell and R. v. Ekmecic.

B. The Origins of the Present Motion in the Case of R. v. Wickman:.

C. The Relationship of the Arguments put Forward in the Calgary Cases and Wickman Case.

D. The Functions of the Provincial Court of Alberta.

E. The Interpretive Approach to Judicial Independence as Guaranteed by s. 11(d) of the Charter.

F. "Financial Security" - general.

-The effect of the Act of settlement 1701 and the Act of 1760 is that in England judges' salaries may not be reduced.

-"Fixed and provided: s. 100 of the Constitution Act

1867.

The court held that the effect of this provision is

that the salaries of Canadian superior court judges

(for example, Court of Queen's Bench) may not be

reduced. The guarantee of judicial independence in

s. 11(d) of the Charter of Rights must guarantee the

same financial security to Provincial Court judges,

for persons charged with an of fence must receive

the same guarantee of independence in the Provincial

Court.

-International Standards

-The position in the United States

-A purposive analysis of the s. 11(d) guarantee of "financial security" as a condition of judicial independence in Canada: such an analysis of the purpose of "security" leads to the conclusion that a reduction in the salaries of Provincial Court Judges could reasonably be perceived as an infringement of judicial independence.

-The March 31, 1994 Order in Council reducing the judges' salaries by 5% violates the constitutional guarantee of financial security which the court holds is applicable to federally-appointed judges and to Provincial Court judges. The court held that the reduction cannot be supported as being part of an "overall economic measure" unless it is the result of a statutory provision applicable to all citizens, such as provincial income tax. Thus it is not constitutionally permissible to defend a reduction in judges' salaries on the basis that it is part of a measure applicable to all other person who are paid from the public purse. The Order in Council is held to be invalid. But the defence cannot succeed in obtaining an order staying proceedings, or an order of prohibition and certiorari, because, the Order in Council having been declared to be invalid, the reduction in salaries no longer exists in law. So there is no longer a violation of financial security.

-The court held further that there is a constitutional obligation to maintain the financial security of the judges by increasing their salaries to correspond with increases in the cost of living. However, the information placed before the court does not permit it to decide in these cases whether this obligation has not been met.

-The court rejected the defence argument that s. 11(d) of the Charter, in guaranteeing financial security as an essential condition of judicial independence, requires either the existence of a statutory committee to decide or make recommendations about judges' salaries, or the application of the formula used between 1980 and 1989 (809 of the salaries of judge of the Court of Queen's Bench): That formula might or might not result in attaining the minimum guaranteed constitutionally.

- The court also rejected the defence argument that there may be a perception that, because the judges may be seen to be negotiating salaries, they lack independence.

- The salaries of judges of the Court of Queen's Bench are indexed up to an annual limit, and in addition a report is made every three years to Parliament by a "Triennial Commission" of non-judges. But the recommendations of the Triennial Commissions as to salaries have not been implemented, and in any case the Commissions make recommendations on the adequacy of salaries which reflect other considerations than increases in the cost of living. As a result imposition constitutionally of a formula requiring Provincial Court judges' salaries to be increased to the same degree as those of Queen's Bench judges (less a 20 per cent discount) might require the province to pay salaries in an amount exceeding the minimum which is required constitutionally.

- The court rejected several miscellaneous attacks on the statutory power to fix salaries.

-Security of pension

G. Security of Tenure - supernumerary judges
- The Court held that supernumerary judges are not appointed at pleasure. The Court held that they may be removed from office only on the same grounds as full-time judges.

H. Security of Tenure - provisions for removal of judges
- The Court held that some of the statutory grounds for removal are invalid.

- The Court held that the Provincial Judges Act provision for inclusion of non-judges in the Judicial Council or a committee of the Council for disciplinary purposes renders the provisions invalid.

- But the defence in these cases may not invoke the invalidity of these provisions, for, these provisions having been held to be invalid, they no longer infringe judicial independence.

I. Institutional Independence of the Provincial Court:
Designation of days of sittings: The Court held that the Provincial Court Judges Act provision empowering the Attorney General to designate the days of sittings is invalid.

Designation of residence of a judge: The Court held that the Provincial Court Judges Act provision empowering the Attorney General to designate the place of residence of a judge is invalid.

But the defence in these cases may not invoke the invalidity of these provisions, as they no longer exist in law and therefore they do not impair the independence of the Provincial Court

J. Remarks Made by Premier Klein:

- The Court held that certain remarks made by Premier Klein did not constitute a direct attack on the independence of the Provincial Court.

- The Court rejected the defence argument that the Premier's remarks were made for an "ulterior motive".

K. Implications of the Action Recently Commenced by Some Individual Provincial Court Judges and by the Alberta Provincial Court Judges' Association:

- The Court held that to some extent the allegations made in that case have been considered in this judgment, and to that extent any perception of lack of independence has been removed.

- The Court held that in any event the allegations of law made by the judges in their Statement of Claim would be mere evidence of their opinion, and hearsay and therefore could not form the basis for a conclusion that a reasonable, informed person would perceive the Provincial Court as lacking independence.

L. Do the violations of Judicial Independence vitiate the Trial Proceedings Before Judge Ayotte in Which the Evidence has Already Been Heard?

- The Court held that they do not.

M. Conclusion.

McDONALD J.

1 These reasons for judgment apply to all three cases: R. v.Campbell; R v. Ekmecic; and R. v. Wickman.

A. The Origins of the Present Motion in the Cases of R. v. Campbell and R. v. Ekmecic:

2 The cases of Campbell and Ekmecic were brought in Calgary. I shall refer to them as "the Calgary cases". Counsel for the defence in both cases is Mr. Legge. Otherwise the two cases are unrelated. Mr. Campbell is charged that he:

> On or about the 19th day of July, 1993, at or near Calgary, Alberta, being a person named in an appearance notice that was confirmed by a Justice, did fail, without lawful excuse, to attend court in accordance therewith, contrary to Section 145(5) of the Criminal Code of Canada.
>
> On or about the 4th day of May, 1993, at or near Calgary, Alberta, did unlawfully have in his possession a prohibited weapon, to wit: Nunchukas, contrary to Section 90(1) of the Criminal Code of Canada.

The Crown proceeded summarily. Mr. Campbell pleaded not guilty, and a trial date was set for May 4, 1994, at, 9:30 am. before the presiding Provincial Court Judge in Court Room 406.

3 Mr. Ekmecic was charged that he:

> On or about the 24th day of November, 1993, at or near Calgary, Alberta, did unlawfully assault Jozo Ekmecic, contrary to section 266 of the Criminal Code of Canada.

The Crown proceeded summarily. Mr. Ekmecic pleased not guilty, and a trial date was scheduled for May 4, 1994, at 2:00 pm., before the presiding Provincial Court Judge in Court Room 406. On May 4, in another case before The Honourable Judge James of the Provincial Court, in Calgary, Mr. Legge was representing one John David Tandberg. The Crown sought the detention of the accused on two break and enter charges, and that existing judicial interim release on other charges be revoked. Mr. Legge made a submission that the Provincial Court of Alberta lacked independence as required by s. 11(d) of the Canadian Charter of Rights and Freedoms, which states:

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

> not insulate a direct diminution in judges' salaries from the clear mandate of that Clause; the Constitution makes no exceptions for "nondiscriminatory" reductions.

69 The Framers of the United States Constitution did not expressly guarantee judicial independence, as does s. 11(d) of the Canadian Charter of Rights and Freedoms. They did include art. 3's prohibition against discrimination of judicial salaries, of which Burger C.J. said in United States v. Will (at p. 221):

> As well as promoting judicial independence, it ensures a prospective judge that, in abandoning private practice - more often than not more lucrative than the bench - the compensation of the new post will not diminish. Beyond doubt, such assurance has served to attract able lawyers to the bench and thereby enhances the quality of justice. (Emphasis added.)

However, the Framers left the question of increases in judicial salaries, "to meet such contingencies as inflation" (p. 219), to "the integrity and sound judgment of the elected representatives [in Congress] to enact increases when changing conditions demand" (p. 227).

(f) A purposive analysis of the s. 11(d) guarantee of "financial security" as a condition of judicial independence in Canada:

70 So far, under the title "financial security', I have reviewed the history of this component of judicial independence. I turn now to undertake a purposive analysis.

71 The "financial security" condition of the guarantee of judicial independence must receive "a large and liberal interpretation" (the phrase used by Viscount Sankey in Edwards v. Attorney General for Canada, *[1929] 3 W.W.R. 479* at 489 (P.C.), held in Hunter v. Southam Inc., *[1984] 2 S.C.R. 145* at 155 to be applicable to the Charter. Indeed what is required is

> a generous interpretation avoiding what has been called "the austerity of tabulated legalism" suitable to give individuals the full measure of the fundamental rights and freedoms referred to (per Lord Wilberforce, in Minister of Home Affairs v. Fisher, [1980] A.C. 319 (P.C.) referring to the Bill of Rights incorporated in the Bermudian Constitution; the passage was cited with approval by Dickson J. (as he then was) in Hunter v. Southam Inc., supra at 156.)

72 The purpose of a constitutional guarantee of financial security to judges is to ensure that judges are provided adequate salaries, pensions and other benefits and thus to relieve them of concern that they and their families will suffer materially from having accepted a judicial appointment. No doubt a judge upon accepting a judicial appointment has thus accepted that the salary and pension then established by law will apply to him or her in the beginning; if the new judge's previous earnings exceeded the judicial salary, he or she was prepared to endure reduced earnings for' the sake of an opportunity to perform an important public service for a salary and pension which he or she may reasonably assume will not be changed significantly to his or her disadvantage. The judge is not permitted to "moonlight"; the Provincial Court Judges Act s. 12 prohibits a judge from carrying on or practising 'any other business, profession, trade or occupation" as does s. 55 of the federal Judges Act, *R.S.C. 1985 c.J-1*. If the government (or legislature) of the day fails to increase judicial salaries from time to time at least in proportion to the increase in the cost of living (or the increase in some similar index), judges and their families may find it more difficult to meet their obligations, some of which may have been incurred before the judicial appointment. The problem is particularly serious in the case of young judges, appointed when they are in their thirties or forties, especially if they have young children. In turn, this aspect is even more serious because more women judges are being appointed than was the case in past years, for those judges are often appointed when they are young (younger than the average male appointee) and have young children.

73 The course of wisdom and sound policy points to the maintenance of judicial salaries at least in correspondence with increases in living costs. Judges who feel that they are unfairly treated are, even unconsciously, less likely than would otherwise be the case to respond unhesitatingly and vigorously to the dictates of heavy caseloads. They are likely to become, even unconsciously, more exposed to the physical and mental jadedness that can too easily occur from being overburdened by the workload. A judge who feels protected against the ravages of inflation and thus

feels fairly treated by the system, and who is not pressed daily by concerns about his or her financial security, is more likely to work above and beyond the call of duty, than if his or her income is allowed to wither in real terms. As Justice Lorna E. Lockwood of the Supreme Court of Arizona said in "An Independent Judiciary", an article published in Winters, Handbook for Judges (1975: American Judicature Society), at p. 54:

> Another threat [to independence] is economic. As a public employee a state judge is frequently at a disadvantage because of inadequate salary. He cannot enter into competition with practising lawyers, even if he possesses superior ability, and public salaries almost never equal private compensation. The judge usually has a family to support and educate. If he is beset with tensions and worries over his personal problems. it is difficult to maintain a calm. impartial judicial attitude at all times. (Emphasis added)

74 In Canada it is inaccurate to refer to a judge as a "public employee" because an employee or, to use legal terminology, a "servant", is subject to the control of his or her employer or "master" as to the manner in which he or she performs his or her duties. A judge is not subject to the control of the Crown (the executive government) or of the legislature as to the manner in which he or she performs his or her judicial functions: that is the essence of judicial independence. Allowing for the inappropriateness of that phrase in Canada, everything else Justice Lockwood said is applicable to Canadian judges and in particular to the judges of the Provincial Court of Alberta.

75 A separate and distinct point is that if the judges of a court are not protected as to their incomes in relation to living costs, the prospect of a judicial appointment will lose its attractiveness to lawyers of great ability and first-class reputation. There will be a greater likelihood that the persons who are available as prospective appointees will not include lawyers whose appointment would lend stature and distinction to the court. Those lawyers will prefer to remain in private practice. There will be an increased risk that a court which has not attracted the best possible candidates will no longer be resistant to interference by the executive government to the extent that one may expect of a truly independent tribunal. Later in this section I shall return to the subject of the effects of a failure to increase judges' salaries to meet increases in the cost of living.

76 The argument advanced by defence counsel in these cases is that those concerns have not been positively addressed by the successive governments of Alberta in very recent years, in regard to judges of the Provincial Court. It is not for me, in the context of the issues raised in this case, to make any comments which could be interpreted as being critical of the successive provincial governments or as suggesting that on the part of those governments there has been a lack of wisdom or a failure to adopt sound policies. Whether a policy is wise or sound is a matter which lies in the realm of the executive and legislative branches of government, not that of the judiciary. Assuming (without deciding) that the policies of the provincial governments have been unwise and have not been sound, that is irrelevant to the issue of law which I must decide, namely, whether the salaries paid to Provincial Court judges, and especially the manner in which they are fixed, fail (when viewed in the context of financial benefits as a whole) to measure up to that "financial security" which is a condition of the independence of the judges of the Provincial Court.

77 In Valente, at p. 704, Le Dain J. spoke of the condition of "financial security" as follows (I have already quoted this passage, but I reproduce it here for the convenience of the reader):

> The second essential condition of judicial independence for purposes of s.ll(d) of the charter is, in my opinion, what may be referred to as financial security. That means security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to a pension and a pension that depends on the grace or favour of the Executive.

At p. 705-6 he added:

> The principal objections to the manner in which the salaries of provincial court judges are provided for is [sic] that they are not fixed by the legislature and they are not made a charge on the Consolidated Revenue Fund. These two requirements have traditionally been regarded as affording the highest degree of security in respect of judicial salaries. Section 100 of the constitution Act, 1867 requires that the salaries of superior, district and county court judges be fixed by Parliament. The salaries of these and other federally-appointed

> judges are fixed by Parliament in the Judges Act, which provides in s. 33(1) that the salaries payable under the Act shall be paid out of the Consolidated Revenue Fund. In all of the other provinces the salaries of provincial judges are, as in Ontario, fixed by the executive government by regulation. In some, but not all Provinces, they are paid out of the Consolidated Revenue Fund.
>
> Although it may be theoretically preferable that judicial salaries should be fixed by the legislature rather than the executive government and should be made a charge on the Consolidated Revenue Fund rather than requiring annual appropriation, I do not think that either of these features should be regarded as essential to the financial security chat may be reasonably perceived as sufficient for independence under s. 11(d)of the charter. At the present time in Canada the amount of judges' salaries is a matter for the initiative of the Executive, whether they are fixed by act of the legislature or by regulation. Moreover, it is far from clear that having to bring proposed increases to judges' salaries before the legislature is more desirable from the point of view of judicial independence, and indeed adequate salaries, than having the question determined by the Executive alone, pursuant to a general legislative. authority. In the case of the salaries of provincial court judges in Ontario, assurance that proper consideration will be given to the adequacy of judicial salaries is provided by the role assigned to the Ontario Provincial Courts Committee, although I do not consider the existence of such a committee to be essential to security of salary for purposes of s. 11(d). The essential point, in my opinion, is that the right to salary of. a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge.

78 The position stated by Le Dain J. must be assumed to have taken into account the purposive approach to interpretation of the constitutional guarantee, and the need to give that guarantee a large, liberal and generous interpretation. But his decision in Valente focused upon the procedure by which Provincial Court judges' salaries are fixed. His decision related to the "principal objections" which had been made "to the manner in which the salaries of Provincial Court judges are provided for", namely, "that they are not fixed by the legislature and they are not made a charge on the Consolidated Revenue Fund." The Provincial courts Act, R.S.O. 1980, c.398, and its successor, the courts of Justice Act, 1984, provided that the salaries of provincial court judges be fixed by regulation made by the Lieutenant Governor in Council after the latter received recommendations concerning the salaries from the Ontario Provincial Courts Committee, which was a body established statutorily pursuant to a 1983 statute, the Provincial Judges and Masters statute Law Amendment Act, 1983, 1983 (Ont.), c.78. Pursuant to 5.35 of that Act, the Committee had three members: one appointed by provincial court and family court judges' associations; one appointed by the government; and the third, the chairman, appointed jointly by the associations and the government. The annual report and recommendations of the Committee were to be laid before the Legislative Assembly.

79 Le Dain J. noted that in all the provinces, as in Ontario, the salaries of provincial court judges were fixed by the executive government by regulation. He had said (at pp. 693-4) that the constitutional guarantee of security of salary and pension is not the same in the case of provincial court judges as it is in the case of superior court judges (i.e. federally-appointed judges). In the case of federally-appointed judges, there is an express provision in s. 100 of the constitution Act, 1867, that their "salaries, allowances and pensions shall be fixed and provided by the Parliament of Canada". He added, in regard to s. 100 and s. 99 (which deals with security of tenure):

> These provisions are generally regarded as representing the highest degree of constitutional guarantee of security of tenure and security of salary and pension. They find their historical inspiration in the provisions of the Act of settlement of 1701 [12 & 13 Will. 3, c.2], which provided that judges should hold office during good behaviour, subject to removal on an address of both Houses of Parliament, and that their salaries should be "ascertained and established".

He held that if the same level of constitutional guarantee were to be accorded to Provincial Court judges by interpretation of s.ll(d) of the Charter, that "would be, in effect, to amend the judicature provisions of the Constitution." He then continued:

CITATION: R. v. Downey, 2024 ONSC 2157
COURT FILE NO.: CR-22-10000121-0000
DATE: 20240415

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HIS MAJESTY THE KING	)	*P. Leishman* for the Crown
	)	
– and –	)	
	)	
MARLON DOWNEY	)	*M. Anevich and C. Angelini* for Marlon Downey
	)	
Applicant	)	
	)	
	)	**HEARD at Toronto:** April 4th, 2024
	)	

J. K. PENMAN J.

Overview

[1] On November 25, 2020, Marlon Downey was charged with a series of human trafficking charges in relation to one complainant. On the same day he was arrested for a separate set of similar offences. That case has since been stayed for delay although I understand that decision is currently under appeal. Mr. Downey has been in custody since his arrest.

[2] Mr. Downey's first appearance in provincial court was on November 26, 2020. Mr. Downey's first trial was scheduled to take place June 19, 2023, but could not be reached because a judge was not available. His trial is now currently scheduled to take place April 22, 2024, through May 3, 2024, a delay of 41 months and 8 days.

[3] As this period exceeds the 30-month ceiling for trials in the Superior Court established in *R. v. Jordan*, 2016 SCC 27, Mr. Downey now applies to have the proceedings stayed on the basis that his s. 11(b) *Charter* right to a trial within a reasonable time has been infringed.

[4] The defence position is that the main reason for delay is a lack of judicial resources. Delays in providing disclosure and securing a direct indictment also contributed. They argue that the Covid-19 pandemic cannot account for the delay as the system had since adapted to the 'new normal' post covid. Nor were there any delays caused by adjournments due to covid related court closures or jury blackout periods.

[5] The Crown opposes the application and submits that the delay is under the 30-month ceiling. As per *Jordan*, they argue that the periods of delay are largely due to a 'discrete exceptional circumstance', namely the pandemic and should not be counted within the 30-month time frame. The Crown points out that Mr. Downey chose trial by judge and jury and that the jury blackout period was in place resulting in his case not being scheduled. Second, the COVID-19 pandemic created scheduling challenges. Finally, there is a period of defence delay related to counsel's unavailability when rescheduling the trial dates.

[6] On April 8th I advised counsel that I was granting the defence application. These are my reasons.

Appearances in Provincial Court

[7] Mr. Downey made his first appearance in provincial court on November 26, 2020. It was not until early of April 2021 that disclosure was provided. On May 11, 2021, a judicial pre-trial was held and on June 1, 2021, the parties met with the trial coordinator to set two days for the preliminary hearing.

[8] The earliest date available to the court was in August of 2021, but the Crown was unavailable for the entire month. Dates were available in September for the court and the Crown but the defence was not available. The Crown was not available after that from October 2021 until March of 2022. March 7th and 8th, 2022 were selected for the preliminary hearing.

[9] Efforts were made by the defence to secure earlier dates given Mr. Downey was in custody, including trying to arrange a judicial pre-trial. The Crown's first availability for a pre-trial was six weeks later. The defence then had the matter brought before a judge on June 15th, 2021. The assigned Crown did not attend, and the matter then came back on July 14th, 2021, and the issues were discussed. Between this appearance and July 27th, 2021, the Crown decided to seek a direct indictment.

Appearances in Superior Court

[10] The matter appeared for the first time in Superior Court in February of 2022.

[11] On April 1, 2022, a JPT was held, and it was agreed the trial would take ten days with five days of pre-trial motions. Those motions were to be vacated on agreement of counsel if they were heard earlier in Mr. Downey's other matter.

[12] Dates were set with the trial coordinator on April 20, 2022. The pre-trial motions were set for October 30th, 2023, for five days, and the trial proper for December 11, 2023, for two weeks. The assigned Crown and court were available July 4th for the motions and August 22nd for the trial dates. The Crown was available July 4th – September 16th, November 7th-31st. Defence counsel was not available until December 5th, 2022.

[13] When the matter appeared in court on April 25th, 2022, Mr. Angelini indicated that when he had filled out the trial confirmation form, he had done so assuming the motions and trial would be set as one three-week block, and that had he provided dates for a five day and then two-week block, his dates might have been earlier. He indicated he would redo the form with his availability adjusted accordingly. The matter was then put to May 16th, 2022, to see about earlier dates.

[14] The matter returned on May 16th, May 30th and then June 6th, 2022, to see if there were earlier dates. In August of 2022 earlier dates were obtained. The dates of February 6-10, 2023, for the pre-trial motions, and June 19th, 2023, for the trial proper was put on the record on September 12, 2022.

[15] Th pretrial motions were ultimately dealt with during Mr. Downey's other matter, and on January 16th the matter was adjourned directly to the trial date of June 19th, 2023.

[16] On June 19th, 2023, the matter appeared before Justice Goldstein who indicated there was not a judge available but adjourned the matter one day in the hopes that one would become available. It is worthy of note that at this point the matter was already over the prescribed *Jordan* time limit at 30 months and 24 days.

[17] On June 20th, 2023, the matter appeared again before Justice Goldstein who indicated:

> Well, the bottom line is, unfortunately we're not going to be in a position to proceed with this trial. I don't have a trial judge for you, unfortunately. So we have – _I mean, there's a whole bunch of reasons for that. We have outstanding appointments, vacancies here, but also we still have a hangover from COVID as I think, I think you both know, which is causing – _we're trying to get as many things on as we can, but of course the COVID backlog is still there. So I'm going to say, approach your administrative Crown for a new trial date and maybe just put this into practice court next week.

[18] On June 23rd, the Crown contacted Mr. Angelini and offered a trial date of July 10th, just over two weeks later. Mr. Angelini was not available. The matter then appeared again on July 17th, August 14th, August 28th, and September 11th with the parties indicating that efforts were being made to secure dates as quickly as possible.

[19] The parties then appeared before Justice Forestell on September 28th, 2023. A trial date of November 14th was offered and available to both the court and the Crown. Mr. Angelini indicated that date had just been offered to him the day before and he was not available. December 4th was also offered but both the Crown and Mr. Angelini indicated they might be able to accommodate the date but were in other matters. January 8th was offered as a 'possibility' if another four-week matter were to resolve. The Crown inquired if January 22nd was available instead. Mr. Angelini indicated he was not available as he had another Superior Court trial. February 19th was offered, but Mr. Angelini was not available. April 2nd was offered but the Crown was not available. April 22nd, 2024, was the date ultimately agreed upon by all parties.

Legal Framework

[20] In evaluating an application made under s. 11 (b) of the *Charter*, a court must identify and characterize the periods of delay occasioned throughout the trial. This requires an application of the *R. v. Jordan* framework: calculating the total delay, subtracting any defence delay in determining net delay.: see paras 47, 61-64. The court must then consider any exceptional circumstances including any discrete exceptional circumstances.: see para 69 and 75.

[21] Defence delay for the purposes of this analysis consists of two types of delay. First delay that is waived by the defence. That is not an issue in this case. Second, delay "that is caused solely or directly by the defence's conduct".: *Jordan* para 66. This does not include legitimate actions taken by the defence to respond to the charges.: see para 64-65. I would include in this second category the election by the accused to have their matter tried by a judge and jury.

[22] Recent caselaw has modified the notion of a 'bright line' rule in assessing defence delay. *R. v. Boulanger*, 2022 SCC 2 at para 8 makes clear that all relevant circumstances should be considered to determine how delay should be apportioned among the participants. This approach has been followed in several cases.: *R. v. Hanan*, 2023 SCC 12 at para 9, 54-56; *R. v. Albinowski*, 2018 ONCA 1084 at para 46; *R. v. Zahor*, 2022 ONCA 449 at para 101-102; *R. v. Bowen-Wright*, 2024 ONSC 293 at para 38-39.

[23] Exceptional circumstances include events beyond the Crown's control in that they are reasonably unforeseen or unavoidable, and result in delay that cannot reasonably be remedied by the Crown.: *Jordan* para 69. Discrete exceptional circumstances are unexpected, uncontrolled events that happen which lead to delay. These engage a quantitative analysis in that the delay is subtracted from the net delay for the purpose of determining whether the remaining delay continues to exceed the presumptive ceiling.: *Jordan* para 75.

[24] The pandemic falls within a category of "discrete exceptional circumstance" as defined in *Jordan*. It satisfies the criteria of i) being reasonably unforeseen and ii) Crown counsel cannot reasonably remedy the delay emanating from these circumstances. Given the systemic perspective within which the pandemic must be seen, "the reasonableness of a period of time to prosecute a case takes its colour from the surrounding circumstances.": *Jordan* para 103; *R. v. Agpoon*, 2023 ONCA 449 at para 19, 21.

[25] It is within this framework that "trial judges should not parse each day or month…[but] should step back from the minutiae and adopt a bird's-eye view of the case.: *Jordan* at para 91; *Agpoon* para 22.

Overall Delay Analysis

[26] There are two main questions in this application. First, how much delay should be attributed to pandemic related delay, specifically in this case jury blackout delay and general court scheduling/backlog delay indirectly related to covid. Second, how much defence delay was there

in scheduling the trial dates and how to apportion any ‘resulting defence delay’ when the first trial date could not proceed due to judicial unavailability.

i) Court Closures

[27] The Crown argued that 13 days should be deducted for court closures from November 25th, 2020, to December 8th, 2020. The difficulty with this argument is that the courts were not closed at this point and Mr. Downey’s matter was clearly at the intake stage in any event. Disclosure was not provided until April of 2021.

[28] I pause here to note that, in this case, there appeared to have been no trickle-down effect relating to the COVID-19 closures and dates being set while this matter was in the provincial court. When preliminary hearing dates were being set on June 1, 2021, the first dates that were offered were on August 18 and 19th, 2021, just over two months away. The Crown was not available for those dates.

[29] I agree with counsel for Mr. Downey that if anything, the delay in provincial court was because of slow disclosure roll out, the Crown being unavailable for many of the preliminary hearing dates, and the Crown’s decision to then seek a direct indictment.

[30] The 13 days for court closures as argued by the Crown will not be deducted from the overall delay.

ii) Jury Blackout Delay

[31] The Crown argues that 3 months and 21 days should be deducted from the overall delay during the time frames of May 11, 2021, to September 2021 given the jury blackout that was in place. In fairness to the Crown there was an additional moratorium on new jury selections from December 7th, 2021, until February 28th, 2022.: see *Agpoon*.

[32] I am unable to find that there was any delay that should be attributed to the jury blackout period specifically. This matter was not even in the Superior Court ready to set a date until after the blackout period was over, and notwithstanding the pandemic backlog issues, this matter was eventually scheduled to proceed within a reasonable time.

[33] The Crown argued that the issue of the jury blackout periods was evident throughout the lifespan of this file point to the adjournment of the trial on June 19th and 20th, 2023. They argued it was clear from Justice Goldstein’s comments that the matter could be reached on the priority list if it remained a jury trial.

[34] The difficulty with this argument is twofold. First, an accused person is entitled to elect to have their matter tried before a judge and jury, and this fact cannot be used against them in assessing delay. Secondly, Justice Goldstein said nothing about the matter not being reached because it was proceeding with a jury. It is clear when looking at Justice Goldstein’s comments

that the matter could not be reached because a judge was not available in combination with covid created backlog.

[35] While I do not accept the argument about specific jury blackout delay, I am satisfied that there was delay attributable to general covid backlog in setting the first trial date. Mr. Downey appeared for the first time in Superior Court, February 17th of 2022. His first trial was eventually scheduled to proceed June 19th, 2023, some 487 days or 16 months later. While not entirely out of the range for this jurisdiction, it is at the longer end particularly for what I understand is a straightforward case.

[36] In the circumstances I will deduct 3 months for 'covid backlog' delay.

iii) Defence Delay in Setting the First Trial Date

[37] The Crown also argues that there should be defence delay when counsel was not available from July 4th until December 5th, 2022, when the first trial dates were being set.

[38] It was conceded by counsel for Mr. Downey that some of the delay in setting this first trial date should be attributable to the defence. Specifically, the time frame from September 16th, 2022, to December 5th, 2022, a period of 2 months and 20 days or 80 days. This is a fair concession and a reasonable one taking into account the defence efforts to secure earlier dates.

[39] I would apportion 2 months and 20 days (80 days) to defence delay.

iv) Setting of the 2nd Trial Date

[40] The Crown argues that the period of delay from June 30, 2023, until May 3, 2024 (10 months and 3 days), should be apportioned in its entirety to covid related delay. This period accounts for the anticipated end of the original trial on June 30, 2023, to the anticipated end of the new trial on May 3, 2024. In the alternative they argue that the portion from July 10, 2023, until April 2, 2024 (8 months and 23 days), should be characterized entirely as defence delay.

[41] The Crown based this submission on Mr. Downey's election to be tried by a jury, and the comments of Justice Goldstein that the trial could not be reached because of judicial vacancies and "covid backlog is still there". I am not satisfied that the entire period of delay from the time of the original trial date in June of 2023 to April of 2024 should be attributed to covid related delay. The reason for the need to reschedule in this case was that there was no judge available.

[42] In *R. v. Alli*, 2023 ONSC 5829, which was released on December 11, 2023, Forestell J., at para 18-25 described the situation in this court between April and December of 2023 as follows:

> This jurisdiction has a very high volume of serious and complex cases. The volume of cases in this jurisdiction has increased appreciably in recent

years. As noted by Molloy J. in *R. v. R.D.*, Toronto has a higher percentage of complex trials and long trials than other jurisdictions.

There are more homicide trials in Toronto than in any other jurisdiction in Canada. There are also more large 'project' cases in Toronto than in other jurisdictions. The 'project' cases can involve hundreds of accused and multiple, complex applications. The length and complexity of trials has increased with no increase in the number of judges and no increase in the number of courtrooms.

In addition, this jurisdiction continues to deal with a backlog of cases created by the suspension of jury trials for a total of approximately 11 months during periods of the COVID-19 pandemic. While the last jury suspension ended about twenty months ago, the completion of backlogged trials in addition to the normal caseload has created ongoing systemic delay.

In spite of the high volume of cases and the effects of the COVID-19 backlog however, simple trials were generally being set in 2022 within 12 months of indictments being filed. The trials were set with the expectation that the court would have a full complement of judges at the time of the trials.

In April of 2023 when this trial was not reached because there was no judge available to hear it, this jurisdiction had seven judicial vacancies. There are still seven vacancies in this jurisdiction. The number of vacancies has remained essentially unchanged for at least a year.

On May 3, 2023, 20 days after this trial was not reached because of a lack of judicial resources, Chief Justice Wagner expressed his concern about the chronic shortage of federally appointed judges. He pointed out that courts were operating with 10 to 15 per cent of their judicial positions vacant. These comments are applicable to this jurisdiction.

Had the judicial positions in Toronto been filled, this case and others would not have been delayed.

...

Judges of this Court are working at capacity. It is common for judges on the criminal team in Toronto to work through scheduled non-sitting weeks and even through vacation weeks to attempt to ensure that trials are heard in a timely fashion. All participants in the process have done everything possible to avoid delay. This case has taken longer than it should have because this court lacked the judicial resources to hear the case in a timely manner.

[43] I adopt those comments and note that the issue of judicial unavailability in this jurisdiction has also been discussed in *Bowen-Wright, R. v. Constantino*, 2024 ONSC 491 and *R. v. Liu*, 2024 ONSC 2022.

[44] The comments of Code J., in *Liu* at para 52 are also apposite:

> In my view it was unacceptable for the federal government to have ignored the May 2023 written warning from the Chief Justice of Canada. This kind of stubborn institutional refusal to respond to a crisis in the justice system is inexcusable and it is "constitutionally impermissible" as the Supreme Court put it in *Jordan, supra* at para 117.

[45] As Schreck J: said in *Bowen-Wright* at para 52:

> ….the Crown and the justice system have a duty to mitigate delay caused by discrete events.: *Jordan* para 75; *Cody* at para 48. Regardless of how many judicial vacancies there were before the pandemic, one obvious way to reduce the backlog of cases is to make sure that judicial vacancies are filled so that trials do not get adjourned. The state failed to do this.

[46] The effect of the pandemic on the system in causing backlog has been well known and was certainly obvious in June of 2023. There was no moratorium on judicial vacancies being filled during the pandemic. There is no reason why vacancies which have existed since before the pandemic could not have been filled at a faster pace than what we have seen.

[47] This leads to the alternative argument with respect to whether the 'resulting' delay in scheduling the second trial should be attributed to the defence. Schreck J., in *Bowen-Wright* summarizes some of the more important factors to consider when assessing the kind of delay under the modern 'contextual approach'.: see para 38-43. Consideration must be given to all the circumstances including:

a. The reason for the need to reschedule.
b. The extent to which the defence was unavailable.
c. The reasons for defence unavailability.
d. The extent of notice given of the new available date.

[48] The extent to which the defence was unavailable, the reasons for that unavailability and the notice given are inextricably bound up in the factual circumstances of this case. After the June 19th trial was adjourned the Crown emailed Mr. Angelini on June 23rd, advising that dates beginning July 10th were available for trial, just over two weeks later. Understandably Mr. Angelini was not available.

[49] In *R. v. Godin*, 2009 SCC 26 at para 23, the court stated: "scheduling requires reasonable availability and reasonable cooperation; it does not, for s. 11(b) purposes, require defence counsel to hold themselves in a state of perpetual availability". It is not reasonable to expect that the defence should have been available some two weeks later. There is no delay attributable to the defence for this part of the delay.

[50] The matter then appeared again on July 17th, August 14th, August 28th, and September 11th but no dates were available. To be clear, this is not an issue of Mr. Angelini or the Crown not being available, there were simply no dates being offered. There was no explanation provided as to why no dates were being offered. I am not prepared to apportion any of the time frame between July 19th and September 28th as defence delay.

[51] When the matter appeared on September 28th, a trial date of November 14th was offered. Mr. Angelini was only advised of this date the day before and again, understandably, he was not available. Other dates were offered on December 4th, January 8th (a possible date) and January 22nd. Both Mr. Angelini and the Crown had difficulties with December 4th, given obligations with other Superior Court matters. Mr. Angelini was not available January 22nd or February 19th. Mr. Angelini also indicated that had the January 8th date been offered two weeks earlier, he would have been available.

[52] Defence counsel's unavailability for portions of this time frame were reasonable.: see *R. v. Safdar*, 2021 ONCA 207. Defence counsel had made consistent efforts through the course of the entire proceedings to have the matter heard as quickly as possible. He was booked on other serious matters and was being given very little notice of new potential dates. The defence acknowledged that the time frame from January 22, 2024, until April 2nd, should be apportioned as defence delay. This is a delay of 2 months and 12 days or 72 days. This is a reasonable concession and one I agree with.

[53] As outlined above, I have not found that COVID-19 related issues were the primary reason for the delay in this case. In provincial court there was no delay caused by Covid-19 related backlog or jury blackout periods, but rather Crown delay in setting the preliminary hearing and the seeking of a direct indictment. At the time of the first trial date this matter was already over the *Jordan* prescribed limit of 30 months. While COVID-19 backlog may have caused some delay, the most significant contributing factor to the overall delay in this case was a systemic lack of judicial resources.: *Alli* para 26.

[54] Having regard to all the circumstances of this particular case, I am apportioning the delay as follows:

a. 2 months and 19 days (80 days) defence delay in setting the first trial date;
b. 2 months and 12 days (72 days) defence delay in setting the second trial date;
c. 3 months (90 days) of covid 'backlog delay';

[55] The delay as deducted amounts to 8 months (242 days), bringing the total delay in this case to 33 months and 7 days (1012 days). This clearly exceeds the 30-month ceiling as established by *Jordan*.

Conclusion

[56] The application is granted. There will be an order pursuant to s. 11(b) and 24(1) of the *Charter* staying the proceedings.

_____

J.K. Penman J.

Released: April 15, 2024

CITATION: R. v. Downey, 2024 ONSC 2157
COURT FILE NO.: CR-22-10000121-0000
DATE: 20240415

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HIS MAJESTY THE KING

– and –

Marlon Downey

Applicant

REASONS FOR JUDGMENT

J. K. Penman J.

Released: April 15, 2024

SUPREME COURT OF CANADA

CITATION: R. *v.* Edwards, 2024 SCC 15

APPEALS HEARD: October 16, 2023
JUDGMENT RENDERED: April 26, 2024
DOCKETS: 39820, 39822, 40046, 40065, 40103

BETWEEN:

Leading Seaman C.D. Edwards, Captain C.M.C. Crépeau, Gunner K.J.J. Fontaine and Captain M.J. Iredale
Appellants

and

His Majesty The King
Respondent

AND BETWEEN:

Sergeant S.R. Proulx and Master Corporal J.R.S. Cloutier
Appellants

and

His Majesty The King
Respondent

AND BETWEEN:

Corporal K.L. Christmas
Appellant

and

His Majesty The King
Respondent

AND BETWEEN:

Lieutenant (Navy) C.A.I. Brown
Appellant

and

His Majesty The King
Respondent

AND BETWEEN:

Sergeant A.J.R. Thibault
Appellant

and

His Majesty The King
Respondent

- and -

Canadian Civil Liberties Association and British Columbia Civil Liberties Association
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Kasirer, Jamal and O'Bonsawin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 149) Kasirer J. (Wagner C.J. and Côté, Rowe, Jamal and O'Bonsawin JJ. concurring)

DISSENTING REASONS: (paras. 150 to 211) Karakatsanis J.

Leading Seaman C.D. Edwards, Captain C.M.C. Crépeau, Gunner K.J.J. Fontaine and Captain M.J. Iredale *Appellants*

v.

His Majesty The King *Respondent*

- and -

Sergeant S.R. Proulx and Master Corporal J.R.S. Cloutier *Appellants*

v.

His Majesty The King *Respondent*

- and -

Corporal K.L. Christmas *Appellant*

v.

His Majesty The King *Respondent*

- and -

Lieutenant (Navy) C.A.I. Brown *Appellant*

v.

His Majesty The King *Respondent*

- and -

Sergeant A.J.R. Thibault *Appellant*

v.

His Majesty The King *Respondent*

and

Canadian Civil Liberties Association and
British Columbia Civil Liberties Association *Interveners*

Indexed as: R. *v.* Edwards

2024 SCC 15

File Nos.: 39820, 39822, 40046, 40065, 40103.

2023: October 16; 2024: April 26.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Kasirer, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT MARTIAL APPEAL COURT OF CANADA

Constitutional law — Charter of Rights — Independent and impartial tribunal — Courts martial — Military judges — Whether military status of military judges violates constitutional guarantee of judicial independence and impartiality to which persons tried before courts martial are entitled — Canadian Charter of Rights and Freedoms, s. 11(d) — National Defence Act, R.S.C. 1985, c. N-5, ss. 165.21, 165.24(2).

The nine accused are members of the Canadian Armed Forces who were charged with service offences under the Code of Service Discipline ("CSD"), which forms Part III of the *National Defence Act* ("*NDA*"), and were brought before courts martial. Under the CSD, members of the Canadian Armed Forces may be charged with service offences, which are serious and encompass offences specific to military personnel and offences under the *Criminal Code* or other acts of Parliament. Service offences are tried before a court martial, which is a military court that has the same powers, rights, and privileges as a superior court of criminal jurisdiction. Courts martial are presided over by military judges, who are required under s. 165.21 of the *NDA* to be barristers or advocates of at least 10 years' standing at the bar of a province and to be military officers and to have been so for at least 10 years. Section 165.24(2) of the *NDA* further provides that the Chief Military Judge must hold a rank of not less than

colonel. The *NDA* provides that military judges can only be removed for cause by the Governor in Council upon recommendation of the Military Judges Inquiry Committee ("MJIC"). As officers, military judges are part of the chain of command, and therefore are also subject to prosecution for service infractions and service offences under the CSD.

The nine accused challenged the statutory requirement that the military judges presiding over their courts martial be officers, alleging that it violates their right to a hearing by an independent and impartial tribunal under s. 11(d) of the *Charter*. In the courts martial, some of the military judges held that they lacked judicial independence by reason of their dual status of judge and officer, and therefore that the respective accused's s. 11(d) rights were infringed. The Court Martial Appeal Court ("CMAC") held that an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that military judges meet the minimum constitutional norms of impartiality and independence, and therefore that the accused's s. 11(d) rights were not infringed.

Held (Karakatsanis J. dissenting): The appeals should be dismissed.

Per Wagner C.J. and Côté, Rowe, **Kasirer**, Jamal and O'Bonsawin JJ.: The status of military judges as officers under the *NDA* is not incompatible with their judicial functions for the purposes of s. 11(d) of the *Charter*. Accused members of the Canadian Armed Forces who appear before military judges are entitled to the same guarantee of judicial independence and impartiality under s. 11(d) as accused persons

who appear before civilian criminal courts, but this does not require that the two systems be identical in every respect. As presently configured in the *NDA*, Canada's system of military justice fully ensures judicial independence for military judges in a way that takes account of the military context, and specifically of the legislative policies of maintaining discipline, efficiency and morale in the Armed Forces and public trust in a disciplined military. Accordingly, the requirement that military judges be officers pursuant to ss. 165.21 and 165.24(2) of the *NDA* does not fall afoul of s. 11(d) of the *Charter*.

In *R. v. Généreux*, [1992] 1 S.C.R. 259, the Court held that the military status of military judges does not violate s. 11(d). While the Court may depart from precedent when a decision's rationale has been eroded by significant societal or legal change, it has not been shown that the rationale in *Généreux* has been eroded due to such changes, and therefore there is no compelling reason to abandon settled law. The Court in *Généreux* did acknowledge that the place of military judges in the military hierarchy detracts from absolute judicial independence, but it also confirmed that s. 11(d) does not require absolute judicial independence or a sort of truly independent military judiciary that could only be assured by civilian judges. "Absolute" independence is not the constitutional standard endorsed in the Court's jurisprudence.

Généreux establishes that whatever concerns might arise as a result of Parliament's choice to require that military judges be officers, that model is not inherently unconstitutional under s. 11(d). Other models, such as a military judiciary

composed of civilian judges, might also be constitutionally compliant, but *Généreux* does not stand for the proposition that an independent military judiciary requires civilian judges or that only one policy option would be constitutionally compliant. Law reform initiatives in other countries may assist in setting government policy but do not require Parliament to follow suit. Recommendations made in independent reports that were submitted in these cases may be of value as a matter of government policy, but they do not determine what is required by s. 11(d) of the *Charter*. The suitability of various policy options, within the bounds of the Constitution, is a matter of legislative choice. The Court's proper role is to decide whether ss. 165.21 and 165.24(2) of the *NDA* are constitutional. What is at issue is not whether the Canadian military justice system could practically function with civilian judges but whether the impugned requirement under the *NDA* violates the guarantee set by s. 11(d).

Généreux continues to provide useful guidance as precedent on the following matters: s. 11(d) applies to the military justice system; a parallel system staffed by judges with military status who are sensitive to the needs of military justice does not, in itself, offend s. 11(d); and there may well be different modalities for ensuring that military judges have a degree of independence that meets the constitutional minimum. Adapted to the military context, military justice is different in some respects from civilian criminal justice, but the guarantee of independence is no less *Charter*-compliant by reason of this difference.

In *Généreux*, the Court ultimately concluded that military judges did not enjoy a sufficient degree of independence; however, this was based on provisions of the *NDA* that have since been amended. Accordingly, a fresh analysis is required. To assess the independence of a tribunal, a reviewing court asks whether the tribunal may be reasonably perceived as independent. As explained in *Généreux*, the exercise for evaluating independence and impartiality under s. 11(d) is the same: the question is whether a reasonable and informed person would perceive the tribunal as independent and impartial. The reasonable and informed person has knowledge of all the relevant circumstances and views the matter realistically and practically. They are alive to the relevant contextual considerations, they are right minded, they think the matter through, they apply themselves to the question and obtain the required information.

In *Valente v. The Queen*, [1985] 2 S.C.R. 673, the Court identified three essential conditions of judicial independence: security of tenure, financial security and administrative independence. Security of tenure requires that the judge hold office whether until an age of retirement, for a fixed term, or for a specific adjudicative task so as to secure against interference by the executive. Financial security requires that the right to salary and pension be established by law and that judicial remuneration be fixed through a process that includes an independent commission. Administrative independence means judicial control over the administrative decisions that bear directly on the exercise of the judicial function. Additionally, even if the reasonable and informed person would conclude that a court is independent because the three essential conditions are met, they may still come to the conclusion that the court is not impartial

at either the individual or the institutional level. While independent courts benefit from a strong presumption of impartiality that is not easily displaced, if a reasonable and informed person would think it more likely than not that the court would not decide fairly because of individual or institutional concerns, the impartiality of the court may be challenged.

The three essential conditions of judicial independence for military judges are met through the provisions of the *NDA*. First, regarding security of tenure, the *NDA* now provides that military judges are appointed by the Governor in Council, and that unless they are removed for cause, they hold office until they are voluntarily released from the military or resign from the position of military judge, or until they reach the age of 60. Military judges can only be removed from office by the Governor in Council, for cause, upon a recommendation of their judicial peers properly convened as the MJIC. While it is true that military judges, as officers, can be convicted of offences under the CSD and sanctioned to sentences including dismissal from the Armed Forces, a reasonable and informed person, looking at matters practically, including a reading of the *NDA* as a whole, would not view the risk of there being an indirect means of removing military judges to be a realistic possibility. Second, the requirement of financial security is amply met as military judges have their own remuneration scheme and their compensation is fixed through a process that centres on an independent committee. Third, military judges, including the Chief Military Judge, are responsible for the decisions that must be left to judges in order for there to be sufficient administrative independence, such as assigning military judges to preside at courts

martial and establishing procedural rules. These matters are insulated from non-judicial interference by the chain of command.

The place of military judges in the executive branch and their exposure to prosecution for CSD offences do not ground a reasonable perception of a lack of impartiality. First, military judges, as members of the executive, are not in an irretrievable conflict of interest with their judicial role such that the constitutional principle of separation of powers is violated. The manner in which their role as judges is circumscribed makes it plain that they do not act as members of the executive when they perform their judicial duties. Only the Chief Military Judge can assign duties to military judges, and these duties must not be incompatible with their judicial duties, which are also assigned by the Chief Military Judge. Military judges have their own, separate grievance procedure and have protections against interference through performance evaluations by the executive. Like other judges, military judges take a solemn oath to act impartially. They are vested with the same powers, rights and privileges as judges of a superior court of criminal jurisdiction and enjoy the same immunity from liability. The reasonable and informed person would expect that military judges will abide by their oath of office and have confidence that, given their legal training and experience, they will set aside improper influences or recuse themselves if they ever feel that they cannot do so.

Second, a reasonable apprehension of bias is not created by the possible liability of military judges to discipline under the CSD. Military judges are not above

the law and can be held accountable when they act outside their judicial functions for their conduct as members of the Armed Forces. As officers, military judges are part of the chain of command and must comply with lawful orders issued by superior officers. If they fail to do so, they could be subject to discipline under the CSD. However, there are sufficient protections against a perception taking hold that the status of military judges as officers exposes them to interference by the executive in the exercise of their judicial functions. Before military judges can be prosecuted, the person laying the charge must receive legal advice concerning the appropriate charge, and the Director of Military Prosecutions, who has an obligation to act independently of partisan concerns, must decide to proceed with charges. Moreover, an order from a superior officer that has the purpose of interfering with a military judge's judicial work would be an unlawful order and an abusive or purely retaliatory prosecution would be an unlawful prosecution. Overall, the reasonable and informed person would not be concerned that the independence or impartiality of military judges can be undermined because of their status as officers that makes them subject to the CSD.

The requirements in ss. 165.21 and 165.24(2) of the *NDA* therefore meet the standards of judicial independence and impartiality under s. 11(d) of the *Charter*. A reasonable and informed person, looking at the matter realistically and practically and having thought the matter through, would not conclude that the officer status of military judges raises any apprehension of bias or that it amounts to a lack of sufficient independence such that there is a breach of s. 11(d).

Per **Karakatsanis** J. (dissenting): The appeals should be allowed and the legislative scheme under the *NDA* should be declared of no force or effect insofar as it subjects military judges to the disciplinary process administered by military authorities. Members of the Canadian Armed Forces charged with offences are not guaranteed a hearing by an impartial and independent tribunal under s. 11(d) of the *Charter* due to the pressure military judges face as part of the chain of command, particularly, their disciplinary accountability through a regime that can be launched and prosecuted by their hierarchical superiors. The liability of military judges to the executive under the CSD as currently structured undermines their judicial independence. The breach of s. 11(d) cannot be saved by s. 1.

There is agreement with the majority that the requirement that military judges presiding over courts martial also have the military status of officers does not necessarily contravene the s. 11(d) right of a member of the Armed Forces. Properly designed and protected, the executive and judicial roles of military judges can coexist. There is also acceptance that under the *NDA*, military judges can, as officers, be accountable for CSD offences. However, the ability of the military executive to impose discipline on military judges would cause a reasonable and informed person facing a court martial to apprehend that the military judge could be unduly influenced by a loyalty to rank and by the position or policies of the military hierarchy, to the detriment of the accused member's individual rights. There are insufficient safeguards in place to alleviate the potential risk of interference by the military chain of command. There is

not enough institutional separation — or independence — between the executive and the judicial role.

The separation of powers is fundamentally important in maintaining judicial independence, in particular separation from the executive branch. Judges must be able to render decisions based solely on the requirements of the law and justice according to their own conscience, without outside interference or pressure. Judicial independence and impartiality are distinct concepts but they often overlap. Independence is an underlying condition that contributes to the guarantee of an impartial hearing. The three hallmarks of judicial independence — security of tenure, financial security and administrative independence — do not provide a complete answer to the question of whether judges benefit from sufficient independence. A particular tribunal will still lack institutional independence if there is the appearance that it cannot perform its adjudicative role without interference.

Although judicial discipline and accountability, both important imperatives of broader social policy, can be in tension with judicial independence, civilian judges remain accountable for their conduct through ethical and professional rules of conduct via a judicial oversight committee. This encroachment on their independence is justified by the need to protect the integrity of the administration of justice. However, in matters of discipline, the separation between the judiciary and the other branches of government is necessary to avoid the appearance of any intervention based on public opinion and political expediency. Judicial independence requires that

discipline of the judiciary be reserved to an autonomous, apolitical and independent entity.

In the military context, judicial independence is analyzed under these same principles. The standard of independence for military judges is no less than for civilian judges. Military judges, much like civilian judges, are subject to the civilian criminal justice system and are accountable for their misconduct through a judicial oversight committee (the MJIC). However, unlike civilian judges, military judges are also answerable for their conduct to their superiors within the chain of command. By holding a military rank, military judges are subject to service infractions and to the many service offences that can be prosecuted under the CSD for the military objectives of good order and discipline, efficiency and morale. They belong to the same institution responsible for laying charges against them and against the members who appear before them. If convicted of service offences, military judges may face dismissal from the Armed Forces, a criminal record and life-time imprisonment. Moreover, under the *NDA*, military judges face military prosecution for offences already covered by the *Criminal Code* and any other act of Parliament, but the decision to proceed under the military justice system can have a significant impact on their rights. Thus, military judges face a unique disciplinary regime that is launched and prosecuted by the executive, which has no equivalent in the civilian world.

The military context matters in determining whether a reasonable and informed person would be concerned about the pressures military judges face given

their disciplinary accountability towards their superiors. Independent reports, which provide material insight on the concerns of a reasonable and informed member of the public, have long insisted that military judges, who currently keep the rank they held before their judicial appointment, should be awarded their own distinct rank, or civilianized. Because of a judge's given rank, it is reasonable that military personnel facing a court martial may fear a judge could prioritize allegiance to rank and to the chain of command over their respective individual rights. The possibility of the executive reviewing the military judge's conduct either by summary hearing or by court martial would be perceived by a reasonable and informed person as insufficient independence between the executive and judicial roles.

Because of this reasonable apprehension that military judges may not be institutionally impartial, any safeguards that may reduce those effects must be considered. Here, the safeguards said to alleviate the risk that military judges would feel pressure to be loyal towards the chain of command are insufficient. First, the requirement in the *NDA* that military judges must take an oath of office, while an important foundation for an individual judge's independence, does little to guard against an apprehension of institutional bias. Second, military judges do not have sufficient security of tenure simply because they may only ultimately be removed as a military judge for cause through the MJIC. On conviction of a disciplinary offence, the *NDA* allows for sanctions of demotion or dismissal from the Armed Forces, meaning military judges would lose their status as officers and therefore a key qualification for their tenure. In any event, because military judges remain liable for uniquely military

disciplinary charges initiated by their superiors, the rationale that animates the need for security of tenure — securing against interference by the executive — is not safeguarded. Third, the presumption that the Director of Military Prosecutions will carry out its functions independently of partisan concerns cannot be relied upon to safeguard judicial independence. The protection of the rule of law should not depend on a belief that institutions are immune from impropriety and, above all, the DMP does not act independently of the chain of command; rather, the DMP performs its functions under the supervision of the Judge Advocate General, who must be totally loyal and partisan to the interests of the military. A reasonable and informed observer would therefore be concerned about institutional bias because military judges could face discipline from their superiors.

Cases Cited

By Kasirer J.

Applied: *R. v. Généreux*, [1992] 1 S.C.R. 259; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; **considered:** *MacKay v. The Queen*, [1980] 2 S.C.R. 370; *R. v. Stillman*, 2019 SCC 40, [2019] 3 S.C.R. 144; *R. v. Pett*, 2020 CM 4002; *R. v. D'Amico*, 2020 CM 2002; **referred to:** *R. v. Lippé*, [1991] 2 S.C.R. 114; *R. v. Kirkpatrick*, 2022 SCC 33; *R. v. Chouhan*, 2021 SCC 26, [2021] 2 S.C.R. 136; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2

S.C.R. 259; *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282; *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, [2013] 2 S.C.R. 357; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, [2020] 2 S.C.R. 506; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541; *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *R. v. Leblanc*, 2011 CMAC 2, 7 C.M.A.R. 559; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249; *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3; *Canada (Director of Military Prosecutions) v. Canada (Office of the Chief Military Judge)*, 2020 FC 330, [2020] 3 F.C.R. 411; *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21, [2020] 2 S.C.R. 556; *R. v. Kokopenace*, 2015 SCC 28, [2015] 2 S.C.R. 398; *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267; *President of the Republic of South Africa v. South African Rugby Football Union*, [1999] ZACC 9, 1999 (7) B.C.L.R. 725; *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485; *R. v. Billard*, 2008 CMAC 4, 7 C.M.A.R. 238; *R. v. Finta*, [1994] 1 S.C.R. 701; *R. v. Lalande*, 2011 CM 2005; *R. v. Liwyj*, 2010 CMAC 6, 7 C.M.A.R. 481; *R. v. Edmunds*, 2018 CMAC 2, 8 C.M.A.R. 260; *R. v. Cawthorne*,

2016 SCC 32, [2016] 1 S.C.R. 983; *Boucher v. The Queen*, [1955] S.C.R. 16; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773.

By Karakatsanis J. (dissenting)

R. v. Généreux, [1992] 1 S.C.R. 259; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Pett*, 2020 CM 4002; *R. v. D'Amico*, 2020 CM 2002; *R. v. Bourque*, 2020 CM 2008; *R. v. MacPherson and Chauhan and J.L.*, 2020 CM 2012; *R. v. Cogswell*, 2020 CM 2014; *R. v. Jacques*, 2020 CM 3010; *R. v. Pépin*, 2021 CM 3005; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] 1 S.C.R. 175; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796; *R. v. Lippé*, [1991] 2 S.C.R. 114; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249; *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3; *R. v. Golzari*, 2017 CMAC 3, 8 C.M.A.R. 106; *MacKay v. The Queen*, [1980] 2 S.C.R. 370; *R. v. Stillman*, 2019 SCC 40, [2019] 3 S.C.R. 144; *Canada (Director of Military*

Prosecutions) v. Canada (Office of the Chief Military Judge), 2020 FC 330, [2020] 3 F.C.R. 411; *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754; *R. v. Bain*, [1992] 1 S.C.R. 91; *R. v. Oakes*, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Act to amend the National Defence Act and to make related and consequential amendments to other Acts, S.C. 2019, c. 15, s. 25.

Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d), 24(1).

Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 5(1), (2).

Constitution Act, 1982, s. 52.

Criminal Code, R.S.C. 1985, c. C-46, ss. 271, 279(2).

Judges Act, R.S.C. 1985, c. J-1, ss. 98(1), 102, 117(1).

National Defence Act, R.S.C. 1985, c. N-5, ss. 2 "service offence", 9.2, 9.3(3), 12, 17, 18, 19, 29(2.1), 49, Part III, "Code of Service Discipline", 55, 60, 83, 85, 90, 92, 93, 97, 129, 130, 139, 140.1, 140.2, 141(1.1), 161.1(1), 162.4, 162.5, 162.7, 162.94, 163, 163.6 to 163.91, 164(1.1) [rep. 2019, c. 15, s. 25], (1.3) [*idem*], Div. 6, 165, 165.11, 165.15, 165.17, 165.21, 165.23, 165.231, 165.24, 165.25, 165.3, 165.31, 165.32, 165.33 to 165.37, 179, 203.1(2)(b), 249.27, 273.601, Sch.

Queen's Regulations and Orders for the Canadian Forces (last modifications on June 20, 2022), arts. 1.13, 3.20, 4.081(1), ch. 15, arts. 19.75(1), 20.04, 26.10, 26.12, 102.02, 102.04, 102.07(2)(*b*), ch. 120, 204.

Treaties and Other International Instruments

United Nations. Economic and Social Council. *Bangalore Principles of Judicial Conduct*, U.N. Doc. E/RES/2006/23, July 27, 2006, preamble.

Authors Cited

Brun, Henri, Guy Tremblay et Eugénie Brouillet. *Droit constitutionnel*, 6e éd. Cowansville, Que.: Yvon Blais, 2014.

Canada. Commission of Inquiry into the Deployment of Canadian Forces to Somalia. *Dishonoured Legacy: The Lessons of the Somalia Affair — Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia — Executive Summary*. Ottawa, 1997.

Canada. Department of National Defence. *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay Minister of National Defence*, by Patrick J. LeSage. Toronto, 2011.

Canada. Department of National Defence. *Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces*, by Louise Arbour. Ottawa, 2022.

Canada. Department of National Defence. *Report of the Third Independent Review Authority to the Minister of National Defence*, by Morris J. Fish. Ottawa, 2021.

Canada. Department of National Defence. *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c. 35*, by Antonio Lamer. Ottawa, 2003.

Canada. Director of Military Prosecutions. DMP Policy Directive # 002/00, *Pre-Charge Screening*, updated September 1, 2018 (online: https://www.canada.ca/content/dam/dnd-mdn/documents/legal-juridique/policies-directives/dmp-dpm-policy-directive-002-00-pre-charge-screening-verification-prealable-accusation.pdf; archived version: https://www.scc-csc.ca/cso-dce/2024SCC-CSC15_1_eng_fra.pdf).

Canada. Special Advisory Group on Military Justice and Military Police Investigation Services. *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*. Ottawa, 1997.

Canadian Judicial Council. *Ethical Principles for Judges*. Ottawa, 2021.

Cloutier, Jean-Bruno. “L’utilisation de l’article 129 de la *Loi sur la défense nationale* dans le système de justice militaire canadien” (2004), 35 *R.D.U.S.* 1.

Drapeau, Michel W., and Gilles Létourneau, in collaboration with Joshua Juneau and Stéfanie Bédard. *Canada's Military Justice System is in a Meltdown: Will Government Act?* Ottawa: Michel Drapeau Law Office, 2021.

Fidell, Eugene R. *Military Justice: A Very Short Introduction*. New York: Oxford University Press, 2016.

Friedland, Martin L. *A Place Apart: Judicial Independence and Accountability in Canada*. Ottawa: Canadian Judicial Council, 1995.

Gibson, Michael. "Military justice in operational settings, peacekeeping missions and situations of transitional justice", in Alison Duxbury and Matthew Groves, eds., *Military Justice in the Modern Age*. Cambridge: Cambridge University Press, 2016, 381.

Huppé, Luc. *Histoire des institutions judiciaires du Canada*. Montréal: Wilson & Lafleur, 2007.

Huppé, Luc. *La déontologie de la magistrature: Droit canadien: perspective internationale*. Montréal: Wilson & Lafleur, 2018.

Huppé, Luc. "Les fondements de la déontologie judiciaire" (2004), 45 *C. de D.* 93.

Létourneau, Gilles. *Combattre l'injustice et réformer*. Montréal: Wilson & Lafleur, 2015.

Létourneau, Gilles. *Introduction to Military Justice: an Overview of the Military Penal Justice System and its Evolution in Canada*. Montréal: Wilson & Lafleur, 2012.

Létourneau, Gilles, and Michel W. Drapeau. *Military Justice in Action: Annotated National Defence Legislation*, 2nd ed. Toronto: Carswell, 2015.

Madden, Mike. "Keeping up with the Common Law O'Sullivans? The Limits of Comparative Law in the Context of Military Justice Law Reforms" (2013), 51 *Alta. L. Rev.* 125.

McNairn, David. "A Military Justice Primer, Part I" (2000), 43 *Crim. L.Q.* 243.

Sharpe, Robert J. *Good Judgment: Making Judicial Decisions*. Toronto: University of Toronto Press, 2018.

Smith, Lionel. *The Law of Loyalty*. New York: Oxford University Press, 2023.

Sossin, Lorne. "Judicial Appointment, Democratic Aspirations, and the Culture of Accountability" (2008), 58 *U.N.B.L.J.* 11.

United Nations Office on Drugs and Crime. *Commentary on the Bangalore Principles of Judicial Conduct*. Vienna, 2007.

Walker, Janet. "Military Justice: from Oxymoron to Aspiration" (1994), 32 *Osgoode Hall L.J.* 1.

APPEAL from a judgment of the Court Martial Appeal Court of Canada (Bell C.J. and Rennie and Pardu JJ.A.), 2021 CMAC 2, [2021] C.M.A.J. No. 2 (Lexis), 2021 CarswellNat 2036 (WL), setting aside decisions of d'Auteuil D.C.M.J., 2020 CM 3006, 2020 CarswellNat 3203 (WL); 2020 CM 3007, 2020 CarswellNat 3502 (WL); and 2020 CM 3008, 2020 CarswellNat 3831 (WL), and a decision of Pelletier M.J., 2020 CM 4011, 2020 CarswellNat 4042 (WL). Appeal dismissed, Karakatsanis J. dissenting.

APPEAL from a judgment of the Court Martial Appeal Court of Canada (Bell C.J. and Rennie and Pardu JJ.A.), 2021 CMAC 3, [2021] C.M.A.J. No. 3 (Lexis), 2021 CarswellNat 2096 (WL), setting aside decisions of Pelletier M.J., 2020 CM 4012, 2020 CarswellNat 5129 (WL); and 2020 CM 4013, 2020 CarswellNat 6959 (WL). Appeal dismissed, Karakatsanis J. dissenting.

APPEAL from a judgment of the Court Martial Appeal Court of Canada (Bell C.J. and Phelan and Green JJ.A.), 2022 CMAC 1, [2022] C.M.A.J. No. 1 (Lexis), 2021 CarswellNat 6625 (WL), setting aside a decision of d'Auteuil D.C.M.J., 2020 CM 3009, 2020 CarswellNat 5069 (WL). Appeal dismissed, Karakatsanis J. dissenting.

APPEAL from a judgment of the Court Martial Appeal Court of Canada (Bell C.J. and Heneghan and Scanlan JJ.A.), 2022 CMAC 2, [2022] C.M.A.J. No. 2

(Lexis), 2022 CarswellNat 773 (WL), setting aside a decision of Pelletier M.J., 2021 CM 4003, 2021 CarswellNat 1303 (WL). Appeal dismissed, Karakatsanis J. dissenting.

APPEAL from a judgment of the Court Martial Appeal Court of Canada (Bell C.J. and Rennie and Pardu JJ.A.), 2022 CMAC 3, [2022] C.M.A.J. No. 3 (Lexis), 2022 CarswellNat 1088 (WL), affirming a decision of Deschênes M.J., 2020 CM 5005, 2020 CarswellNat 5068 (WL). Appeal dismissed, Karakatsanis J. dissenting.

Mark Létourneau, *Patrice Desbiens* and *Francesca Ferguson*, for the appellants.

Dylan Kerr and *Karl Lacharité*, for the respondent.

Zain Naqi and *David Ionis*, for the intervener the Canadian Civil Liberties Association.

David McEwan, *Greg Allen* and *Chloe Trudel*, for the intervener the British Columbia Civil Liberties Association.

The judgment of Wagner C.J. and Côté, Rowe, Kasirer, Jamal and O'Bonsawin JJ. was delivered by

KASIRER J. —

(1) The Framework for Assessing the Independence of Military Judges

[84] To assess the independence of a tribunal, a reviewing court asks "whether the tribunal may be reasonably perceived as independent" (*Valente*, at p. 689; see also *Committee for Justice and Liberty*, at p. 394). In *Généreux*, at p. 286, Lamer C.J. explained that the exercise for evaluating independence and impartiality under s. 11(d) is the same ("[T]he test for this purpose is the same as the test for determining whether a decision-maker is biased. The question is whether an informed and reasonable person would perceive the tribunal as independent."). There is a strong presumption of judicial impartiality. As this Court has explained, "the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge" (*Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, at para. 59).

[85] This Court has held that the reasonable and informed person has "knowledge of all the relevant circumstances" and "view[s] the matter realistically and practically" (*Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, at para. 26, cited with approval in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282, at para. 37; see also *Valente*, at pp. 684-85). The reasonable and informed person is "apprised of" and "tak[es] into account all relevant circumstances" (*Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, [2013] 2 S.C.R. 357, at paras. 13, 28 and 36) given that they are "well-informed" (*Canada (Minister of Citizenship and Immigration) v.*

Tobiass, [1997] 3 S.C.R. 391, at para. 70). As the CMAC observed in *Edwards et al.*, they are alive to the relevant contextual considerations (para. 9). They are "right minded", they "th[ink] the matter through", and they "appl[y] themselves to the question and obtai[n] thereon the required information" (*Committee for Justice and Liberty*, at p. 394). Ultimately, this Court's jurisprudence "expect[s] a degree of mature judgment on the part of an informed public" (*Yukon Francophone School Board*, at para. 61).

[86] In *Valente*, this Court identified three essential conditions or hallmarks of judicial independence: security of tenure, financial security and administrative independence (pp. 694, 704 and 708; see also *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, [2020] 2 S.C.R. 506, at para. 31; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116, at para. 33). Security of tenure requires that the judge hold office "whether until an age of retirement, for a fixed term, or for a specific adjudicative task" so as to "secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner" (*Valente*, at p. 698). Financial security requires that "the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence", which was later held to require that judicial remuneration be fixed through a process that includes an independent commission (p. 704; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Provincial Judges Reference*"); *Provincial*

Court Judges' Association of British Columbia). Administrative independence "may be summed up as judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function" (*Valente*, at p. 712).

(2) The Three Essential Conditions of Judicial Independence Are Met Through Provisions of the *NDA*

[87] The appellants argue that the military status of military judges raises a reasonable apprehension of bias and results in military judges having an insufficient degree of independence.

[88] While they do not systematically ground their grievances in the *Valente* framework, and while some of their arguments seem to straddle the distinction between independence and impartiality, the appellants focus their challenge on the constitutionality of the impugned sections of the *NDA* on two broad points.

[89] First, they say, the requirement that military judges be members of both the judicial and executive branches violates the constitutional imperative of the separation of powers. Specifically, s. 11(d) does not permit members of the executive branch — including military officers — to exercise "core judicial functions", but they do (A.F., at para. 81). This gives rise to a perception that military judges labour under a conflict of interest, or of allegiances, between their judicial and their officer roles that could infect the independent and impartial exercise of their judicial duties. The appellants add that deference to the hierarchy within the chain of command also contributes to

undermining the independence of military judges (para. 79). These considerations impugn the requirement of administrative independence, which would allow military judges to exercise their duties free from actual or perceived pressure or undue influence from others in the military hierarchy.

[90] The appellants' second argument pertains to the fact that, as officers, military judges are susceptible of being charged with service offences under the CSD. The appellants say that because military judges are themselves subject to prosecution before a court martial, the military hierarchy could bring pressure, or be perceived to be in a position to do so, on the judge as a threat or retaliatory measure for decisions made in the exercise of their judicial duties. This strikes in particular at the requirement that military judges must have security of tenure in order to judge matters with the confidence that they will not lose their positions as a result of the displeasure of others who are superior to them in the chain of command. It touches too on the requirement for administrative independence as that pressure may be reflected in smaller ways that interfere with their judicial work.

[91] Before examining the substance of these arguments, it is useful to dispel some uncertainty in respect of the manner in which the Court interpreted s. 11(d) in *Généreux*. One of the interveners joins the appellants in submitting that Lamer C.J. failed to follow the usual approach of giving a purposive interpretation to *Charter* guarantees in applying s. 11(d) to the military judiciary. Regarding the essential conditions for judicial independence established in *Valente*, Lamer C.J. wrote that "the

Barrett Richard Jordan *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Alberta, British Columbia Civil Liberties Association and Criminal Lawyers' Association (Ontario) *Interveners*

Indexed as: R. *v.* Jordan

2016 SCC 27

File No.: 36068.

2015: October 7; 2016: July 8.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Right to be tried within reasonable time — Delay of more than four years between charges and end of trial — Whether accused's right to be tried within reasonable time under s. 11(b) of Canadian Charter of Rights and Freedoms infringed — New framework for applying s. 11(b).

J was charged in December 2008 for his role in a dial-a-dope operation. His trial ended in February 2013. J brought an application under s. 11(*b*) of the *Canadian Charter of Rights and Freedoms*, seeking a stay of proceedings due to the delay. In dismissing the application, the trial judge applied the framework set out in *R. v. Morin*, [1992] 1 S.C.R. 771. Ultimately, J was convicted. The Court of Appeal dismissed the appeal.

Held: The appeal should be allowed, the convictions set aside and a stay of proceedings entered.

Per Abella, Moldaver, Karakatsanis, Côté and Brown JJ.: The delay was unreasonable and J's s. 11(*b*) *Charter* right was infringed. The *Morin* framework for

Barrett Richard Jordan *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l'Alberta, Association des libertés civiles de la Colombie-Britannique et Criminal Lawyers' Association (Ontario) *Intervenants*

Répertorié : R. *c.* Jordan

2016 CSC 27

N° du greffe : 36068.

2015 : 7 octobre; 2016 : 8 juillet.

Présents : La juge en chef McLachlin et les juges Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté et Brown.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Procès dans un délai raisonnable — Délai de plus de quatre ans entre le dépôt des accusations et la fin du procès — Y a-t-il eu atteinte au droit de l'accusé d'être jugé dans un délai raisonnable que lui garantit l'art. 11b) de la Charte canadienne des droits et libertés? — Nouveau cadre d'analyse pour l'application de l'art. 11b).

J a été inculpé en décembre 2008 pour avoir participé à une opération de vente de drogue sur appel. Son procès s'est terminé en février 2013. J a présenté une demande fondée sur l'al. 11*b*) de la *Charte canadienne des droits et libertés* en vue d'obtenir l'arrêt des procédures en raison du délai. En rejetant la demande, le juge du procès a appliqué le cadre d'analyse établi dans l'arrêt *R. c. Morin*, [1992] 1 R.C.S. 771. En fin de compte, J a été déclaré coupable. La Cour d'appel a rejeté l'appel.

Arrêt : Le pourvoi est accueilli, les déclarations de culpabilité sont annulées et l'arrêt des procédures est ordonné.

Les juges Abella, Moldaver, Karakatsanis, Côté et Brown : Le délai était déraisonnable et le droit de J protégé par l'al. 11*b*) de la *Charte* a été violé. Le cadre d'analyse

applying s. 11(*b*) has given rise to both doctrinal and practical problems, contributing to a culture of delay and complacency towards it. Doctrinally, the *Morin* framework is too unpredictable, too confusing, and too complex. It has itself become a burden on already overburdened trial courts. From a practical perspective, the *Morin* framework's after-the-fact rationalization of delay does not encourage participants in the justice system to take preventative measures to address inefficient practices and resourcing problems.

A new framework is therefore required for applying s. 11(*b*). This framework is intended to focus the s. 11(*b*) analysis on the issues that matter and encourage all participants in the criminal justice system to cooperate in achieving reasonably prompt justice, with a view to fulfilling s. 11(*b*)'s important objectives.

At the heart of this new framework is a presumptive ceiling beyond which delay — from the charge to the actual or anticipated end of trial — is presumed to be unreasonable, unless exceptional circumstances justify it. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Delay attributable to or waived by the defence does not count towards the presumptive ceiling.

Once the presumptive ceiling is exceeded, the burden is on the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. If the Crown cannot do so, a stay will follow. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied.

It is obviously impossible to identify in advance all circumstances that may qualify as exceptional for the purposes of adjudicating a s. 11(*b*) application. Ultimately, the determination of whether circumstances are exceptional will depend on the trial judge's good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.

établi dans *Morin* pour l'application de l'al. 11*b*) a engendré des problèmes sur les plans tant théorique que pratique, concourant ainsi à une culture des délais et de complaisance à l'endroit de cette culture. Sur le plan théorique, ce cadre d'analyse est trop imprévisible, trop difficile à saisir et trop complexe. Il est devenu lui-même un fardeau pour des tribunaux de première instance déjà surchargés. D'un point de vue pratique, la justification après coup du délai sur laquelle débouche le cadre établi dans *Morin* n'incite pas les participants au système de justice à prendre des mesures préventives pour remédier aux pratiques inefficaces et au manque de ressources.

Il faut donc recourir à un nouveau cadre d'analyse pour appliquer l'al. 11*b*). Ce cadre vise à ce que l'analyse d'une demande fondée sur cette disposition se concentre sur les questions qui importent et à inciter tous les participants au système de justice criminelle à collaborer pour administrer la justice d'une manière qui soit raisonnablement prompte afin de réaliser les objectifs importants visés par l'al. 11*b*).

Au cœur de ce nouveau cadre se trouve un plafond présumé au-delà duquel le délai entre le dépôt des accusations et la conclusion réelle ou anticipée du procès est présumé déraisonnable, à moins que des circonstances exceptionnelles le justifient. Ce plafond présumé est fixé à 18 mois pour les affaires instruites devant une cour provinciale et à 30 mois pour celles instruites devant une cour supérieure (ou celles instruites devant une cour provinciale à l'issue d'une enquête préliminaire). Le délai imputable à la défense ou celui qu'elle renonce à invoquer ne compte pas dans le calcul visant à déterminer si ce plafond est atteint.

Une fois que le plafond présumé a été dépassé, il incombe au ministère public de réfuter la présomption du caractère déraisonnable du délai en invoquant des circonstances exceptionnelles. S'il ne peut le faire, un arrêt des procédures doit suivre. Des circonstances exceptionnelles sont des circonstances indépendantes de la volonté du ministère public, c'est-à-dire (1) qu'elles sont raisonnablement imprévues ou raisonnablement inévitables, et (2) qu'on ne peut raisonnablement y remédier.

Il est manifestement impossible de déterminer a priori toutes les circonstances qui peuvent se qualifier d'exceptionnelles lorsqu'il s'agit de trancher une demande fondée sur l'al. 11*b*). En fin de compte, la réponse à cette question du caractère exceptionnel des circonstances dépendra du bon sens et de l'expérience du juge de première instance. Une liste des circonstances de ce type ne saurait être exhaustive. Elles se divisent toutefois généralement en deux catégories : les événements distincts et les affaires particulièrement complexes.

If the exceptional circumstance relates to a discrete event (such as an illness or unexpected event at trial), the delay reasonably attributable to that event is subtracted from the total delay. If the exceptional circumstance arises from the case's complexity, the delay is reasonable and no further analysis is required.

An exceptional circumstance is the only basis upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling. The seriousness or gravity of the offence cannot be relied on, nor can chronic institutional delay. Most significantly, the absence of prejudice can in no circumstances be used to justify delays after the presumptive ceiling is breached. Once so much time has elapsed, only circumstances that are genuinely outside the Crown's control and ability to remedy may furnish a sufficient excuse for the prolonged delay.

Below the presumptive ceiling, however, the burden is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have. Absent these two factors, the s. 11(*b*) application must fail. Stays beneath the presumptive ceiling should only be granted in clear cases.

As to the first factor, while the defence might not be able to resolve the Crown's or the trial court's challenges, it falls to the defence to show that it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications (including the s. 11(*b*) application) reasonably and expeditiously. At the same time, trial judges should not take this opportunity, with the benefit of hindsight, to question every decision made by the defence. The defence is required to act reasonably, not perfectly.

Turning to the second factor, the defence must show that the time the case has taken markedly exceeds the reasonable time requirements of the case. These requirements derive from a variety of factors, including the complexity of the case and local considerations. Determining the time the case reasonably should have taken is

Si la circonstance exceptionnelle concerne un événement distinct (comme une maladie ou un imprévu au procès), le délai raisonnablement attribuable à cet événement est soustrait du délai total. Si la circonstance exceptionnelle résulte de la complexité de l'affaire, le délai est raisonnable et aucune autre analyse n'est nécessaire.

Une circonstance exceptionnelle est le seul fondement permettant au ministère public de s'acquitter du fardeau qui lui incombera de justifier un délai qui excède le plafond établi. Ni la gravité de l'infraction ni les délais institutionnels chroniques ne peuvent servir à justifier le délai. Fait plus important encore, l'absence de préjudice ne peut en aucun cas servir à justifier des délais lorsque le plafond est dépassé. Quand il s'est écoulé autant de temps, seules des circonstances véritablement indépendantes de la volonté du ministère public et auxquelles celui-ci ne pouvait remédier peuvent donner une excuse suffisante pour justifier le délai prolongé.

Lorsque le délai est inférieur au plafond présumé, il incombe toutefois à la défense de démontrer le caractère déraisonnable du délai. Pour ce faire, elle doit démontrer (1) qu'elle a pris des mesures utiles qui font la preuve d'un effort soutenu pour accélérer l'instance, et (2) que le procès a été nettement plus long que ce qu'il aurait dû raisonnablement être. En l'absence de l'un ou l'autre de ces deux facteurs, la demande fondée sur l'al. 11*b*) doit être rejetée. Dans les cas où le délai est inférieur au plafond, l'arrêt des procédures ne doit être prononcé que dans les cas manifestes.

Quant au premier facteur, bien que la défense puisse être incapable de résoudre les défis auxquels sont confrontés le ministère public ou le tribunal de première instance, elle doit démontrer qu'elle a essayé d'obtenir les dates les plus rapprochées possible pour la tenue de l'audience, qu'elle a collaboré avec le ministère public et le tribunal et a répondu à leurs efforts, qu'elle a avisé le ministère public en temps opportun que le délai commençait à poser problème, et qu'elle a mené toutes les demandes (y compris celle fondée sur l'al. 11*b*)) de manière raisonnable et expéditive. Cela dit, le juge du procès ne doit pas profiter de l'occasion, avec l'avantage du recul, pour remettre en question chacune des décisions de la défense. Cette dernière est tenue d'agir raisonnablement, non pas à la perfection.

Quant au second facteur, la défense doit démontrer que le temps qu'a pris la cause excède de manière manifeste le délai qui aurait été raisonnablement nécessaire pour juger l'affaire. Ces exigences dépendent d'une panoplie de facteurs, y compris la complexité du dossier et des considérations de nature locale. Le fait de déterminer

not a matter of precise calculation, as has been the practice under the *Morin* framework.

For cases currently in the system, a contextual application of the new framework is required to avoid repeating the post-*Askov* situation, where tens of thousands of charges were stayed as a result of the abrupt change in the law. Therefore, for those cases, the new framework applies, subject to two qualifications. First, for cases in which the delay exceeds the ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to the release of this decision. This transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice.

The second qualification applies to cases currently in the system in which the total delay (minus defence delay) falls below the ceiling. For these cases, the two criteria — defence initiative and whether the time the case has taken markedly exceeds what was reasonably required — must also be applied contextually, sensitive to the parties' reliance on the previous state of the law. Specifically, the defence need not demonstrate having taken initiative to expedite matters for the period of delay preceding this decision. Since defence initiative was not expressly required by the *Morin* framework, it would be unfair to require it for the period of time before the release of this decision. Further, if the delay was occasioned by an institutional delay that was, before this decision was released, reasonably acceptable in the relevant jurisdiction under the *Morin* framework, that institutional delay will be a component of the reasonable time requirements of the case for cases currently in the system.

In this case, the total delay between the charges and the end of trial was 49.5 months. As the trial judge found, four months of this delay were waived by J when he

le temps qu'aurait dû raisonnablement prendre une affaire à être jugée n'est pas une question de calculs précis, comme le veut la pratique instaurée par le cadre d'analyse établi dans *Morin*.

Pour les affaires en cours d'instance, une application contextuelle du nouveau cadre s'impose pour éviter que se reproduise ce qui s'est passé après le prononcé de l'arrêt *Askov*, alors que des dizaines de milliers d'accusations ont fait l'objet d'un arrêt des procédures en raison de la modification soudaine du droit. Par conséquent, le nouveau cadre s'applique à ces affaires, sujet à deux réserves. Premièrement, dans les cas où le délai excède le plafond, une mesure transitoire exceptionnelle peut s'appliquer lorsque les accusations ont été portées avant le prononcé du présent jugement. C'est le cas lorsque le ministère public convainc la cour que le temps qui s'est écoulé est justifié du fait que les parties se sont raisonnablement conformées au droit tel qu'il existait au préalable. Cela suppose qu'il faille procéder à un examen contextuel, eu égard à la manière dont l'ancien cadre a été appliqué et au fait que la conduite des parties ne peut être jugée rigoureusement en fonction d'une norme dont ils n'avaient pas connaissance.

La deuxième réserve s'applique aux affaires déjà en cours pour lesquelles le délai total (moins celui imputable à la défense) est inférieur au plafond. Pour ces causes, les tribunaux doivent appliquer les deux critères — soit celui relatif à l'initiative dont a fait preuve la défense et celui de la question de savoir si le temps qu'a mis la cause pour être entendue a excédé de manière manifeste le temps qui était raisonnablement requis — en fonction du contexte et en étant sensibles au fait que les parties se sont fiées à l'état du droit qui prévalait auparavant. Plus précisément, la défense n'a pas à démontrer qu'elle a pris des initiatives pour accélérer les choses au cours de la période qui a précédé le prononcé du présent jugement. Puisque de telles initiatives n'étaient pas expressément requises par le cadre d'analyse prévu dans *Morin*, il serait injuste d'exiger qu'elles aient été prises avant le prononcé de la présente décision. En outre, si le retard a été causé par un délai institutionnel raisonnablement acceptable dans le ressort en cause selon le cadre d'analyse prévu dans *Morin* qui prévalait avant le prononcé de la présente décision, ce retard institutionnel sera un des éléments du délai raisonnable nécessaire de la cause pour les affaires déjà en cours d'instance.

En l'espèce, le délai total qui s'est écoulé entre le dépôt des accusations et la fin du procès a été de 49 mois et demi. Comme l'a conclu le juge du procès, J a renoncé à

changed counsel shortly before the trial was set to begin, necessitating an adjournment. In addition, one and a half months of the delay were caused solely by J for the adjournment of the preliminary inquiry because his counsel was unavailable for closing submissions on the last day. This leaves a remaining delay of 44 months, an amount that vastly exceeds the presumptive ceiling of 30 months in the superior court. The Crown has failed to discharge its burden of demonstrating that the delay of 44 months (excluding defence delay) was reasonable. While the case against J may have been moderately complex given the amount of evidence and the number of co-accused, it was not so exceptionally complex that it would justify such a delay.

Nor does the transitional exceptional circumstance justify the delay in this case. Since J's charges were brought prior to the release of this decision, the Crown was operating without notice of the new framework within a jurisdiction with some systemic delay issues. But a total delay of 44 months (excluding defence delay), of which the vast majority was either Crown or institutional delay, in an ordinary dial-a-dope trafficking prosecution is simply unreasonable regardless of the framework under which the Crown was operating. Therefore, it cannot be said that the Crown's reliance on the previous state of the law was reasonable. While the Crown did make some efforts to bring the matter to trial more quickly, these efforts were too little and too late. And the systemic delay problems that existed at the time cannot justify the delay either. Much of the institutional delay could have been avoided had the Crown proceeded on the basis of a more reasonable plan by more accurately estimating the amount of time needed to present its case. To the extent that the trial judge held that this delay was reasonable, he erred.

All the parties were operating within the culture of complacency towards delay that has pervaded the criminal justice system in recent years. Broader structural and procedural changes, in addition to day-to-day efforts, are required to maintain the public's confidence by delivering justice in a timely manner. Ultimately, all participants in the justice system must work in concert to achieve speedier trials. After all, everyone stands to benefit from these

invoquer une période de quatre mois lorsqu'il a changé d'avocat peu de temps avant le début du procès, ce qui a nécessité un ajournement. En outre, un mois et demi du retard est exclusivement attribuable à J pour l'ajournement de l'enquête préliminaire parce que son avocat n'était pas disponible pour présenter ses observations finales la dernière journée. Il reste donc un délai de 44 mois, soit un délai qui excède considérablement le plafond présumé fixé à 30 mois pour les affaires instruites devant une cour supérieure. Le ministère public ne s'est pas acquitté de son fardeau de démontrer que le délai de 44 mois (excluant le délai attribuable à la défense) était raisonnable. Si le dossier opposé à J a pu être modérément complexe compte tenu de la somme d'éléments de preuve et du nombre de coaccusés, il n'était pas exceptionnellement complexe au point de justifier pareil délai.

L'application d'une mesure transitoire exceptionnelle ne justifie pas non plus le délai en l'espèce. Puisque les accusations contre J ont été portées avant le prononcé de la présente décision, le ministère public agissait sans connaissance du nouveau cadre d'analyse dans un ressort aux prises avec certains problèmes de retard systémique. Un total de 44 mois (excluant le délai attribuable à la défense) dont la majeure partie était imputable au ministère public ou d'ordre institutionnel pour une poursuite ordinaire pour vente de drogue sur appel est néanmoins tout simplement déraisonnable, quel qu'ait été le cadre d'analyse suivant lequel agissait le ministère public. On ne peut donc affirmer que le ministère public s'est fié d'une manière qui soit raisonnable à l'état du droit qui prévalait auparavant. Même si le ministère public a fait certains efforts pour que le procès se tienne plus rapidement, c'était trop peu trop tard. Les problèmes de retard systémique vécus à l'époque ne sauraient non plus justifier le temps qu'il a fallu pour instruire la cause. Le délai institutionnel aurait pu être évité en bonne partie si le ministère public avait procédé sur la base d'un plan plus raisonnable en estimant avec plus d'exactitude le temps qu'il lui fallait pour présenter sa preuve. Le juge du procès a commis une erreur en concluant que, en l'espèce, le délai était raisonnable.

Toutes les parties travaillaient dans une culture de complaisance à l'égard des délais qui s'est répandue dans le système de justice criminelle ces dernières années. Pour permettre aux tribunaux de maintenir la confiance du public en rendant justice en temps utile, il faut apporter des changements structurels et procéduraux supplémentaires au système en plus de fournir des efforts quotidiens. En fin de compte, tous les participants

efforts. Timely trials are possible. More than that, they are constitutionally required.

Per McLachlin C.J. and Cromwell, Wagner and Gascon JJ.: This Court's jurisprudence for dealing with alleged breaches of s. 11(*b*) of the *Canadian Charter of Rights and Freedoms* over the last 30 years supplies a clear answer to this appeal. Striking out in the completely new direction adopted by the majority is unnecessary. A reasonable time for trial under s. 11(*b*) cannot and should not be defined by numerical ceilings, as the majority concludes.

The right to be tried in a reasonable time is multi-factored, fact-sensitive, and case-specific; its application to specific cases is unavoidably complex. The relevant factors and general approach set out in *R. v. Morin*, [1992] 1 S.C.R. 771, respond to these complexities. With modest adjustments to make the analysis more straightforward and with some additional clarification, a revised *Morin* framework will continue to ensure that the constitutional right of accused persons to be tried in a reasonable time is defined and applied in a way that appropriately balances the many relevant considerations. In order to do so, the *Morin* considerations should be regrouped under four main analytical steps.

First, the accused must establish that there is a basis for the s. 11(*b*) inquiry. The court should look to the overall period between the charge and the completion of the trial to determine whether its length merits further inquiry.

Second, the court must determine on an objective basis what would be a reasonable time for the disposition of a case like the one under review — that is, how long a case of this nature should reasonably take. The objective standard of reasonableness has two components: institutional delay and inherent time requirements of the case. Both of these periods of time are to be determined objectively. The acceptable period of institutional delay is the period that is reasonably required for the court to be ready to hear the case once the parties are ready to proceed, and is determined in accordance with the administrative guidelines for institutional delay set out by this Court in *Morin*: eight to ten months before the provincial

au système de justice doivent travailler de concert pour accélérer le déroulement des procès. Après tout, c'est l'ensemble de la société qui bénéficiera de ces efforts. Instruire les procès en temps utile est possible. Mais plus encore, la Constitution l'exige.

La juge en chef McLachlin et les juges Cromwell, Wagner et Gascon : La jurisprudence élaborée par la Cour au cours des 30 dernières années pour traiter des allégations de violation de l'al. 11*b*) de la *Charte canadienne des droits et libertés* permet de répondre clairement à la question posée par le présent pourvoi. Il n'est pas nécessaire d'aller dans la direction entièrement nouvelle empruntée par les juges majoritaires. Le délai raisonnable pour juger un accusé, au sens où il faut l'entendre pour l'application de l'al. 11*b*), ne peut ni ne devrait être défini par des plafonds numériques, comme le concluent les juges majoritaires.

Le droit d'être jugé dans un délai raisonnable est fonction de nombreux facteurs, des faits et des particularités de chaque cas; son application à une affaire donnée est inévitablement complexe. Les facteurs pertinents et l'approche générale décrits dans *R. c. Morin*, [1992] 1 R.C.S. 771, tiennent compte de cette complexité. Sous réserve de quelques rajustements pour simplifier l'analyse et de certains éclaircissements supplémentaires, le cadre de l'arrêt *Morin* révisé permettra de continuer de veiller à ce que la définition et l'application du droit constitutionnel de l'accusé d'être jugé dans un délai raisonnable mettent comme il se doit en balance les nombreux facteurs pertinents. Pour ce faire, il y a lieu de regrouper les facteurs énumérés dans *Morin* en quatre grandes étapes analytiques.

Premièrement, l'accusé doit nécessairement faire la preuve de l'opportunité de procéder à une analyse fondée sur l'al. 11*b*) de la *Charte*. Le tribunal doit examiner l'ensemble de la période écoulée entre le dépôt des accusations et la clôture du procès pour décider si le temps qu'il a fallu justifie un examen plus approfondi.

Deuxièmement, le tribunal doit déterminer ce qui, objectivement, constituerait une durée de procès raisonnable dans le cas d'une affaire comme celle qui fait l'objet de l'examen, c'est-à-dire combien de temps devrait raisonnablement prendre une cause de même nature. La norme objective du caractère raisonnable comporte deux volets : le délai institutionnel et le délai inhérent au dossier. Ces deux délais doivent être établis de façon objective. Le délai institutionnel acceptable correspond au temps dont le tribunal a raisonnablement besoin pour être prêt à instruire l'affaire, une fois que les parties sont prêtes pour le procès. Il est déterminé selon les lignes directrices administratives applicables à ce type de délais que la Cour a énoncées dans

courts and six to eight months before the superior courts. These guidelines set some rough limits on the point at which inadequacy of state resources will be accepted as an excuse. The guidelines should not be understood as precluding allowance for any sudden and temporary strain on resources that causes a temporary congestion in the courts. The inherent time requirements of a case, on the other hand, represent the period of time that is reasonably required for the parties to be ready to proceed and to conclude the trial for a case similar in nature to the one before the court, and are to be determined on the basis of judicial experience, supplemented by submissions of counsel and evidence. In estimating a reasonable time period, the court should also take into account the liberty interests of the accused.

Third, the court must consider how much of the actual delay in the case counts against the state. This is done by subtracting the periods attributable to the defence, including any waived time periods, from the overall period of delay. When the accused consents to a date for trial offered by the court or to an adjournment sought by the Crown, that consent, without more, does not amount to waiver. The onus is on the Crown to demonstrate that this period is waived, that is, that the accused's conduct reveals something more than mere acquiescence in the inevitable, and that it meets the high bar of being clear, unequivocal, and informed acceptance. Delay resulting from unreasonable actions solely attributable to the accused must also be subtracted from the period for which the state is responsible, such as last-minute changes in counsel or adjournments flowing from a lack of diligence. It is also necessary to subtract from the actual delay any periods that, although not fairly attributable to the defence, are nonetheless not fairly counted against the state, including unavoidable delays due to inclement weather or illness of a trial participant.

Fourth, the court must determine whether the actual period of time that fairly counts against the state exceeds the reasonable time by more than can be justified on any acceptable basis. Where the actual time exceeds what would have been reasonable for a case of that nature, the result will be a finding of unreasonable delay unless

l'arrêt *Morin*, en l'occurrence, de huit à dix mois pour les instances qui se déroulent devant une cour provinciale et de six à huit mois pour celles qui se déroulent devant une cour supérieure. Ces lignes directrices établissent des limites approximatives en deçà desquelles l'insuffisance des ressources de l'État sera considérée comme une excuse acceptable. L'interprétation des lignes directrices devrait permettre de tenir compte de toute pression soudaine et temporaire sur les ressources qui cause un engorgement passager des tribunaux. En revanche, le délai inhérent à l'affaire correspond au délai raisonnablement nécessaire pour que les parties soient prêtes à procéder à l'instruction et pour mener l'affaire jusqu'à son dénouement, dans un dossier d'une nature semblable à celle du dossier dont la cour est saisie. Il est calculé en fonction de l'expérience judiciaire, complétée par les observations des avocats et par des éléments de preuve. Pour estimer une période de temps raisonnable, le tribunal devrait également tenir compte du droit à la liberté de la personne garanti à l'accusé.

Troisièmement, le tribunal doit se demander quelle portion du délai est imputable à l'État. Pour ce faire, il soustrait toute période attribuable à la défense — y compris les périodes qu'elle a renoncé à invoquer — de la totalité du délai. Lorsque l'accusé donne son consentement à la date de procès proposée par le tribunal ou à un ajournement réclamé par le ministère public, ce consentement, s'il est isolé, ne constitue pas une renonciation. Il incombe au ministère public de démontrer que l'accusé a renoncé à invoquer ce délai. Le ministère public doit prouver que, par sa conduite, l'accusé a signifié qu'il ne s'agissait pas de sa part d'une simple reconnaissance de l'inévitable. Ensuite, il doit satisfaire au critère rigoureux qui l'oblige à établir que l'accusé a accepté le délai de façon claire, non équivoque et éclairée. Les délais résultant de mesures déraisonnables imputables uniquement aux agissements de l'accusé doivent aussi être soustraits de la période dont l'État est responsable, comme les changements d'avocats survenus à la dernière minute ou les ajournements résultant d'un manque de diligence. Il est également nécessaire de soustraire du temps effectivement écoulé toute période qui, bien qu'elle ne soit pas légitimement imputable à la défense, ne peut néanmoins être reprochée légitimement non plus à l'État, y compris les délais inévitables attribuables aux intempéries ou à la maladie d'un des participants au procès.

Quatrièmement, le tribunal doit déterminer si la période qui peut légitimement être imputée à l'État excède le délai raisonnable d'une période plus longue que ce qui peut être justifié de quelque façon acceptable. Lorsque le temps qui s'est réellement écoulé excède ce qui aurait été raisonnable pour une cause de même nature, il faut

the Crown can show that the delay was justified. Even substantial excess delay may be justified and therefore reasonable where, for example, there is a particularly strong societal interest in the prosecution proceeding on its merits, or where the delay results from temporary and extraordinary pressures on counsel or the court system. However, it does not follow that in these conditions the excess period is invariably justified. The accused still may be able to demonstrate actual prejudice. Although actual prejudice need not be proved to find an infringement of s. 11(*b*), its presence would make unreasonable (in the particular circumstances of the case) a delay that might otherwise be objectively viewed as reasonable. As a result, justification may be found to be lacking.

Under this revised *Morin* framework, any delay in excess of the reasonable time requirements and any actual prejudice arising from the overall delay must be evaluated in light of societal interests: on one hand, fair treatment and prompt trial of accused persons and, on the other, determination of cases on their merits. If there are exceptionally strong societal interests in the prosecution of a case against an accused which substantially outweigh the societal interest and the interest of the accused person in prompt trials, these can serve as an acceptable basis upon which exceeding the inherent and institutional requirements of a case can be justified.

This approach is a slight reorientation of the *Morin* framework because the focus is more explicitly on the period of delay which exceeds what would have been reasonable. But there is no change in principle.

Applying these four steps of the revised *Morin* framework in this case, J's constitutional right to be tried within a reasonable time was violated. The 49.5-month delay from the charges to the end of the scheduled trial date is sufficient to trigger an inquiry into whether the delay is unreasonable. There were 10.5 months of inherent delay and 18 months of institutional delay. These findings make it appropriate to conclude that the reasonable time requirements for a case of this nature were 28.5 months. The case in fact took 49.5 months. The difference is 21 months. Of that, 4 months are attributable to the defence. The rest — a period of 17 months

conclure au caractère déraisonnable du délai, à moins que le ministère public puisse démontrer que ce dernier était justifié. Même les excédents importants peuvent se justifier, et donc être jugés raisonnables lorsque, par exemple, l'intérêt de la société à ce que le dossier soit jugé au fond est particulièrement élevé ou lorsque le délai résulte de pressions temporaires et exceptionnelles sur les avocats ou sur le système judiciaire. Cependant, on ne peut en conclure que, dans ces conditions, la période excédentaire sera systématiquement justifiée. L'accusé peut tout de même prouver qu'il a réellement subi un préjudice. Même s'il n'est pas nécessaire qu'un tel préjudice soit mis en preuve pour que le tribunal conclue à une violation de l'al. 11*b*), sa présence peut (dans les circonstances particulières de la cause) rendre déraisonnable un délai qui, autrement, pourrait être objectivement jugé raisonnable. Par conséquent, le tribunal pourra conclure à l'absence de justification.

Selon ce cadre de l'arrêt *Morin* révisé, le délai excédant le temps qui aurait raisonnablement été nécessaire pour juger l'affaire et le préjudice qu'a réellement subi l'accusé en raison du délai général doivent être évalués en fonction de l'intérêt qu'a la société, d'une part, à ce que les accusés soient jugés rapidement et équitablement et, d'autre part, à ce que les causes soient jugées au fond. Si la société a un intérêt particulièrement pressant à ce que l'accusé soit traduit en justice et que cet intérêt l'emporte nettement sur celui de la société et de l'accusé à ce que le procès ait lieu rapidement, cet intérêt pressant peut être considéré comme une raison acceptable justifiant un délai plus long que les délais inhérent et institutionnel propres à l'affaire.

Cette démarche intellectuelle se veut une légère réorientation du cadre d'analyse prescrit par l'arrêt *Morin* parce qu'il met l'accent plus explicitement sur la portion du délai qui excède ce qui aurait été raisonnable. Cette nouvelle approche ne constitue pas pour autant un changement de principe.

Appliquant en l'espèce ces quatre volets du cadre d'analyse de l'arrêt *Morin* révisé, il est conclu que le droit constitutionnel de J d'être jugé dans un délai raisonnable a été violé. Le délai de 49 mois et demi écoulé entre le dépôt des accusations et la date prévue de la fin du procès suffit pour justifier l'examen du caractère raisonnable ou non du délai. Le délai inhérent était de 10 mois et demi et le délai institutionnel était de 18 mois. Vu ces conclusions, il y a lieu de conclure que c'est un délai de 28 mois et demi qui aurait été raisonnable pour juger une affaire comme la présente espèce. Or, c'est en réalité 49 mois et demi qu'il a fallu pour le faire. Cela correspond à un écart de 21 mois.

— counts against the state. In other words, this case took almost a year and a half longer than what would be a reasonable period to prosecute a case of this nature. This is not a close case. The time to the end of trial greatly exceeds what would be a reasonable time to prosecute a similar case. While there are societal interests in the trial on the merits of the serious drug crimes alleged against J, these cannot make reasonable the grossly excessive time that it took society to bring him to trial.

In contrast, the majority's new framework is not an appropriate approach to interpreting and applying the s. 11(*b*) right, for several reasons. First, the new approach reduces reasonableness to numerical ceilings. Reasonableness cannot be judicially defined with precision or captured by a number. As well, the majority's judicially created ceilings largely uncouple the right to be tried within a reasonable time from the bedrock constitutional requirement of reasonableness, which is the core of the right.

Moreover, this approach unjustifiably diminishes the right to be tried within a reasonable time. When the elapsed time is below the ceiling, an accused would have to show not only that the case took markedly longer than it reasonably should have but also that he or she took meaningful steps that demonstrate a sustained effort to expedite the proceedings. This requirement has no bearing on whether the delay was unreasonable.

The majority's approach also exceeds the proper role of the Court. Creating fixed or presumptive ceilings is a task better left to legislatures. The ceilings place new limits on the exercise of the s. 11(*b*) right to a trial within a reasonable time for reasons of administrative efficiency that have nothing to do with whether the delay in a given case was or was not excessive. This is inconsistent with the judicial role.

As well, the ceilings have no support in the record in this case. What evidence there is in the record suggests that it would be unwise to establish these sorts of ceilings. For the vast majority of cases, the ceilings are so high that they risk being meaningless. They are unlikely

De cette période, 4 mois sont attribuables à la défense. Le reste — soit une période de 17 mois — est imputable à l'État. Autrement dit, la présente affaire a duré presque un an et demi de plus que ce qui aurait été raisonnable pour instruire le procès dans une cause de même nature. Il ne s'agit pas d'un cas limite. En effet, le délai qu'il a fallu pour traduire l'accusé en justice a été de loin supérieur à celui qui aurait été raisonnablement nécessaire pour juger une affaire semblable. Bien qu'il soit dans l'intérêt de la société qu'il y ait un procès au fond pour les crimes graves relatifs aux stupéfiants reprochés à J, cet intérêt ne saurait rendre raisonnable le délai manifestement excessif qu'il a fallu à la société pour le juger.

Par contre, le nouveau cadre proposé par les juges majoritaires n'est pas la bonne manière d'interpréter ou d'appliquer le droit garanti par l'al. 11*b*), et ce, pour plusieurs raisons. Premièrement, la nouvelle approche ramène la question du caractère raisonnable à des plafonds numériques. Le caractère raisonnable est un concept qui ne peut être défini avec précision par les tribunaux et qu'on ne peut ramener à une valeur numérique. En outre, les plafonds que la majorité propose de créer par voie judiciaire dissocient en grande partie le droit d'être jugé dans un délai raisonnable de l'exigence constitutionnelle fondamentale du caractère raisonnable qui est au cœur de ce droit.

Cette approche restreint en outre de manière injustifiable le droit d'être jugé dans un délai raisonnable. Lorsque le temps écoulé sera inférieur au plafond fixé, l'accusé sera tenu de démontrer non seulement que l'affaire a duré beaucoup plus longtemps que ce qu'elle aurait raisonnablement dû, mais également qu'il a pris des mesures utiles qui font la preuve d'un effort soutenu pour accélérer l'instance. Cette exigence n'a aucune incidence sur la question de savoir si le délai a été déraisonnable.

L'approche des juges majoritaires outrepasse également le rôle dévolu à la Cour. La décision de créer des plafonds fixes ou présumés est une tâche qu'il vaut mieux laisser au législateur. Les plafonds assortissent de nouvelles restrictions l'exercice du droit d'être jugé dans un délai raisonnable garanti par l'al. 11*b*) pour des raisons d'efficacité administrative qui n'ont rien à voir avec la question du caractère excessif ou non du délai dans un cas déterminé. L'imposition de tels plafonds est incompatible avec le rôle dévolu aux tribunaux.

De plus, le dossier en l'espèce n'appuie pas l'établissement des plafonds. Les éléments de preuve versés au dossier donnent en fait à penser qu'il serait imprudent de fixer ce type de plafonds. Dans la grande majorité des cas, les plafonds sont tellement élevés qu'ils risquent de

to address the culture of delay that is said to exist and are more likely to feed such a culture.

The majority's approach also risks negative consequences for the administration of justice. The presumptive ceilings are unlikely to improve the pace at which the vast majority of cases move through the system. As well, if this new framework were applied immediately, the majority's transitional provisions would not avoid the risk of thousands of judicial stays.

Moreover, the increased simplicity which is said to flow from the majority's new framework is likely illusory. Even if creating ceilings were an appropriate task for the courts and even if there were an appropriate evidentiary basis for them, there is little reason to think these ceilings would avoid the complexities inherent in deciding whether a particular delay is unreasonable. The majority's framework simply moves the complexities of the analysis to a new location: deciding whether to rebut the presumption that a delay is unreasonable if it exceeds the ceiling in particular cases.

Ultimately, the majority's new framework casts aside three decades of the Court's jurisprudence when no participant in the appeal called for such a wholesale change, has not been the subject of adversarial scrutiny or debate, and risks thousands of judicial stays. In short, the new framework is wrong in principle and unwise in practice.

Cases Cited

By Moldaver, Karakatsanis and Brown JJ.

Overruled: *R. v. Morin*, [1992] 1 S.C.R. 771; **referred to:** *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Pidskalny*, 2013 SKCA 74, 299 C.C.C. (3d) 396; *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3; *R. v. Williamson*, 2016 SCC 28, [2016] 1 S.C.R. 741; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *R. v. MacDougall*, [1998] 3 S.C.R. 45; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Elliott* (2003), 114 C.R.R. (2d) 1; *R. v. Vassell*, 2016 SCC 26, [2016] 1 S.C.R. 625; *R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83; *R. v. Rodgerson*, 2015 SCC 38, [2015]

perdre tout leur sens. Ils risquent de ne contribuer d'aucune façon à pallier le problème de la soi-disant culture des délais. En fait, des plafonds aussi élevés risquent davantage d'alimenter une telle culture.

L'approche des juges majoritaires risque aussi d'entraîner des conséquences néfastes pour l'administration de la justice. Il est improbable que les plafonds présumés accélèrent le traitement de l'immense majorité des affaires judiciaires. En outre, si ce nouveau cadre était appliqué immédiatement, les dispositions transitoires proposées par les juges majoritaires ne permettraient pas d'éviter le risque que des milliers d'arrêts des procédures soient ordonnés par les tribunaux.

De plus, la simplicité accrue qui découlerait soi-disant du nouveau cadre proposé par les juges majoritaires est vraisemblablement illusoire. Même si la création de plafonds entrait dans les attributions des tribunaux et que la preuve présentée en l'espèce la justifiait, il y a peu de raison de penser que ces plafonds permettraient d'éviter les complexités inhérentes à l'obligation de décider si un délai particulier est déraisonnable. Le cadre élaboré par les juges majoritaires ne fait que déplacer la complexité de l'analyse : une décision sur l'opportunité de réfuter, dans des cas particuliers, la présomption selon laquelle un délai est déraisonnable s'il excède le plafond.

En fin de compte, le nouveau cadre proposé par les juges majoritaires met au rencart une trentaine d'années de jurisprudence de la Cour alors qu'aucun des participants au présent pourvoi n'a réclamé une telle transformation radicale de notre droit, que ce cadre n'a fait l'objet ni d'un débat contradictoire ni d'une analyse de la part des parties et qu'il risque d'entraîner des milliers d'arrêts des procédures ordonnés par les tribunaux. Bref, le nouveau cadre est erroné sur le plan théorique et peu judicieux sur le plan pratique.

Jurisprudence

Citée par les juges Moldaver, Karakatsanis et Brown

Arrêt renversé : *R. c. Morin*, [1992] 1 R.C.S. 771; **arrêts mentionnés :** *R. c. Askov*, [1990] 2 R.C.S. 1199; *R. c. Pidskalny*, 2013 SKCA 74, 299 C.C.C. (3d) 396; *R. c. Godin*, 2009 CSC 26, [2009] 2 R.C.S. 3; *R. c. Williamson*, 2016 CSC 28, [2016] 1 R.C.S. 741; *Ontario (Procureur général) c. Fraser*, 2011 CSC 20, [2011] 2 R.C.S. 3; *R. c. Henry*, 2005 CSC 76, [2005] 3 R.C.S. 609; *R. c. MacDougall*, [1998] 3 R.C.S. 45; *R. c. Conway*, [1989] 1 R.C.S. 1659; *R. c. Elliott* (2003), 114 C.R.R. (2d) 1; *R. c. Vassell*, 2016 CSC 26, [2016] 1 R.C.S. 625; *R. c. Auclair*, 2014 CSC 6, [2014] 1 R.C.S. 83; *R. c. Rodgerson*, 2015

2 S.C.R. 760; *R. v. Tremblay*, [1987] 2 S.C.R. 435; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429; *R. v. Brydges*, [1990] 1 S.C.R. 190; *R. v. Feeney*, [1997] 2 S.C.R. 117; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401; *R. v. Omar*, 2007 ONCA 117, 84 O.R. (3d) 493; *R. v. Ghavami*, 2010 BCCA 126, 253 C.C.C. (3d) 74.

By Cromwell J.

Applied: *R. v. Morin*, [1992] 1 S.C.R. 771, aff'g (1990), 55 C.C.C. (3d) 209; **referred to:** *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Smith*, [1989] 2 S.C.R. 1120; *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3; *R. v. Beason* (1983), 36 C.R. (3d) 73; *R. v. Sharma*, [1992] 1 S.C.R. 814; *R. v. Brassard*, [1993] 4 S.C.R. 287; *R. v. Nuosci*, [1993] 4 S.C.R. 283; *R. v. Ghavami*, 2010 BCCA 126, 253 C.C.C. (3d) 74; *Beavers v. Haubert*, 198 U.S. 77 (1905).

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 10(*b*), 11(*b*).
Criminal Code, R.S.C. 1985, c. C-46, s. 561.
International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47, art. 14(3)(c).
Magna Carta (1215), clause 40.
Speedy Trial Act of 1974, 18 U.S.C. § 3161 (2012).

Authors Cited

Alberta Justice and Solicitor General. Criminal Justice Division. "Injecting a Sense of Urgency: A new approach to delivering justice in serious and violent criminal cases", report by Greg Lepp, April 2013 (online: https://justice.alberta.ca/programs_services/criminal_pros/Documents/InjectingSenseUrgency.pdf).
Amsterdam, Anthony G. "Speedy Criminal Trial: Rights and Remedies" (1975), 27 *Stan. L. Rev.* 525.
B.C. Justice Reform Initiative. *A Criminal Justice System for the 21st Century: Final Report to the Minister of Justice and Attorney General Honourable Shirley Bond*, report by D. Geoffrey Cowper, Q.C., Chair. Victoria: The Initiative, 2012.

CSC 38, [2015] 2 R.C.S. 760; *R. c. Tremblay*, [1987] 2 R.C.S. 435; *Canada (Procureur général) c. Hislop*, 2007 CSC 10, [2007] 1 R.C.S. 429; *R. c. Brydges*, [1990] 1 R.C.S. 190; *R. c. Feeney*, [1997] 2 R.C.S. 117; *Mills c. La Reine*, [1986] 1 R.C.S. 863; *R. c. Fearon*, 2014 CSC 77, [2014] 3 R.C.S. 621; *Lavallee, Rackel & Heintz c. Canada (Procureur général)*, 2002 CSC 61, [2002] 3 R.C.S. 209; *Canada (Procureur général) c. Fédération des ordres professionnels de juristes du Canada*, 2015 CSC 7, [2015] 1 R.C.S. 401; *R. c. Omar*, 2007 ONCA 117, 84 O.R. (3d) 493; *R. c. Ghavami*, 2010 BCCA 126, 253 C.C.C. (3d) 74.

Citée par le juge Cromwell

Arrêt appliqué : *R. c. Morin*, [1992] 1 R.C.S. 771, conf. (1990), 55 C.C.C. (3d) 209; **arrêts mentionnés :** *Mills c. La Reine*, [1986] 1 R.C.S. 863; *R. c. Rahey*, [1987] 1 R.C.S. 588; *R. c. Conway*, [1989] 1 R.C.S. 1659; *R. c. Smith*, [1989] 2 R.C.S. 1120; *R. c. Askov*, [1990] 2 R.C.S. 1199; *R. c. Godin*, 2009 CSC 26, [2009] 2 R.C.S. 3; *R. c. Beason* (1983), 36 C.R. (3d) 73; *R. c. Sharma*, [1992] 1 R.C.S. 814; *R. c. Brassard*, [1993] 4 R.C.S. 287; *R. c. Nuosci*, [1993] 4 R.C.S. 283; *R. c. Ghavami*, 2010 BCCA 126, 253 C.C.C. (3d) 74; *Beavers c. Haubert*, 198 U.S. 77 (1905).

Lois et règlements cités

Charte canadienne des droits et libertés, art. 10*b*), 11*b*).
Code criminel, L.R.C. 1985, c. C-46, art. 561.
Magna Carta (1215), clause 40.
Pacte international relatif aux droits civils et politiques, R.T. Can. 1976 nº 47, art. 14(3)c).
Speedy Trial Act of 1974, 18 U.S.C. § 3161 (2012).

Doctrine et autres documents cités

Alberta Justice and Solicitor General. Criminal Justice Division. « Injecting a Sense of Urgency : A new approach to delivering justice in serious and violent criminal cases », report by Greg Lepp, April 2013 (online : https://justice.alberta.ca/programs_services/criminal_pros/Documents/InjectingSenseUrgency.pdf).
Amsterdam, Anthony G. « Speedy Criminal Trial : Rights and Remedies » (1975), 27 *Stan. L. Rev.* 525.
B.C. Justice Reform Initiative. *A Criminal Justice System for the 21st Century : Final Report to the Minister of Justice and Attorney General Honourable Shirley Bond*, report by D. Geoffrey Cowper, Q.C., Chair, Victoria, The Initiative, 2012.

British Columbia. Provincial Court. "Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources", September 14, 2010 (online: www.provincialcourt.bc.ca/downloads/pdf/Justice_Delayed_-_A_Report_of_the_Provincial_Court_of_British_Columbia_Concerning_Judicial_Resource.pdf).

British Columbia. Provincial Court. "The Semi-Annual Time to Trial Report of the Provincial Court of British Columbia to March 31, 2015" (online: www.provincialcourt.bc.ca/downloads/pdf/Time%20to%20Trial%20-%20Update%20(as%20at%20March%2031,%202015).pdf).

Canada. Department of Justice. "The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System", 2006 (online: www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/).

Canada. Law Reform Commission. Working Paper 67. *Trial Within a Reasonable Time: A Working Paper Prepared for the Law Reform Commission of Canada*. Ottawa: Canada Communication Group, 1994.

Code, Michael A. *Trial Within a Reasonable Time: A Short History of Recent Controversies Surrounding Speedy Trial Rights in Canada and the United States*. Scarborough, Ont.: Carswell, 1992.

Hill, Casey, and Jeremy Tatum. "Re-Chartering an Old Course Rather than Staying Anew in Remedying Unreasonable Delay under the Charter", paper presented at the Crown Defence Conference, Winnipeg, September 2012 (online: www.crowndefence.ca/wp-content/uploads/2011/05/Justice-Casey-Hill_Remedying-Unreasonable-Delay1.pdf).

Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supp. Toronto: Carswell, 2007 (updated 2015, release 1).

Hopwood, Shon. "The Not So Speedy Trial Act" (2014), 89 *Wash. L. Rev.* 709.

LaFave, Wayne R., et al. *Criminal Procedure*, 5th ed. St. Paul, Minn.: West, 2009.

Lamer, Antonio. "The Role of Judges", address to the Empire Club of Canada, 1995 (online: http://speeches.empireclub.org/61076/data?n=1).

LeSage, Patrick J., and Michael Code. *Report of the Review of Large and Complex Criminal Case Procedures*. Toronto: Ontario Ministry of the Attorney General, 2008.

McLachlin, Beverley. "The Challenges We Face" (2007), 40 *U.B.C. L. Rev.* 819.

Ruby, Clayton C. "Trial Within a Reasonable Time under Section 11(b): the Ontario Court of Appeal

Canada. Commission de réforme du droit. Document de travail 67. *La tenue du procès dans un délai raisonnable : un document de travail préparé pour la Commission de réforme du droit du Canada*, Ottawa, Groupe Communication Canada, 1994.

Canada. Ministère de la Justice. « Rapport final sur l'examen prioritaire des dossiers du comité directeur sur l'efficacité et l'accès en matière de justice », 2006 (en ligne : www.justice.gc.ca/fra/pr-rp/sjc-csj/cde-esc/).

Code, Michael A. *Trial Within a Reasonable Time : A Short History of Recent Controversies Surrounding Speedy Trial Rights in Canada and the United States*, Scarborough (Ont.), Carswell, 1992.

Colombie-Britannique. Provincial Court. « Justice Delayed : A Report of the Provincial Court of British Columbia Concerning Judicial Resources », September 14, 2010 (online : www.provincialcourt.bc.ca/downloads/pdf/Justice_Delayed_-_A_Report_of_the_Provincial_Court_of_British_Columbia_Concerning_Judicial_Resource.pdf).

Colombie-Britannique. Provincial Court. « The Semi-Annual Time to Trial Report of the Provincial Court of British Columbia to March 31, 2015 » (online : www.provincialcourt.bc.ca/downloads/pdf/Time%20to%20Trial%20-%20Update%20(as%20at%20March%2031,%202015).pdf).

Commission de Venise (Commission européenne pour la démocratie par le droit). *Can excessive length of proceedings be remedied?* Strasbourg, Council of Europe Publishing, 2007.

Hill, Casey, and Jeremy Tatum. « Re-Chartering an Old Course Rather than Staying Anew in Remedying Unreasonable Delay under the Charter », paper presented at the Crown Defence Conference, Winnipeg, September 2012 (online : www.crowndefence.ca/wp-content/uploads/2011/05/Justice-Casey-Hill_Remedying-Unreasonable-Delay1.pdf).

Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supp., Toronto, Carswell, 2007 (updated 2015, release 1).

Hopwood, Shon. « The Not So Speedy Trial Act » (2014), 89 *Wash. L. Rev.* 709.

LaFave, Wayne R., et al. *Criminal Procedure*, 5th ed., St. Paul (Minn.), West, 2009.

Lamer, Antonio. « The Role of Judges », address to the Empire Club of Canada, 1995 (online : http://speeches.empireclub.org/61076/data?n=1).

LeSage, Patrick J., et Michael Code. *Rapport sur l'examen de la procédure relative aux affaires criminelles complexes*, Toronto, ministère du Procureur général de l'Ontario, 2008.

Disconnects from the Supreme Court" (2013), 2 C.R. (7th) 91.

Venice Commission (European Commission for Democracy through Law). *Can excessive length of proceedings be remedied?* Strasbourg: Council of Europe Publishing, 2007.

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, MacKenzie and Stromberg-Stein JJ.A.), 2014 BCCA 241, 357 B.C.A.C. 137, 611 W.A.C. 137, 313 C.R.R. (2d) 1, [2014] B.C.J. No. 1263 (QL), 2014 CarswellBC 1760 (WL Can.), affirming a decision of Verhoeven J., 2012 BCSC 1735, [2012] B.C.J. No. 2448 (QL), 2012 CarswellBC 3655 (WL Can.). Appeal allowed.

Eric V. Gottardi and *Tony C. Paisana*, for the appellant.

Croft Michaelson, *Q.C.*, and *Peter R. LaPrairie*, for the respondent.

Jolaine Antonio, for the intervener the Attorney General of Alberta.

Tim A. Dickson and *Martin Twigg*, for the intervener the British Columbia Civil Liberties Association.

Frank Addario and *Erin Dann*, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of Abella, Moldaver, Karakatsanis, Côté and Brown JJ. was delivered by

MOLDAVER, KARAKATSANIS AND BROWN JJ. —

I. Introduction

[1] Timely justice is one of the hallmarks of a free and democratic society. In the criminal law context, it takes on special significance. Section 11(*b*) of the *Canadian Charter of Rights and Freedoms* attests to this, in that it guarantees the right of accused persons "to be tried within a reasonable time".

McLachlin, Beverley. « The Challenges We Face » (2007), 40 *U.B.C. L. Rev.* 819.

Ruby, Clayton C. « Trial Within a Reasonable Time under Section 11(b) : the Ontario Court of Appeal Disconnects from the Supreme Court » (2013), 2 C.R. (7th) 91.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, MacKenzie et Stromberg-Stein), 2014 BCCA 241, 357 B.C.A.C. 137, 611 W.A.C. 137, 313 C.R.R. (2d) 1, [2014] B.C.J. No. 1263 (QL), 2014 CarswellBC 1760 (WL Can.), qui a confirmé une décision du juge Verhoeven, 2012 BCSC 1735, [2012] B.C.J. No. 2448 (QL), 2012 CarswellBC 3655 (WL Can.). Pourvoi accueilli.

Eric V. Gottardi et *Tony C. Paisana*, pour l'appelant.

Croft Michaelson, *c.r.*, et *Peter R. LaPrairie*, pour l'intimée.

Jolaine Antonio, pour l'intervenant le procureur général de l'Alberta.

Tim A. Dickson et *Martin Twigg*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Frank Addario et *Erin Dann*, pour l'intervenante Criminal Lawyers' Association (Ontario).

Version française du jugement des juges Abella, Moldaver, Karakatsanis, Côté et Brown rendu par

LES JUGES MOLDAVER, KARAKATSANIS ET BROWN —

I. Introduction

[1] La justice rendue en temps utile est l'une des caractéristiques d'une société libre et démocratique. Elle revêt une importance particulière en matière criminelle. L'alinéa 11*b*) de la *Charte canadienne des droits et libertés* en est la preuve, puisqu'il garantit à l'inculpé le droit « d'être jugé dans un délai raisonnable ».

[2] Moreover, the Canadian public expects their criminal justice system to bring accused persons to trial expeditiously. As the months following a criminal charge become years, everyone suffers. Accused persons remain in a state of uncertainty, often in pre-trial detention. Victims and their families who, in many cases, have suffered tragic losses cannot move forward with their lives. And the public, whose interest is served by promptly bringing those charged with criminal offences to trial, is justifiably frustrated by watching years pass before a trial occurs.

[3] An efficient criminal justice system is therefore of utmost importance. The ability to provide fair trials within a reasonable time is an indicator of the health and proper functioning of the system itself. The stakes are indisputably high.

[4] Our system, however, has come to tolerate excessive delays. The circumstances in this appeal are illustrative. Notwithstanding a delay of over four years in bringing a drug case of modest complexity to trial, both the trial judge and the Court of Appeal were of the view that the appellant was tried within a reasonable time. Their analyses are reflective of doctrinal and practical difficulties plaguing the current analytical framework governing s. 11(*b*). These difficulties have fostered a culture of complacency within the system towards delay.

[5] A change of direction is therefore required. Below, we set out a new framework for applying s. 11(*b*). At the centre of this new framework is a presumptive ceiling on the time it should take to bring an accused person to trial: 18 months for cases going to trial in the provincial court, and 30 months for cases going to trial in the superior court. Of course, given the contextual nature of reasonableness, the framework accounts for case-specific factors both above and below the presumptive ceiling. This framework is intended to focus the s. 11(*b*) analysis on the issues that matter and encourage all participants in the criminal justice system to cooperate in achieving reasonably prompt justice,

[2] La population canadienne s'attend en outre à ce que son système de justice criminelle juge les inculpés de manière diligente. Quand les mois suivant une inculpation au criminel deviennent des années, tout le monde en pâtit. Les inculpés demeurent dans l'incertitude et souvent détenus avant leur procès. Les victimes et leurs familles, qui dans bien des cas ont subi des pertes tragiques, ne peuvent tourner la page. Le public, quant à lui, dont l'intérêt est servi lorsque les inculpés sont traduits rapidement en justice, est frustré avec raison de voir des années passer avant la tenue d'un procès.

[3] L'efficacité du système de justice criminelle est donc de la plus haute importance. La capacité de tenir des procès équitables dans un délai raisonnable est indicative de la santé et du bon fonctionnement du système lui-même. Les enjeux sont indubitablement élevés.

[4] Notre système en est cependant venu à tolérer les délais excessifs, comme en font foi les circonstances du présent pourvoi. Même s'il a fallu plus de quatre ans aux autorités pour porter une affaire de drogue moyennement complexe devant les tribunaux, tant le juge du procès que la Cour d'appel ont estimé que l'appelant avait été jugé dans un délai raisonnable. Leurs analyses respectives traduisent les difficultés sur les plans théorique et pratique qui pèsent sur le test actuel applicable aux demandes fondées sur l'al. 11*b*). Ces difficultés ont fait naître au sein du système une culture de complaisance vis-à-vis des délais.

[5] Un changement d'orientation s'impose donc. Nous exposerons ci-après un nouveau cadre d'analyse pour l'application de l'al. 11*b*). Au cœur de ce nouveau cadre se trouve un plafond présumé quant au temps maximal que cela devrait prendre pour traduire un inculpé en justice : 18 mois pour les procès instruits devant une cour provinciale et 30 mois pour ceux instruits devant une cour supérieure. Bien entendu, compte tenu de la nature contextuelle du caractère raisonnable, le cadre d'analyse prend en considération des facteurs propres à chaque cas, que le délai ait été supérieur ou inférieur au plafond. Il vise par ailleurs à faire en sorte que l'analyse d'une demande fondée sur

with a view to fulfilling s. 11(*b*)'s important objectives.

[6] Applying this new framework, including its transitional features, we conclude that the appellant was not brought to trial within a reasonable time. We would allow the appeal, set aside his convictions and direct a stay of proceedings.

II. Facts

[7] The appellant, Mr. Jordan, was arrested in December 2008 following an RCMP investigation into a "dial-a-dope" operation in Langley and Surrey, British Columbia. He was eventually charged with nine other co-accused on a 14-count information alleging various offences relating to possession and trafficking. Mr. Jordan remained in custody until February 2009, when he was released under strict house arrest and other restrictive bail conditions.

[8] The 10 co-accused made numerous appearances through the early months of 2009 as they obtained counsel, made their elections, and coordinated schedules. By May 2009, all counsel had agreed that the preliminary inquiry would require approximately four days, and it was eventually set for May 13, 14, 17 and 18, 2010. Several of the co-accused entered guilty pleas or were severed from the information. By the time the preliminary inquiry commenced, there were five co-accused left on the information, including Mr. Jordan.

[9] At the preliminary inquiry, it quickly became apparent that the initial time estimate of four days was too low. Crown counsel advised the preliminary inquiry judge that the Crown would be able to present all of the evidence against the four co-accused, but that the Crown would require significantly more

l'al. 11*b*) se concentre sur les questions qui importent et à inciter tous les participants au système de justice criminelle à collaborer pour que l'administration de la justice soit raisonnablement prompte afin de réaliser les objectifs importants visés par l'al. 11*b*).

[6] Après avoir appliqué ce nouveau cadre, y compris ses modalités transitoires, nous concluons que l'appelant n'a pas été traduit en justice dans un délai raisonnable. Nous sommes donc d'avis d'accueillir le pourvoi, d'annuler les déclarations de culpabilité et d'ordonner l'arrêt des procédures.

II. Faits

[7] L'appelant, M. Jordan, a été arrêté en décembre 2008, à la suite d'une enquête menée par la GRC sur une opération de « vente de drogue sur appel » à Langley et à Surrey, en Colombie-Britannique. Il a par la suite été inculpé en compagnie de neuf coaccusés dans une dénonciation comportant 14 chefs d'accusation leur reprochant plusieurs infractions relatives à la possession et au trafic de drogues. M. Jordan a été détenu jusqu'en février 2009, lorsqu'il a été libéré sous réserve de conditions strictes de détention à domicile et d'autres conditions restrictives de mise en liberté sous caution.

[8] Les 10 coaccusés ont comparu à maintes reprises durant les premiers mois de 2009, période pendant laquelle ils ont obtenu les services d'un avocat, choisi leur mode de procès et coordonné les horaires. Au mois de mai 2009, tous les avocats avaient convenu que l'enquête préliminaire allait durer environ quatre jours, et il a finalement été prévu qu'elle se déroulerait les 13, 14, 17 et 18 mai 2010. Plusieurs des coaccusés ont plaidé coupables ou vu leur nom être retiré de la dénonciation. À l'ouverture de l'enquête préliminaire, cinq coaccusés, dont M. Jordan, étaient toujours visés par la dénonciation.

[9] À l'enquête préliminaire, il est vite devenu évident que l'estimation initiale de quatre jours était insuffisante. Le procureur du ministère public a informé le juge présidant l'enquête préliminaire que le ministère public serait en mesure de produire toute la preuve pesant contre quatre des coaccusés, mais

CITATION: R. v. Villanti, 2018 ONSC 4259
COURT FILE NO.: CR-17-00000029-0000
DATE: 20180712

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	*Michael Lockner* and *Helen Song*, for the
Respondent	)	Respondent Crown
	)	
	)	
- and -	)	
	)	
	)	
VINCENT VILLANTI,	)	*Paul Riley*, for the Applicant Vincent Villanti
RAVENDRA CHAUDHARY,	)	*Ravendra Chaudhary*, Appearing in Person
SHANE SMITH, DAVID PRENTICE and	)	*Shane Smith*, Appearing in Person
ANDREW LLOYD	)	*Thomas Mathews*, for the Applicant
Applicants	)	David Prentice
	)	*Stephen White*, for the Applicant
	)	Andrew Lloyd
	)	
	)	
	)	**HEARD:** June 22, 2018

CROLL J.

RULING ON 11(B) APPLICATION

Introduction

[1] The Applicants Vincent Villanti, Ravendra Chaudhary, Shane Smith, David Prentice and Andrew Lloyd are charged with fraud over a value of $5,000 and conspiracy to commit an indictable offence. They were arrested on or about March 26, 2014, and the period of the offences runs from January 31, 2009 up to and including December 31, 2014.

[2] The Applicants have brought an application pursuant to sections 11(b) and 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c. 11, to stay the charges against them because of unreasonable delay. While it was initially unclear from his written material

whether Mr. Chaudhary was also participating in this application, in oral submissions at the start of the hearing he confirmed that he too is seeking this relief.

Background

[3] This case involves a $13 million fraud. The nature of the case is summarized in paras. 3-5 of *R. v. Villanti*, 2017 ONSC 7130 ["*Villanti*"], a decision of Justice A. O'Marra, in which he dismissed the first s. 11(b) application brought by the Applicants in mid-September 2017. He stated as follows:

> 3. With respect to the nature of the allegations, as I understand from the material submitted by the Crown respondent, in April 2012, the Royal Canadian Mounted Police commenced an investigation into an alleged tax avoidance scheme said to have been conducted by the applicants between 2009 and 2013. Earlier a search warrant had been executed June 6, 2013 at two of the accused's office locations, which led to the arrests in March 2014. Further investigation of the continuance of the alleged scheme and execution of another search warrant at the accused's business premises resulted in the time frame being expanded to December, 2014.
>
> 4. The basic allegation is that the accused, in various roles, conducted and developed an investment program through a firm called the Integrated Business Consultants Association (IBCA), and a related company, Synergy, that raised over $13,000,000 from investors on the promise that their investment would be used to provide small businesses with start-up capital. The investors were told they would be able to claim any business losses against their personal income taxes.
>
> 5. It is alleged that little to no such investments were made, but used, rather to pay commissions, salaries and expenses of the accused and companies. Investors were informed of inflated losses which, when claimed by them on their personal taxes, were subsequently disallowed by the Canada Revenue Agency, which in turn subjected the investors to ongoing assessments.

[4] The trial in this case was originally scheduled to begin on September 25, 2017 [the "First Trial"]. It was set for 12 weeks. As stated, the s. 11(b) application brought prior to the September 25, 2017 trial date was dismissed. At that time, the time between the arrest of the Applicants and the anticipated completion of the trial was approximately 44 months, which exceeded the presumptive ceiling of 30 months set out in *R. v. Jordan*, 2016 SCC 27 ["*Jordan*"]. However, O'Marra J. found that both the complexity of the case and the transitional exceptional circumstances, as explained in *Jordan*, justified the time the case had taken to that point.

[5] Following the dismissal of the s. 11(b) application, O'Marra J. granted adjournment applications brought by the Applicants Villanti, Chaudhary and Lloyd. All three sought to adjourn the September trial in order to retain counsel.

[6] Following this, O'Marra J. then dismissed the severance application brought by the Applicants Smith and Prentice, who sought to have their trial go ahead separately from the others. On the facts of this case, O'Marra J. held that severance was not in the interests of justice, despite the delays it would obviously occasion to Messrs. Smith and Prentice.

[7] A new trial date was then set for February 26, 2018 [the "Second Trial"] which was the first date agreeable to all parties.

Period between First Trial date of September 25, 2017 and January 25, 2018

[8] On January 25, 2018 counsel for Mr. Prentice advised the Court that he would be bringing a third party records application seeking production of material from the Canada Revenue Agency. Also within this time period, Mr. Smith apparently indicated to the Crown that he would be calling a large number of witnesses, such that the 12 weeks scheduled for trial would not be sufficient.

[9] The Applicants Prentice and Smith also brought a second s. 11(b) application to be heard at the start of the February 26, 2018 trial, arguing that when the additional 5 months between the First and Second trial dates were added to the delay, their right to be tried within a reasonable time was violated.

January 25, 2018 to date

[10] On January 25, 2018 Justice McMahon, the head of the criminal long trial team at the Ontario Superior Court of Justice in Toronto, indicated for the first time there was no judge available to try this case. The matter was adjourned to the week before the scheduled start of the Second Trial to see if a judge could be made available.

[11] On February 21, 2018 McMahon J. confirmed that there was, in fact, a judge available, and the name could be provided to counsel within a day or so, noting then that counsel may wish to consider the possibility of re-election. In response to the information that Mr. Smith would be calling a large number of witnesses such that the trial time of 12 weeks might not be sufficient, McMahon J. indicated that the trial would be done in a timely manner and expressed assurance that the trial judge would effectively manage the trial time.

[12] However, on February 26, 2018 McMahon J. advised the parties that he had lost two judges from the criminal team for medical reasons and that there were no other judges available to try this case.

[13] The first trial date that McMahon J. could offer for a 12-week jury trial was in January 2019. The trial was rescheduled to January 11, 2019.

[14] As a result, the Applicants bring this current s. 11(b) application.

The s. 11(b) Application

[15] The *Jordan* framework for assessing whether delays in criminal matters are reasonable was summarized in *R. v. Coulter*, 2016 ONCA 704, at paras. 34-41:

> 34 Calculate the *total delay*, which is the period from the charge to the actual or anticipated end of trial (*Jordan*, at para. 47).
>
> 35 Subtract *defence delay* from the total delay, which results in the "*Net Delay*" (*Jordan*, at para. 66).
>
> 36 Compare the Net Delay to the presumptive ceiling (*Jordan*, at para. 66).
>
> 37 If the Net Delay exceeds the presumptive ceiling, it is presumptively unreasonable. To rebut the presumption, the Crown must establish the presence of *exceptional circumstances* (*Jordan*, para. 47). If it cannot rebut the presumption, a stay will follow (*Jordan*, para. 47). In general, exceptional circumstances fall under two categories: *discrete events* and *particularly complex cases* (*Jordan*, para. 71).
>
> 38 Subtract delay caused by discrete events from the Net Delay (leaving the "*Remaining Delay*") for the purpose of determining whether the presumptive ceiling has been reached (*Jordan*, para. 75).
>
> 39 If the Remaining Delay exceeds the presumptive ceiling, the court must consider whether the case was particularly complex such that the time the case has taken is justified and the delay is reasonable (*Jordan*, at para. 80).
>
> 40 If the *Remaining Delay falls below the presumptive ceiling*, the onus is on the defence to show that the delay is unreasonable (*Jordan*, para. 48).
>
> 41 The new framework, including the presumptive ceiling, applies to cases already in the system when *Jordan* was released (the "*Transitional Cases*") (*Jordan*, para. 96).
>
> [Emphasis original]

[16] In this case, the total time between the arrest of the Applicants on or around March 26, 2014 and the anticipated completion of a 12-week trial around April 5, 2019 is 60.5 months, more than double the presumptive *Jordan* ceiling.

[17] Where there are multiple accused, the s. 11(b) calculation should be an individualized exercise (see: *R. v. Ny and Phan*, 2016 ONSC 8031; *R. v. Manasseri*, 2016 ONCA 703).

[18] As stated, at the time of the first s. 11(b) application in September 2017, the time period from arrest to the anticipated end of trial was approximately 44 months. In his *Jordan* analysis, O'Marra J. found that as of September 25, 2017, defence delay at its highest amounted to approximately 9.25 months. While he found that there was some period of delay attributable to each Applicant, it varied among them largely due to the circumstances of their respective counsel or lack of counsel at different times in the process. It appears that O'Marra J. found that the greatest amount of defence delay was attributable to Mr. Villanti, given his counsel's unavailability to start the preliminary inquiry, and the least amount of defence delay was attributable to Mr. Chaudhary. In considering the defence delay, O'Marra J. stated, at para. 29 of Villanti: "None of the defence delay, even if viewed cumulatively, resulted in net delay that in any way quantitatively reduces the delay below the presumptive ceiling of 30 months fixed by the Supreme Court in *Jordan*."

[19] After September 25, 2017 the delay attributable to each Applicant varies. Messrs. Villanti, Lloyd and Chaudhary requested the adjournment. The 154 days (approximately 5 months) between the First Trial Date of September 25, 2017 and February 26, 2018, the Second Trial Date, is considered defence delay for those three Applicants. As a result, the defence delay at its highest, for the Applicants Villanti, Lloyd and Chaudhary, is 14.5 months (9.5 + 5).

[20] There is no further defence delay on account of the Applicants Smith and Prentice. Their defence delay, at its highest, is 9.5 months.

[21] Accordingly, for the Applicants Villanti, Lloyd and Chaudhary, the net delay is 46 months, or just short of 4 years (60.5 - 14.5).

[22] The net delay for the Applicants Smith and Prentice is 51 months, or approximately 4 years, 3 months (60.5 - 9.5).

[23] The Crown submits that the further 11-month delay between the second and third trial dates should be deducted from the net delay because the 11 months stems from exceptional circumstances, as considered in *Jordan*. This would amount to remaining delay for the Applicants Villanti, Lloyd and Chaudhary of 35 months, and remaining delay for the Applicants Smith and Prentice of 40 months.

[24] Even after deducting the 11-month adjournment period, as submitted by the Crown, the remaining delay for all Applicants continues to be presumptively unreasonable.

Analysis

[25] Exceptional circumstances generally fall into two categories: discrete events and particularly complex cases (see: *Jordan*, at para. 81).

[26] A medical emergency affecting an accused, counsel, or the judge is an example of a discrete event that could amount to an exceptional circumstance (see: *Jordan*, at para. 81).

[27] Particularly complex cases are those that require an inordinate amount of trial or preparation time, given the nature of the issues and/or the nature of the evidence. Voluminous disclosure and charges that cover a long period of time are factors that could contribute to complexity (see: *Jordan*, at para. 77). Co-accused delay has also been analyzed under the complexity exceptional circumstance, provided it is in the interests of justice to proceed jointly (see: *Jordan*, at para. 77; *R. v. Gopie*, 2017 ONCA 728, 140 O.R. (3d) 171, at paras. 142, 169-174).

[28] In his analysis on the first s. 11(b) application, O'Marra J. found this was a complex case. He stated, at para. 40 of *Villanti*:

> In my assessment, considering the comments of preliminary inquiry justice that the matter is a complex circumstantial case that required twenty days to complete at the preliminary inquiry stage with only one of five accused participating, voluminous disclosure, a trial anticipated to take length of five to six weeks, later revised to require ten to twelve weeks when all but one accused no longer had counsel to represent them at trial set to start September 25, 2017 qualifies this case as particularly complex one.

[29] As well, O'Marra J. was satisfied that, up to the September 2017 trial date, reasonable efforts to prioritize the case had been undertaken (see the requirement set out in *Jordan*, para. 79). He stated as follows at para. 41:

> I accept, as well, that the Crown effectuated a plan and took steps to mitigate delay. It was perhaps not a perfect plan, but it was a reasonable plan during which adjustments were made.
>
> - The accused were charged jointly, appropriate for the original criminal organization charges, which was later altered and simplified to conspiracy.
>
> - The voluminous digital disclosure was reformatted for easier accessibility.
>
> - After the accused were originally charged, when the police conducted further investigations as a result of suspected continuation of the alleged fraud, the time frame of the allegations was expanded, rather than re-arresting the accused, laying new charges and thereby instituting a separate process.

- The Crown severed three accused whose counsel fell ill in order to avoid the delay of the preliminary inquiry, later preferring an indictment to rejoin all accused in the Superior Court in order to move the matter forward, prevent a multiplicity of proceedings and to minimize its complexity.

[30] The Crown submits that these reasonable efforts continued once it was known that there would be further delay after February 2018. The Crown looked into whether this case could take priority over other scheduled cases, and whether this case could be heard in the time slotted for cases that had resolved. The Crown also points to efforts made by the Court. In this regard, McMahon J. carefully reviewed the list of long trials scheduled for the 361 University Avenue courthouse to determine priority, and contacted two other judicial regions in the GTA to inquire whether there was any excess judicial capacity that could be "loaned" to Toronto for a 12-week trial.

[31] None of these efforts were successful to allow the trial to commence on its scheduled date, or to reduce the time out to the next trial date.

[32] The Crown rejects any suggestion that withdrawing, severing or changing its case would result in any significant time savings. Its position throughout this case has been that it is a large-scale conspiracy, and all of the evidence that would be required to prove it would need to be called against each of the Applicants. In this regard, the Crown points to *R. v. Nguyen*, 2013 ONCA 169, at para. 61:

> …..But these decisions about how to proceed, against whom, upon what charges, and on what evidence, for that matter, whether or when to do so or to withdraw charges, are contingent upon interdependent circumstances and factors far removed from the knowledge of presiding judges. Courts should be hesitant to scrutinize the Crown's decisions absent clear reason to do so: *Khan*, at para. 30.

Exceptional Circumstances

[33] I accept that the illness of two judges is a discrete event that could amount to an exceptional circumstance as outlined in *Jordan*. As McMahon J. informed counsel in January and February 2018, one judge would be unavailable for an extended period; the other for some 4 to 6 weeks.

[34] I also agree with the characterization of the case as complex, leading O'Marra J. to find that the 44-month delay he had to consider was not unreasonable. I do not, however, accept that the potential increase in documents flowing from Mr. Prentice's third party records application, which would be heard and determined in advance of the trial, or the large number of defence witnesses proposed by Mr. Smith, are additional complexities justifying the remaining delay. In my view, the 12 weeks scheduled for trial is sufficiently long for the trial judge to manage issues that may arise from the third party records or the number of

potential defence witnesses. In other words, I am not convinced that there are any additional complexities beyond those found by O'Marra J. in the original s. 11(b) application. All parties were ready to proceed to trial as of the Second Trial date in February 2018. None of the new issues raised by the Crown in this application amount to a novel or fresh complexity that justify the delay.

[35] Rather, the relevant complexity arises from the challenges in scheduling a trial of this length, and is inextricably linked to the discrete event of two judicial illnesses.

[36] However, the amount of time - 11 months - that the Crown seeks to deduct from net delay due to exceptional circumstances is not acceptable in this post-*Jordan* world. Had this trial been adjourned for some 4 to 6 weeks or for some other modest period until a judge was available, I accept that the period should be deducted from net delay as a discrete event. That would be a reasonable approach, in accordance with the *Jordan* framework.

[37] That being said, a trial judge's illness, as a discrete event, is distinct from the delay caused by scarce judicial resources. In explaining, and indeed, apologizing, to counsel for the unavailability of a judge to hear this case from February 2018 to January 2019, McMahon J. stated the following:

> On January 25, 2018: *Okay, so the one thing I will give people the heads up on in relation to it is with the number of judges they've given me for the criminal matters scheduled. Right now, that was why I was hoping that other case might turn into a resolution. Quite practically speaking with the number of homicides, attempt murders and gun cases I have going, right now I do not have a trial judge to do this case. This will be the first case right now. That may very well change between now and then, but I thought in fairness to counsel, this is the first time I've had to say this post Jordan, but in relation to this indictment right now, unless they somehow give another judge or a new appointment or one of the long trials resolves in the next few weeks, that's where we're at……*
>
> *….So, I'll do the best we can…..And if we could just free up four or five murder cases to help out we would, but I can't……*
>
> On February 26, 2018: …..*So I've lost two criminal judges in a couple of days and right now because of those medical challenges they're facing I had to pull a judge off this case to deal with a person who is in custody on a six- week trial and I don't have anybody to replace that judge. So it is frustrating because everybody should get to trial in a timely fashion…..*
>
> On March 1, 2018: *It's just the frustration of this Court with not having sufficient resources to do the job, despite everybody's best effort.*

> *So despite my efforts of getting an additional resource from another region, quite frankly, unless, as we talked about yesterday – I just added up, we have 44 homicides scheduled this year in Toronto to be tried. And we've been resolving some of them and what we've been doing it, but I can only do what I can do and Mr. Lockner, I'm out of, I'm out of options. The first time I have trial time for this is January of 2019 and the reason for the delay would be the unavailability of this court to be able to provide a judge to do the case. So it's not something we've had to do before in a long trial, but that's where we are. We're hoping to get additional judges to complement. We've asked the Federal government for that. We don't have those. It is frustrating, but we can only do with what we got. So….*
>
> *….And I understand all the accused are ready, able and go to trial as is the Crown, and the fault lies with myself and the Court for not providing a judge*.

[38] There is a heavy and challenging caseload of criminal and other cases at the Superior Court in Toronto. Given the existing complement of judges, there is very little, if any, flexibility to respond to sudden absences. Pursuant to the *Jordan* framework, an exceptional circumstance is one that must be reasonably unforeseen or unavoidable. It is, of course, the case that the illness of any particular judge is not reasonably foreseeable. However, it is reasonably foreseeable that, from time to time, judges will be unavailable. In a system that is already experiencing enormous pressure, it is no surprise that such unavailability will trigger serious and challenging scheduling issues, especially when 12 weeks of trial time is required. These scheduling issues include making difficult decisions about the priority in which cases proceed. The delay was also avoidable had there been the proper judicial complement.

[39] The adjournment of the second trial date from February 2018 to January 2019 added an 11-month delay to a case that already exceeded the *Jordan* ceiling. To reiterate, for the Applicants Villanti, Lloyd and Chaudhary, the net delay they have experienced is almost 4 years. For the Applicants Smith and Prentice, the net delay is approximately 4 years, 4 months. Even if the 11-month delay is abridged by 2 to 3 months to account for the exceptional circumstance of judges' illness, the net delay for all Applicants still significantly exceeds the *Jordan* presumptive timeline of 30 months or 2 ½ years.

[40] *Jordan* established a new approach to bringing matters to trial in a timely manner. It did so, the Court explained at para. 19, because:

> …[T]he right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice. It finds expression in the familiar maxim: 'Justice delayed is justice denied.' An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole.

[41] To meet the *Jordan* timeline, it is axiomatic that courts must be properly resourced with the appropriate complement of judges. In this case, despite serious and creative efforts made to find a solution, resource issues prevented the Court from being able to meet its *Jordan* obligation. The delay was simply too long to be considered reasonable.

[42] On all of the facts, I find that the 11-month adjournment period is not an exceptional circumstance that can be deducted from the delay. The Crown has not rebutted the presumption that the delay is unreasonable on a *Jordan* analysis.

Transitional Exceptional Circumstances

[43] *Jordan* provides that transitional exceptional circumstances may justify delay above the ceiling, if the Crown shows that the delay is justified because of a reasonable reliance on the law as it existed at the time the delay was accumulating (see: *Jordan*, para. 126). The Crown quite properly submitted that the transitional exceptional circumstances have no application here, given that the delay that is the focus of this application occurred well after the release of *Jordan* in July 2016.

Conclusion

[44] For these reasons, the s. 11(b) application(s) are granted and the proceedings against the Applicants Vincent Villanti, Ravendra Chaudhary, Shane Smith, David Prentice and Andrew Lloyd are stayed.

Croll J.

Released: July 12, 2018

CITATION: R. v. Villanti, 2018 ONSC 4259
COURT FILE NO.: CR-17-00000029-0000
DATE: 20180712

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN
Respondent

- and -

VINCENT VILLANTI,
RAVENDRA CHAUDHARY,
SHANE SMITH, DAVID PRENTICE and
ANDREW LLOYD
Applicants

RULING ON 11(B) APPLICATION

Croll J.

Released: July 12, 2018

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sissons v. Canadian Tire Corporation Limited,* 2023 BCSC 1134

Date: 20230704
Docket: S1911663
Registry: Vancouver

Between:

Clifford Frank Sissons

Plaintiff

And

Canadian Tire Corporation Limited, Home Hardware Stores Limited, and Quad City Building Materials Ltd.

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for the Plaintiff:	J.S. Stanley A. Brine
Counsel for the Defendants:	N. Mantini M. McGreevey W. McNamara
Place and Date of Trial/Hearing:	Vancouver, B.C. May 23, 2023
Place and Date of Judgment:	Vancouver, B.C. July 4, 2023

I. INTRODUCTION

[1] This is an application brought by the defendants to strike the plaintiff's notice requiring trial by jury (dated August 5, 2022) such that the trial would be heard by judge alone. In the alternative, the defendants seek an order deferring the hearing of this application until after all the expert evidence has been exchanged by the parties. Lastly, the defendants ask that if neither order is granted, they have leave to reapply for the same relief under R. 12–6(5) of the *Supreme Court Civil Rules* to strike out the notice after the exchange of expert evidence.

[2] This matter came before me in general chambers. Despite the limited time available when this matter was called, I invited counsel to attempt to finish. I am grateful to them for being largely successful in doing so, but a continuation of the hearing had to be scheduled for another date outside normal court hours.

[3] The plaintiff's action is for personal injury. He claims he contracted Non-Hodgkin's Lymphoma ("NHL") after buying and using an herbicide called Roundup.

[4] The plaintiff filed a notice of civil claim in October 2019. However, that was substantially amended in January 2023. The amendment removed claims of negligence as against the manufacturer of Roundup, Monsanto Canada ULC, which has since been removed as a defendant. What remains is the allegation that the defendants breached s. 18(a) and (d) of the *Sale of Goods Act,* R.S.B.C. 1996, c. 410 [*Act*]. Section 18 deals with implied conditions as to quality or fitness in contracts of sale or lease. The relevant portions of s. 18 state as follows:

> **18** Subject to this and any other Act, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale or lease, except as follows:
>
> > (a) if the buyer or lessee, expressly or by implication, makes known to the seller or lessor the particular purpose for which the goods are required, so as to show that the buyer or lessee relies on the seller's or lessor's skill or judgment, and the goods are of a description that it is in the course of the seller's or lessor's business to supply, whether the seller or lessor is the manufacturer or not, there is an implied condition that the goods are reasonably fit for that purpose; …
> >
> > …

> (d) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

[5] The plaintiff alleges that he bought the product from the defendants, and because the product caused him to contract NHL, the defendants are liable under s. 18 of the *Act*.

[6] Apart from other defences, the defendants deny liability on the basis that Roundup is neither unsafe nor dangerous. They also plead that the plaintiff's exposure to Roundup did not cause or contribute to his diagnosis of NHL.

II. BACKGROUND

[7] The litigation history of this matter can be summarized as follows:

a) The notice of trial was issued in April 2022. The trial is scheduled to last 29 days, beginning on September 25, 2023, in Vancouver. (The date and time estimate were set before the plaintiff amended his pleadings to remove the claims of product liability and negligence.)

b) On August 5, 2022, the plaintiff filed a notice of trial requiring a jury.

c) On September 7, 2022, the defendants filed a notice to strike the plaintiff's jury notice.

d) A case planning conference was conducted on November 2, 2022. The resulting case planning order required, among other things, that the plaintiff file his application for leave to amend his notice of civil claim by November 30, 2022, and the amended response be filed within 30 days of that filing. The parties were ordered to make best efforts to complete examinations for discovery by January 31, 2023, and to make best efforts to answer outstanding requests for information by February 28, 2023. The defendants were given leave to amend their applications to strike the jury notice following service of the amended notice of civil claim. The master also ordered that the defendants' amended application to strike out "may

be rescheduled to a mutually convenient date but to be before May 2, 2023". The plaintiff says he asked for that stipulation, so he would know the mode of trial with sufficient time to prepare his case and especially instruct the experts.

e) On December 30, 2022, the defendants filed a requisition adjourning the previous hearing date for the application to strike the jury notice—then set for January 10, 2022—to, instead, be heard April 13, 2023.

f) The amended notice of civil claim was filed January 10, 2023. The defendants filed amended responses to the amended civil claim in February 2023.

g) The plaintiff was examined for discovery on January 26 and February 6, 2023.

h) A representative for the defendant Quad City Building Materials Ltd. was examined on March 1, 2023.

[8] The plaintiff also raised a procedural issue: he submits the defendants' application should not proceed because it is contrary to Master Robertson's order because it was being heard after May 2, 2023. Since that order had not been amended, it ought to be treated as binding, precluding the defendants' application being heard.

[9] I am not satisfied that acceding to that argument would be in the overall interest of the parties, or in accordance with the administration of justice. Specifically, I have no reason to doubt that despite best efforts, the parties had difficulty being heard on previous dates in general chambers because presiders were not available for a hearing of this length (over one hour). That situation is an unfortunate and all-too-common reality due, in large part, to the over one dozen current judicial vacancies on the Supreme Court of British Columbia.

III. LAW

[10] Rule 12-6(5) outlines the circumstances in which a party served with a jury notice may seek an order that the trial instead proceed by judge alone:

> **Court may refuse jury trial**
>
> (5) Except in cases of defamation, false imprisonment and malicious prosecution, a party on whom a notice under subrule (3) has been served may apply
>
> (a) within 7 days after service for an order that the trial or part of it be heard by the court without a jury on the ground that
>
> (i) the issues require prolonged examination of documents or accounts or a scientific or local investigation that cannot be made conveniently with a jury,
>
> (ii) the issues are of an intricate or complex character, or
>
> (iii) the extra time and cost involved in requiring that the trial be heard by the court with a jury would be disproportionate to the amount involved in the action, or
>
> (b) at any time for an order that the trial be heard by the court without a jury on the ground that the trial relates to a fast track action or to one of the proceedings referred to in subrule (2).

[11] The exclusions listed under R. 12-6(5) must be construed narrowly, and the party applying to set aside the jury notice bears the burden of satisfying the court that one of the grounds listed under R. 12-6(5) has been clearly established: *Han v. Cho*, 2008 BCSC 1192 at paras. 13, 15, 36.

[12] Rule 12-6(2) outlines certain types of proceedings that must be decided by a judge alone. Relevant to this matter is subsection (j) of this rule, which prohibits a jury trial for "a proceeding referred to in R. 2-1(2)", *i.e.*, one that must be started via petition or requisition. Where it is found an action relates to a matter set out in R. 12-6(2), there is no discretion to be exercised and the jury notice must be set aside: *Henni v. Food Network Canada Inc.*, 2022 BCSC 1711 at para. 37. Among the proceedings referred to in R. 2-1(2) are those in which "the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document": R. 2-1(2)(c).

[13] In the interest of efficiency, the parties agreed to address the issue of appropriateness of a jury trial given the defendants' allegation that the sole issue is the construction of an enactment separately from the complexity issue. Accordingly, I will consider the former issue before turning to the latter.

IV. IS THE CONSTRUCTION OF AN ENACTMENT THE PRINCIPAL QUESTION?

[14] There is no dispute between the parties that the interpretation of a statute is a question of law that cannot be determined by a jury: see *Peters v. Co-operators Life Insurance Company*, 2007 BCSC 1103 at para. 20; see also *Breakaway Futures Ltd. v. Woody Life Village et al*., 2003 BCSC 559 at para. 28.

[15] The defendants argue that the principal question before the court is one of statutory interpretation and that the claim is based on a novel allegation of the interpretation of the contractual warranty for fitness for purpose under s.18 of the *Act*. The defendants submit the plaintiff's claim cannot succeed unless he is correct in this allegedly novel interpretation of the *Act*, “the sole or principal question at issue is alleged to be one of construction of an enactment” such that the jury notice should be struck pursuant to R. 12-6(5)(b): see *Henni* at para. 47.

[16] The plaintiff disagrees, arguing that the case does not involve the interpretation of the legislation, but rather the application of s. 18 to the facts of the case, which he says is a matter separate from the *Act*'s construction. To the extent that there is any issue about the interpretation of s. 18, the plaintiff notes that it is the trial judge's duty to instruct the jury on questions of law whether those question rise from the statute or the common law. The jury is then left to determine whether the facts of the case are sufficient to apply the law to it. In that way, the plaintiff argues, there is nothing unusual about this case that would preclude a jury from deciding it.

[17] The plaintiff also emphasizes that the right to a trial by jury is “a substantive right of great importance” that should be denied only for clear, cogent reasons: *King v. Colonial Homes Limited and Others*, [1956] 2 S.C.R. 528 at 533, 1956 CanLII 13; *MacKinnon v. Ebner*, 1997 CanLII 644 (B.C.S.C.) at para. 28, [1997] B.C.J. No. 364

(Chambers); see also *Gladwell v. Busletta*, 2018 BCSC 1934 at para. 65 (Chambers). Further, as noted in *Bartram v. GlaxoSmithKline Inc*., 2016 BCSC 1409 at para. 7, the effect of R. 12-6(5) "is to create a presumptive right to a civil jury trial". Because the person applying to strike the jury notice bears the onus of clearly demonstrating that a jury could not hear the case, the plaintiff relies on *Sartore v. Beckley*, 2002 BCSC 21 at para. 18, to submit that if a jury could probably hear the case, the application to strike the jury notice must fail.

[18] I do not understand the defendants to disagree with these propositions of law. Rather, the defendants' argument centres on what they say is the plaintiff's novel argument about how the legislation works, which is, in their submission, cogent reason for denying the plaintiff a jury trial pursuant to R. 12-6(5)(b).

[19] The plaintiff further argues that even if he is raising a completely novel interpretation of s. 18 of the *Act* (a point he does not concede), it is premature to strike out the jury notice because there is always the possibility that a trial judge could determine (whether on application or not) that there is no appropriate question to put to the jury during the course of the trial. Even after all evidence has been adduced, the plaintiff points out that the parties will need to make submissions to the trial judge about the charge and questions to be put to the jury. It may be at that point (although, again, this is not conceded) that it becomes apparent that the case is only about interpretation and, therefore, the case should not be submitted to the jury.

[20] Obviously, the approach described by the plaintiff is not ideal, as it may result in the unnecessary expenditure of a great deal of judicial resources to empanel a jury that is never used. It is also appropriate to consider the unnecessary inconvenience to individual jurors resulting from having to potentially attend part or all of a trial only to be dismissed before deciding the matter. That said, these considerations are not determinative.

[21] The more compelling point is that the wording of R. 12-6(2) is mandatory, stating that "[a] trial must be heard without a jury if trial relates to" any of the listed

prescribed circumstances. Thus, if it is found that an action falls within the ambit of R. 12-6(2) (which includes the matters listed in R. 2-1(2)), the court has no discretion, and the jury notice must be set aside: *Henni* at para. 37.

[22] It is also important to focus on the language of R. 2-1(2)(c), which, when read in conjunction with R. 12-6(2), prohibits a jury trial where "the sole or principal question at issue is alleged to be one of construction of an enactment" (emphasis added).

[23] Recently, in *Henni* Justice Hughes stated the test for whether construction of an enactment is alleged to be the sole principal question at issue at para. 36:

> [36] Whether a trial "relates to" a matter pursuant to Rule 12-6(2) means something more than "touches on or is in any way concerned with" one of the excluded matters. An excluded matter must be the main or central focus of the trial: *Han* at para. 37. If the findings of fact will substantially dispose of the issues to be tried, Rule 12-6(2) ought not to be applied. However, if after the facts are found there remains a genuine question as to the significance of those facts when construing a contract, it will be the "principle question in issue" regardless of the relative length or complexity of the fact-finding exercise: *Nelson Marketing International v. Royal & Sun Alliance Insurance*, 2003 BCSC 439 at para. 20 [*Nelson Marketing*].

[24] I agree with the defendants that this case ought to proceed without a jury because the principal question is the construction of an enactment. While there are clearly substantial factual issues that will also have to be determined, I find there remains a genuine question as to their significance in light of the proper construction of s. 18(a) and (d) of the *Act*, whatever that may be. The interpretation of this provision will be determinative regardless of the relative length or complexity of the fact-finding exercise: see *Henni* at para. 36. Thus, the construction of the statute that the plaintiff urges is the principal question to be determined at trial.

[25] That the construction of s. 18 will be the principal question at trial is illustrated by the fact that even if all factual questions are resolved in the plaintiff's favour, success hinges on the court adopting his preferred interpretation of the provision. If the defendants eventually prevail on their interpretation of the legislation, the plaintiff's claim will not succeed; however, if the plaintiff is successful in his

interpretation of the legislation, he may or may not succeed against the defendants on some or all of his claims. That the interpretation of the legislation operates in this binary manner indicates that it the principal question to be tried: see *Henni* at para. 47.

[26] The plaintiff submits a number of cases that he relies on show that courts have easily distinguished the interpretation of a statute from its applicability, but I am not persuaded that these precedents are sufficiently analogous to this situation. For instance, in *Bartram*, there was no dispute about the interpretation of the operative statutory provision; the main issue revolved around the complexity of the scientific issues involved.

[27] I also have doubts about the plaintiff's reliance on *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, 1995 CanLII 72, for this purpose. That case involved an appeal to the Supreme Court of Canada from a jury's assessment of damages suffered after the plaintiff contracted HIV from an unsuccessful artificial insemination procedure. Justice Sopinka, writing for the majority, noted that it was somewhat problematic that the trial judge had left it to the jury to decide if the procedure could be characterized as the sale of goods such that the *Act* was applicable, "Only once [the court] has determined that the [*Act*] has any application in the circumstances should the jury be instructed to determine whether the statutory warranty was breached on the facts": para. 70.

[28] There are two problems with the plaintiff's reliance on this case. First, there was no indication that either party had applied to strike the jury notice in order to proceed by judge alone. Based on jurisprudence that I discuss later, it seems likely such an application may have been successful. Second, while the specific comments of the majority seem to imply the trial judge likely could have decided the issue of the contract's construction before putting it to the jury, that comment was *obiter dicta* because the majority explicitly noted that it was an issue that it "need not determinatively settle": para. 70.

[29] The plaintiff also argues that the defendants' application should not be granted because, he submits, his interpretation of the *Act* is not novel. However, that is not persuasive. In R. 2-1(2)(c), it is not the actual construction of an enactment that is relevant to determining whether a jury trial is appropriate; instead, the question is whether the sole or principal question at issue is alleged to be one of construction. Therefore, the presence of opposing pleadings with regard to the construction of one or more of the legal instruments listed in that rule—not the relative merit of the duelling interpretations—is what is relevant to deciding whether or not the jury trial is appropriate: *Peters* at para. 20.

[30] Relatedly, the fact that a judge could determine the correct interpretation of the legislation and could, if necessary, not put the case to the jury is similarly irrelevant. The controlling issue is whether or not the case is alleged to be one where the principal issue is the construction of the statute. Having found that it is, it is mandatory that the jury notice be struck.

[31] As noted previously, the plaintiff argues the court should not accept the argument about the novelty of the interpretation in light of the presumptive right to a civil jury trial. The concern is that someone wanting to avoid a jury trial could simply raise the spectre of an issue of statutory interpretation in order to strike the jury notice through the operation of R. 12-6(5), R.12-6(2)(j), and R. 2-1(2)(c). I was not guided to any case law that articulated whether there was a minimum standard for the strength of legal arguments regarding the construction of an enactment to invoke the rule.

[32] However, again, the answer is found in looking to the wording of the rule in light of the overall structure of the rules. As noted above, a jury notice must be struck where the principal or sole question is alleged to be one of construction. The use of the word “alleged” implies a lower bar for establishing the strength of any arguments regarding statutory interpretation. That seems consistent with para. 20 of *Peters*.

[33] In any event, I do not find that in this case the defendants’ framing of the statutory construction issue has no merit or is purely tactical.

[34] I am aware that there is some tension in the case law about whether the applicability of a statute is part of its construction for the purpose of R. 2-1(2)(c). In *Henni* at paras. 49–50, Justice Hughes appears to imply that both interpretation and application of a statute are relevant to construction:

> [49] Similarly in this case, even if the plaintiffs are successful in establishing copyright infringement, that will not dispose of the litigation in their favour. The proper construction and application of the Release, including whether it releases proprietary rights and which of the defendants—if any—it applies to, then comes into play. These issues will remain to be determined after the facts are found with respect to whether copyright infringement is made out. The plaintiffs cannot succeed unless and until the Release is interpreted in their favour so as not to bar some or all of their claims, or not to apply to some or all of the defendants who may be found liable to the plaintiffs. In this way, it is the interpretation of the Release and its application to the facts as found that will determine the litigation.
>
> [50] When considered from this perspective, it becomes clear that interpretation of the Release is the central issue in the litigation. Neither party can succeed without that issue being resolved largely in their favour. In the result, I am of the view that the principal issue in this case is the construction and application of the Release. As such, the jury notice must be struck pursuant to Rule 12-6(2).

[35] Justice Hughes' reasoning on this point draws upon Justice McEwan's treatment of the issue in *Nelson Marketing International v. Royal & Sun Alliance Insurance*, 2003 BCSC 439, where he articulated the relevant legal test as follows:

> [20] … [I]f the findings of fact substantially dispose of the issues to be tried then [the current R. 12-6(2)] should not be applied. But if, after the facts have been found, a genuine question remains as to the significance of those facts within a [current R. 2-1(2)(c)] issue, it will be the "principle question in issue" within the meaning of the Rule, regardless of the relative length or complexity of the fact finding exercise itself.

[36] Importantly, in the cases McEwan J. considered to derive this test—*Manley v. Chilliwack Hospital et al*., 2000 BCSC 649, and *Penner v. The Great-West Life Assurance Company*, 2002 BCSC 1131—the court drew a distinction between the interpretation and application of a legal document, with the former being deemed a matter of construction for the purpose of Rule 2-1(2)(c) while the latter was not.

[37] In *Manley* at para. 32, Justice Bauman (as he then was) adopted the distinction drawn by Master Horn in *Genesis Industries Corp. v. Century Oils*

(Canada) Inc., 1993 CanLII 1563, [1993] B.C.J. No. 1030 (S.C.), between the construction of a contract and its application or enforcement. In *Penner* at para. 16, the court adopted *Manley*'s reasoning on this point, stating that of the various provisions the plaintiff relied on to make out their claim, only some would require interpretation. For most, "the issue w[ould] likely turn on whether the provision applies, not what, in the context of the contract, does the provision mean": para. 16. As a result, Justice Koenigsberg concluded that the principal issues were matters that were suitable for a jury trial: para. 16.

[38] In *Peters*, the court referred with approval to both *Manley* and *Penner*, although Justice Frankel reached a different conclusion as to how central to a matter the construction of a statute must be in order to render it inappropriate to proceed with a jury trial:

> [24] Where I differ from Mr. Justice Bauman and Madam Justice Koenigsberg is that I am of the view that if a case involves an issue of interpretation, then a jury trial is not available. It does not matter how central that question is to the litigation.

[39] While it might appear that there is some difference of opinion in these cases, in my view, when taken together, they are consistent because they demonstrate the enquiry is fact and pleading specific. In other words, how precisely the line is drawn between interpretation and application for the purposes of R. 2-1(2)(c)—and how this distinction impacts the appropriateness of a jury trial in the circumstances—will ultimately fall to the particular facts, pleadings, and circumstances of the case because of the wide variety of scenarios that could potentially be captured by the rule.

[40] Accordingly, I conclude the jury notice should be struck as the principal question is one of the constructions of a statute.

[41] This conclusion is sufficient to dispose of the matter. However, if I am wrong, I would have found that a jury trial would not be appropriate due to the matter's complexity for the following reasons.

V. DO CONVENIENCE, COMPLEXITY & PROPORTIONALITY OF TIME AND COST MAKE A JURY TRIAL INAPPROPRIATE?

[42] Regardless of the statutory interpretation issue, the defendants also say that the jury notice should be struck because of the need of the jury to conduct a prolonged examination of documents of a scientific nature, the complexity and intricacy of the issues, and the disproportionality between the amount involved and the extra time and cost of a jury trial.

[43] I appreciate counsel referring me to a number of authorities that discuss how the court should approach the issues of prolonged examination of documents by a jury and complexity; however, I do not intend on going through those cases at length. Again, the issue will turn on the particular facts and pleadings in the case. The case law establishes that that juries are deemed to be sophisticated, and counsel are under a duty to present a case in a manner to assist the jury along with the guidance of instructions from the trial judge: *Sartore* at paras. 8, 12–13, 19; *MacKinnon* at para. 26; *Bartram* at paras. 10–11. It is also true that the obligation of counsel to assist the jury extends to the presentation of expert evidence. Counsel needs to ensure that expert evidence is presented in such a way that a jury can understand it: *MacKinnon* at para. 24; *Cliff v. Dahl*, 2012 BCSC 276 at para. 38.

[44] The defendants point to several factors that they say contribute to the complexity and intricacy of the case as well as the requirement that jurors will have to examine lengthy scientific documents. They submit that this complexity comes, in part, from the strict regulatory framework imposed by the federal legislation governing pesticides. It was not immediately clear to me why all of that evidence would be relevant in a case centred on the sale of goods. However, the defendants argue that this information goes to the issue of whether the product is defective. It is too early at this stage for me to say that information would not be admissible and relevant.

[45] More compelling is that the case necessarily involves a complex issue relating to the causes of NHL. The plaintiff's list of documents includes medical

records from a number of healthcare providers spanning a 33-year period during which the plaintiff claims to have used Roundup. The defendants say they are still seeking production of additional medical records. I accept that the issue of whether the plaintiff's NHL was caused by the use of pesticides would be complex, requiring extensive expert evidence and scientific documents that could, on their own, preclude the case from going to a jury.

[46] The plaintiff claims the case is very simple and that he can complete his case in six days. The problem with this submission is that it fails to take into account the pleadings as a whole. The defendants plead that Roundup is safe for use when used as directed on the product's label and specifically deny that exposure to the product, or one of its chemical constituent ingredients when used as directed, can cause NHL. On that basis, the defendants deny that Roundup is unfit or unsafe for its intended use. The defendants are allowed to adduce evidence to substantiate their claim. I am unable to say at this point that the extensive regulatory evidence is irrelevant and would be inadmissible. In addition, there is at least some possibility that extended review of the plaintiff’s medical history may be admissible and relevant. That review could span over 30 years, making it a potentially onerous task.

[47] Thus, while the plaintiff believes he can present a simplified case to the jury, he cannot prevent the defendants from raising the issue of causation, which is in addition to the question of the applicability and construction of the legislation. The defendants’ arguments are not speculative nor frivolous; their position arises naturally and fairly from the pleadings and the evidence.

[48] As I understood the plaintiff's case, if the defendants succeed on their interpretation of the legislation, the case would not go to the jury. In my respectful view, it would be inefficient as well as imprudent for the court to allow a jury to be empaneled for an extensive, complicated trial where there is a possibility that it would not ultimately be used to decide the matter.

[49] The plaintiff seeks to have the application to strike the jury notice concluded far enough in advance of the trial because he said he needs to tailor his expert

evidence to whether it was going to be a jury trial or a judge-alone trial. In my respectful view, that raises the possibility that, while wanting to keep his presentation of his case simplified for a jury, he may well have a larger case in reply, especially given the issues that the defendants intend to raise and the evidence that will be adduced to support their arguments.

[50] Furthermore, I agree with the defendants that the mode of trial ought not to be significant in terms of instructing an expert. If an expert can provide an opinion that is relevant, admissible, and helpful, it should not matter whether that opinion is going before a jury or a judge.

[51] Accordingly, even if I had not found that the trial is one that involves the construction of a statute, I would have struck the jury notice under R. 12-6(5)(a).

VI. CONCLUSION

[52] For all those reasons, the jury notice is struck.

"Sharma J."

Her Majesty The Queen *Appellant*

v.

Marc Beauregard *Respondent*

INDEXED AS: BEAUREGARD *v.* CANADA

File No.: 17884.

1985: October 4; 1986: September 16.

Present: Dickson C.J. and Beetz, Estey, McIntyre and Lamer JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Judicial independence — Financial security of federally appointed judges — Pensions — Federal legislation requiring superior court judges to contribute to pension — Whether federal legislation plan violated s. 100 of the Constitution Act, 1867 — Judges Act, R.S.C. 1970, c. J-1 as amended, s. 29.1.

Civil rights — Equality before the law — Federal legislation requiring superior court judges to contribute to pension plan — Legislative distinction on the basis of the appointment date of judges — Higher contributions required from judges appointed after the date of first reading of the bill — Whether federal legislation violated s. 1(b) of the Canadian Bill of Rights — Judges Act, R.S.C. 1970, c. J-1 as amended, s. 29.1.

Respondent, a Quebec Superior Court judge appointed on July 24, 1975, challenged the constitutional validity of s. 29.1 of the *Judges Act*. This section was introduced in Parliament on February 17, 1975 and was enacted December 20, 1975. Section 29.1(1) provided that judges appointed before February 17, 1975 would contribute one and one-half per cent of their salary toward the cost of pensions, while s. 29.1(2) provided that judges appointed after February 16, 1975 would contribute six and one-half per cent prior to January 1, 1977, and seven per cent thereafter. Prior to the enactment of s. 29.1, superior court judges were not required to contribute to their pension plan. The Federal Court, at trial and on appeal, accepted respondent's allegation, but for different reasons, that s. 29.1 violated s. 100 of the *Constitution Act, 1867* but rejected his argument that s. 29.1 was inoperative in that it violated his right to equality before the law recognized by s. 1(*b*) of the *Canadian Bill of Rights*. This appeal is to determine whether s. 29.1 of the *Judges Act* infringes (1) s. 100 of

Sa Majesté La Reine *Appelante*

c.

Marc Beauregard *Intimé*

RÉPERTORIÉ: BEAUREGARD *c.* CANADA

N° du greffe: 17884.

1985: 4 octobre; 1986: 16 septembre.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre et Lamer.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Indépendance de la magistrature — Sécurité financière des juges nommés par le fédéral — Pensions — Loi fédérale exigeant que les juges des cours supérieures contribuent à leur régime de pensions — La loi fédérale viole-t-elle l'art. 100 de la Loi constitutionnelle de 1867? — Loi sur les juges, S.R.C. 1970, chap. J-1 et modifications, art. 29.1.

Libertés publiques — Égalité devant la loi — Loi fédérale exigeant que les juges des cours supérieures contribuent à leur régime de pensions — Distinction dans la loi fondée sur la date de nomination des juges — Contributions plus élevées exigées des juges nommés après la date de la première lecture du projet de loi — La loi fédérale viole-t-elle l'art. 1b) de la Déclaration canadienne des droits? — Loi sur les juges, S.R.C. 1970, chap. J-1 et modifications, art. 29.1.

L'intimé, un juge de la Cour supérieure du Québec nommé le 24 juillet 1975, a contesté la constitutionnalité de l'art. 29.1 de la *Loi sur les juges*. Déposé devant le Parlement le 17 février 1975, cet article a été adopté le 20 décembre 1975. Le paragraphe 29.1(1) prévoyait que les juges nommés avant le 17 février 1975 contribueraient un et demi pour cent de leur traitement au paiement du coût des pensions, tandis que le par. 29.1(2) disposait que les juges nommés après le 16 février 1975 y contribueraient, antérieurement au 1er janvier 1977, six et demi pour cent de leur traitement et sept pour cent par la suite. Avant l'adoption de l'art. 29.1, les juges des cours supérieures n'étaient pas tenus de contribuer à leur régime de pensions. En première instance et en appel, la Cour fédérale a retenu, mais pour des motifs différents, l'allégation de l'intimé que l'art. 29.1 violait l'art. 100 de la *Loi constitutionnelle de 1867*. Elle a cependant rejeté son argument selon lequel l'art. 29.1 était inopérant puisqu'il violait son droit à l'égalité devant la loi reconnu par l'al. 1*b*) de la *Déclaration*

the *Constitution Act, 1867* and (2) s. 1(*b*) of the *Canadian Bill of Rights*.

Held (Beetz and McIntyre JJ. dissenting in part): The appeal should be allowed.

(1) *Section 100 of the Constitution Act, 1867*

Per curiam: The principle of judicial independence is fundamental to our Constitution. The role of our courts as resolver of disputes, interpreter of the law and defender of the Constitution, requires that they be completely separate in authority and function from all other participants in the justice system, in particular, from the executive and the legislative branches of government. One of the essential components of the principle of judicial independence is financial security. In the present case, the scheme for contributory pensions established in s. 29.1 of the *Judges Act* does not interfere with the independence of superior court judges. All s. 29.1 does is treat judges, pursuant to the constitutional obligation imposed by s. 100 of the *Constitution Act, 1867*, in accordance with standard, widely used and generally accepted pension schemes in Canada. Canadian judges are Canadian citizens and must bear their fair share of the financial burden of administering the country. Parliament's power to fix the salaries and pensions of superior court judges, however, is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there were discriminatory treatment of judges *vis-à-vis* other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be *ultra vires* of s. 100 of the *Constitution Act, 1867*. There is no suggestion of any of these considerations in the present appeal.

There is no "federalism" limitation on Parliament's capacity to change the basis of superior court judges' pensions from non-contributory to contributory. Provincial legislatures under s. 92(14) of the *Constitution Act, 1867* have no jurisdiction with respect to these pensions. Section 100 explicitly subtracts them from provincial jurisdiction respecting the administration of justice. This section states clearly that the salaries and pensions of superior court judges shall be fixed and provided by the Parliament of Canada.

canadienne des droits. Le pourvoi vise à déterminer si l'art. 29.1 de la *Loi sur les juges* contrevient (1) à l'art. 100 de la *Loi constitutionnelle de 1867* et (2) à l'al. 1*b*) de la *Déclaration canadienne des droits*.

Arrêt (les juges Beetz et McIntyre sont dissidents en partie): Le pourvoi est accueilli.

(1) *L'article 100 de la Loi constitutionnelle de 1867*

La Cour: Le principe de l'indépendance de la magistrature est un élément fondamental de notre Constitution. Le rôle de nos tribunaux en tant qu'arbitres des litiges, interprètes du droit et défenseurs de la Constitution exige qu'ils soient complètement séparés, sur le plan des pouvoirs et des fonctions, de tous les autres participants du système judiciaire et en particulier des pouvoirs exécutif et législatif du gouvernement. La sécurité financière est une composante essentielle du principe de l'indépendance judiciaire. Dans la présente espèce, le régime de pensions avec participation des intéressés établi à l'art. 29.1 de la *Loi sur les juges* ne porte pas atteinte à l'indépendance des juges des cours supérieures. L'article 29.1 ne fait que traiter les juges, en vertu de l'obligation constitutionnelle imposée par l'art. 100 de la *Loi constitutionnelle de 1867*, d'une manière conforme aux régimes de pensions normaux qui sont largement répandus et généralement acceptés au Canada. Les juges canadiens sont des citoyens canadiens et doivent assumer leur juste part du fardeau financier de l'administration du pays. Le pouvoir du Parlement de fixer les traitements et les pensions des juges des cours supérieures n'est cependant pas illimité. S'il y avait un indice qu'une loi fédérale traitant de ces questions avait été adoptée dans un but malhonnête ou spécieux, ou si les juges étaient traités d'une manière discriminatoire par rapport aux autres citoyens, de graves questions se poseraient alors concernant l'indépendance judiciaire et la loi pourrait très bien être jugée *ultra vires* de l'art. 100 de la *Loi constitutionnelle de 1867*. Ces considérations ne sont nullement proposées dans le présent pourvoi.

Il n'y a aucune restriction fondée sur le «fédéralisme» à l'égard du pouvoir du Parlement de modifier les fondements des pensions des juges des cours supérieures en les faisant passer de pensions sans participation à des pensions avec participation. Le paragraphe 92(14) de la *Loi constitutionnelle de 1867* ne confère aux législatures provinciales aucune compétence relativement à ces pensions. L'article 100 les soustrait explicitement au pouvoir provincial en matière d'administration de la justice. Cet article prévoit clairement que les traitements et les pensions des juges des cours supérieures doivent être fixés et payés par le Parlement du Canada.

Further, Parliament's ability to implement a widely used and accepted latter-day pension model is not constrained by the words of s. 100. The word "pensions" is not limited to the type of pensions known and in existence for the judiciary in 1867 and the word "provided" does not impose on Parliament an obligation to pay the full cost of judicial pensions.

Finally, although it might well be unconstitutional in most contexts for Parliament to direct how judges are to spend their salaries, the word "pensions" in s. 100 specifically authorizes Parliament to deal with this subject matter. In exercising that jurisdiction Parliament must legislate with respect to both the quantum and the scheme of judicial pensions. The 1975 law enacting s. 29.1 of the *Judges Act* dealt with the scheme. There can be no objection here to Parliament's action since the scheme chosen was a widely used and accepted one and since it was introduced in conjunction with a substantial increase in judicial salaries and other benefits in 1975.

Cases Cited

Referred to: *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Toronto Corporation v. York Corporation*, [1938] A.C. 415; *McEvoy v. Attorney General for New Brunswick*, [1983] 1 S.C.R. 704; *Judges v. Attorney-General of Saskatchewan*, [1937] 2 D.L.R. 209; *Evans v. Gore*, 253 U.S. 245 (1920); *O'Malley v. Woodrough*, 307 U.S. 277 (1939); *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220.

(2) *Section 1(b) of the Canadian Bill of Rights*

Per Dickson C.J. and Estey and Lamer JJ.: Section 29.1 of the *Judges Act* does not violate s. 1(*b*) of the *Canadian Bill of Rights*. Once it is accepted that the general substance of the law is consistent with a valid federal objective—here, to provide for remuneration of s. 96 judges—and that it is not discriminatory for Parliament to draw some line between present incumbents and future appointees, the cases under the *Canadian Bill of Rights* do not permit the courts to be overly critical in reviewing the precise line drawn by Parliament. Some line is fair and is not discriminatory. Thus, while from the respondent's perspective a line drawn on the date of passage of the bill would have been preferable, it cannot be said that the choice of the date

De plus, le pouvoir du Parlement d'appliquer un modèle de pension moderne largement utilisé et accepté n'est pas limité par le texte de l'art. 100. Le mot «pensions» ne se limite pas au genre de pensions connues pour les juges en 1867 et qui existaient à ce moment-là et le mot «payés» n'impose pas au Parlement l'obligation de payer la totalité des pensions des juges.

Finalement, même s'il pourrait bien être inconstitutionnel dans la plupart des contextes que le Parlement dicte aux juges la façon de dépenser leur traitement, le terme «pensions» à l'art. 100 autorise expressément le Parlement à traiter de cette question. En exerçant ce pouvoir, le Parlement doit légiférer en ce qui a trait à la fois au montant et au régime des pensions des juges. La loi de 1975 adoptant l'art. 29.1 de la *Loi sur les juges* traitait du régime. Étant donné que le régime choisi était généralement utilisé et accepté et puisqu'il a été introduit conjointement avec une augmentation sensible des traitements et des autres prestations des juges en 1975, il n'y a en l'espèce rien à reprocher à ce qu'a fait le Parlement.

Jurisprudence

Arrêts mentionnés: *Valente c. La Reine*, [1985] 2 R.C.S. 673; *Toronto Corporation v. York Corporation*, [1938] A.C. 415; *McEvoy c. Procureur général du Nouveau-Brunswick*, [1983] 1 R.C.S. 704; *Judges v. Attorney-General of Saskatchewan*, [1937] 2 D.L.R. 209; *Evans v. Gore*, 253 U.S. 245 (1920); *O'Malley v. Woodrough*, 307 U.S. 277 (1939); *Di Iorio c. Gardien de la prison de Montréal*, [1978] 1 R.C.S. 152; *Re Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714; *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220.

(2) *L'alinéa 1b) de la Déclaration canadienne des droits*

Le juge en chef Dickson et les juges Estey et Lamer: L'article 29.1 de la *Loi sur les juges* ne viole pas l'al. 1*b*) de la *Déclaration canadienne des droits*. Une fois que l'on a admis que l'esprit général de la loi est compatible avec un objectif fédéral régulier—en l'occurrence, pourvoir à la rémunération de juges visés par l'art. 96—et que le Parlement n'établit pas de distinction injuste en traçant une certaine ligne entre les juges qui sont actuellement en fonction et ceux qui seront nommés à l'avenir, les affaires relevant de la *Déclaration canadienne des droits* n'autorisent pas les tribunaux à être trop critiques en examinant la ligne précise tracée par le Parlement. Une certaine ligne est juste et n'est pas discriminatoire. Donc, quoique, du point de vue de l'intimé, il eût été préférable de tracer une ligne à la date de l'adoption du projet de loi, on ne saurait prétendre que le choix de la date de la première lecture comme

of first reading as the cut-off date was contrary to the *Canadian Bill of Rights*.

Per Beetz and McIntyre JJ. (dissenting): The forms of discrimination prohibited by s. 1(*b*) of the *Canadian Bill of Rights* are not limited to the specifically mentioned grounds such as race, national origin, colour, religion or sex. This Court is also not bound by the Diceyan concept of equality nor is it prevented from adopting a more egalitarian approach.

A legislation passed by Parliament does not offend against the principle of equality before the law if passed in pursuance of a valid federal objective. The question which must be resolved in each case is whether an inequality that may be created by legislation affecting a special class is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of the universal application of law to meet special conditions and to attain a necessary and desirable social objective. Where variation from the principle of universal application of the law is justified, the principle cannot be tampered with to a degree or to an extent which goes beyond what is necessary to reach a desirable social objective. This test, including its element of proportionality, clearly extends to the manner or means chosen to achieve a valid federal objective, particularly where this manner or these means introduce the very inequality complained of. This manner or these means must then be carefully scrutinized by the courts and they must be struck down whenever they do not meet the test.

In the case at bar, s. 29.1(2) of the *Judges Act* is inconsistent with s. 1(*b*) of the *Canadian Bill of Rights*. The policy decision reflected in s. 29.1 of the *Judges Act* is that judges' pension plans should be on a contributory basis in order to reduce the financial burden on future taxpayers. Parliament chose to phase in the contributory requirement, by requiring contributions at the higher rate only from newly appointed judges so that, through the attrition of senior appointees as a result of death or resignation, the whole body of the judiciary would eventually participate in the contributory scheme. However, in choosing the date of first reading of the bill as the cut-off date to implement the phasing-in feature of the federal legislation, the new measure "grandfathered" certain incumbent superior court judges, but did not "grandfather" them all. A small minority of them—those appointed after February 16, 1975 but before December 20, 1975—were not grandfathered. Applying the test to s. 29.1, it cannot be said that the distinction between incumbent judges, which resulted from the

date limite était contraire à la *Déclaration canadienne des droits*.

Les juges Beetz et McIntyre (dissidents): L'alinéa 1*b*) de la *Déclaration canadienne des droits* n'interdit pas que les types de discrimination fondés sur un motif expressément mentionné, tel que la race, l'origine nationale, la couleur, la religion ou le sexe. De plus, la Cour n'est pas liée par le concept d'égalité énoncé par Dicey et rien ne l'empêche d'adopter un point de vue plus égalitaire.

Une loi adoptée par le Parlement ne contrevient pas au principe de l'égalité devant la loi si elle est adoptée dans la recherche d'un objectif fédéral régulier. La question à résoudre dans chaque cas est celle de savoir si l'inégalité qui peut être créée par la loi vis-à-vis d'une catégorie particulière est arbitraire, fantaisiste ou superflue, ou si elle a un fondement rationnel et acceptable en tant que dérogation nécessaire au principe général de l'application universelle de la loi pour faire face à des conditions particulières et atteindre un objectif social nécessaire et souhaitable. Lorsque la dérogation au principe de l'application universelle de la loi est justifiée, on ne peut déroger au principe plus que ce qui est nécessaire pour atteindre un objectif social souhaitable. Ce critère, y compris son élément de proportionnalité, vise clairement la manière ou les moyens choisis pour atteindre un objectif fédéral régulier, particulièrement lorsque cette manière ou ces moyens introduisent l'inégalité même dont on se plaint. Cette manière ou ces moyens doivent alors être examinés soigneusement par les tribunaux et ils doivent être écartés lorsqu'ils ne satisfont pas au critère.

En l'espèce, le par. 29.1(2) de la *Loi sur les juges* est incompatible avec l'al. 1*b*) de la *Déclaration canadienne des droits*. La décision de principe qui ressort de l'art. 29.1 de la *Loi sur les juges* porte que les régimes de pensions des juges devraient être des régimes avec participation de manière à réduire le fardeau financier des futurs contribuables. Le Parlement a choisi d'introduire l'exigence de la participation, en demandant seulement aux juges nouvellement nommés de contribuer au taux plus élevé de manière que, par suite du décès ou de la démission des juges exempts, l'ensemble de la magistrature participe éventuellement au régime de retraite avec contribution. Toutefois, par le choix de la date de la première lecture du projet de loi comme date limite pour procéder à l'introduction progressive de la mesure législative fédérale, celle-ci préservait le statu quo à l'égard de certains juges des cours supérieures déjà en fonction, mais ne le faisait pas pour tous. Dans le cas d'une faible minorité de juges—ceux nommés après le 16 février 1975 mais avant le 20 décembre 1975—on ne préservait

selection of the date of first reading as the cut-off point, was necessary to achieve the federal objective. No rational motives were advanced or appear to exist for the selection of that date as the cut-off point which, with its discriminatory effect, is entirely arbitrary and capricious.

Cases Cited

By the majority

Referred to: *MacKay v. The Queen*, [1980] 2 S.C.R. 370; *Curr v. The Queen*, [1972] S.C.R. 889; *R. v. Drybones*, [1970] S.C.R. 282; *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349; *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170; *R. v. Burnshine*, [1975] 1 S.C.R. 693; *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376; *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183.

By the minority

By the minority

MacKay v. The Queen, [1980] 2 S.C.R. 370; *Curr v. The Queen*, [1972] S.C.R. 889; *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349; *R. v. Burnshine*, [1975] 1 S.C.R. 693; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170; *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376; *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183.

Statutes and Regulations Cited

Act of Settlement, 1700 (Engl.), 12 & 13 Will. 3, c. 2.
Act to amend the Judges Act and certain other Acts or related purposes and in respect of the reconstitution of the Supreme Courts of Newfoundland and Prince Edward Island, S.C. 1974-75-76, c. 48.
Canadian Bill of Rights, R.S.C. 1970, App. III, s. 1(*b*).
Canadian Charter of Rights and Freedoms.
Constitution Act, 1867, preamble, ss. 55, 91(8), (27), 92(14), 96, 99, 100, 129.
Judges Act, R.S.C. 1970, c. J-1, s. 29.1 [en. S.C. 1974-75-76, c. 81, s. 100].
Statute Law (Superannuation) Amendment Act, 1975, S.C. 1974-75-76, c. 81, s. 100.
Supplementary Retirement Benefits Act, R.S.C. 1970 (1st Supp.), c. 43 as amended.

Authors Cited

Lane, Lord. "Judicial Independence and the Increasing Executive Role in Judicial Administration". In *Judicial Independence: The Contemporary Debate*. Edited

pas le statu quo. Si l'on applique le critère à l'art. 29.1, on ne peut pas dire que la distinction entre les juges en fonction, résultant du choix de la date de la première lecture comme date limite, était nécessaire pour atteindre l'objectif fédéral. Aucun motif rationnel n'a été présenté ou ne semble exister pour le choix de cette date comme date limite, laquelle, avec ses effets discriminatoires, est entièrement arbitraire et fantaisiste.

Jurisprudence

Citée par la majorité

Arrêts mentionnés: *MacKay c. La Reine*, [1980] 2 R.C.S. 370; *Curr c. La Reine*, [1972] R.C.S. 889; *R. c. Drybones*, [1970] R.C.S. 282; *Procureur général du Canada c. Lavell*, [1974] R.C.S. 1349; *Procureur général du Canada c. Canard*, [1976] 1 R.C.S. 170; *R. c. Burnshine*, [1975] 1 R.C.S. 693; *Prata c. Ministre de la Main-d'œuvre et de l'Immigration*, [1976] 1 R.C.S. 376; *Bliss c. Procureur général du Canada*, [1979] 1 R.C.S. 183.

Citée par la minorité

MacKay c. La Reine, [1980] 2 R.C.S. 370; *Curr c. La Reine*, [1972] R.C.S. 889; *Procureur général du Canada c. Lavell*, [1974] R.C.S. 1349; *R. c. Burnshine*, [1975] 1 R.C.S. 693; *Roncarelli v. Duplessis*, [1959] R.C.S. 121; *Procureur général du Canada c. Canard*, [1976] 1 R.C.S. 170; *Prata c. Ministre de la Main-d'œuvre et de l'Immigration*, [1976] 1 R.C.S. 376; *Bliss c. Procureur général du Canada*, [1979] 1 R.C.S. 183.

Lois et règlements cités

Act of Settlement, 1700 (Engl.), 12 & 13 Will. 3, chap. 2.
Charte canadienne des droits et libertés.
Déclaration canadienne des droits, S.R.C. 1970, app. III, art. 1*b*).
Loi constitutionnelle de 1867, préambule, art. 55, 91(8), (27), 92(14), 96, 99, 100, 129.
Loi de 1975 modifiant le droit statutaire (Pensions de retraite), S.C. 1974-75-76, chap. 81, art. 100.
Loi modifiant la Loi sur les juges, et certaines autres lois connexes par suite de la réorganisation de la Cour suprême de Terre-Neuve et de l'Île-du-Prince-Édouard, S.C. 1974-75-76, chap. 48.
Loi sur les juges, S.R.C. 1970, chap. J-1, art. 29.1 [adj. S.C. 1974-75-76, chap. 81, art. 100].
Loi sur les prestations de retraite supplémentaires, S.R.C. 1970 (1er Supp.), chap. 43 et modifications.

Doctrine citée

Lane, Lord. «Judicial Independence and the Increasing Executive Role in Judicial Administration». In *Judicial Independence: The Contemporary Debate*. Edited

by Shimon Shetreet and Jules Deschênes. Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1985, pp. 525-528.

Lederman, W. R. "The Independence of the Judiciary" (1956), 34 *Can. Bar Rev.* 769, 1139.

Shetreet, Shimon. "The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration". In *Judicial Independence: The Contemporary Debate*. Edited by Shimon Shetreet and Jules Deschênes. Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1985, pp. 393-402.

Tarnopolsky, Walter S. *The Canadian Bill of Rights*. 2nd ed., Toronto: McClelland and Stewart Ltd., 1975.

APPEAL from a judgment of the Federal Court of Appeal, [1984] 1 F.C. 1010, 148 D.L.R. (3d) 205, 48 N.R. 252, dismissing appellant's appeal and respondent cross-appeal from a judgment of the Trial Division, [1981] 2 F.C. 543, 130 D.L.R. (3d) 433. Appeal allowed, Beetz and McIntyre JJ. dissenting in part.

W. I. C. Binnie, Q.C., and *D. M. Low*, for the appellant.

David W. Scott, Q.C., and *Carole Brown*, for the respondent.

The judgment of Dickson C.J. and Estey and Lamer JJ. was delivered by

THE CHIEF JUSTICE—This appeal concerns the financial position and security of federally appointed judges. Relatively narrow amendments by Parliament to a federal law relating to pension benefits for judges, and pensions for their dependants, gave rise to the case. The legal issues which must be addressed are, however, quite broad. They involve careful consideration of at least three important relationships—the federal Parliament and the judiciary, the executive branch of the federal government and the judiciary, and the federal government and provincial governments. Moreover, it is crucial to the resolution of this appeal to develop a proper understanding and application of the fundamental constitutional principle of judicial independence.

by Shimon Shetreet and Jules Deschênes. Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1985, pp. 525-528.

Lederman, W. R. «The Independence of the Judiciary» (1956), 34 *R. du B. can.* 769, 1139.

Shetreet, Shimon. «The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration». In *Judicial Independence: The Contemporary Debate*. Edited by Shimon Shetreet and Jules Deschênes. Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1985, pp. 393-402.

Tarnopolsky, Walter S. *The Canadian Bill of Rights*. 2nd ed., Toronto: McClelland and Stewart Ltd., 1975.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1984] 1 C.F. 1010, 148 D.L.R. (3d) 205, 48 N.R. 252, qui a rejeté l'appel de l'appelante et l'appel incident de l'intimé d'une décision de la Division de première instance, [1981] 2 C.F. 543, 130 D.L.R. (3d) 433. Pourvoi accueilli, les juges Beetz et McIntyre sont dissidents en partie.

W. I. C. Binnie, c.r., et *D. M. Low*, pour l'appelante.

David W. Scott, c.r., et *Carole Brown*, pour l'intimé.

Version française du jugement du juge en chef Dickson et des juges Estey et Lamer rendu par

LE JUGE EN CHEF—Le présent pourvoi porte sur la situation et la sécurité financières des juges nommés par le gouvernement fédéral. Le litige résulte de modifications relativement mineures apportées par le Parlement à une loi fédérale portant sur les prestations de retraite pour les juges et sur les pensions pour les personnes à leur charge. Toutefois, les questions de droit qui doivent être examinées sont très vastes. Elles exigent une étude attentive d'au moins trois genres de relations importantes — savoir celles qui existent respectivement entre le Parlement fédéral et la magistrature, entre le pouvoir exécutif du gouvernement fédéral et la magistrature, et enfin entre le gouvernement fédéral et les gouvernements provinciaux. En outre, il est très important pour régler le présent pourvoi d'élaborer une interprétation et une application appropriées du principe constitutionnel fondamental de l'indépendance judiciaire.

I

Facts

The law attacked in this appeal, the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, came into force on December 20, 1975. But the events relevant to the appeal started a year and a day earlier, and there are other important dates in the chronology.

On December 19, 1974 the federal Government introduced a bill to amend the *Judges Act*, R.S.C. 1970, c. J-1. At that time the *Judges Act* provided provincial superior court judges with salaries of $38,000, pensions* after retirement, and pensions for surviving spouses and children of deceased judges. Judges were not required to pay for, or contribute toward, the costs of these pensions. The bill introduced by the Government on December 19, 1974 dealt with only the first and third components of the regime then in existence. The bill made provision for a 39 per cent increase in the salaries of superior court judges and a 50 per cent increase in the pensions for their surviving spouses and children. But further changes were foreshadowed; on the date the bill was introduced the federal Minister of Justice wrote to all federally appointed judges, stating in part:

However, these improvements were achieved in the context of a comprehensive review of federal policies in relation to pensions which has just recently been concluded. As a result, it may become necessary at some future time to ask judges now in office to make a modest

* In the English version of the *Judges Act*, ss. 23-29 are found under the heading «Annuities» and the benefits to judges, spouses and children provided in these sections are referred to as 'annuities'. The heading at the start of the French version of these sections is *Pensions* and the word *pension* is used throughout the sections. In this judgment I have used the word 'pension' because I think it corresponds more closely to the ordinary understanding of the benefits being considered. Furthermore, s. 100 of the *Constitution Act, 1867*, which is the pivotal constitutional provision in this appeal, uses the word 'Pensions'; in the interests of consistency and ease of understanding I will use it to describe the benefits conferred by the *Judges Act* and in issue in this appeal.

I

Les faits

La loi contestée dans le présent pourvoi, savoir la *Loi de 1975 modifiant le droit statutaire (Pensions de retraite)*, S.C. 1974-75-76, chap. 81, est entrée en vigueur le 20 décembre 1975. Toutefois, les événements pertinents ont commencé un an et un jour plus tôt et leur succession comporte d'autres dates importantes.

Le 19 décembre 1974, le gouvernement fédéral a déposé un projet de loi visant à modifier la *Loi sur les juges*, S.R.C. 1970, chap. J-1. À cette époque, la *Loi sur les juges* accordait aux juges des cours supérieures des provinces des traitements de 38 000 $, des pensions* de retraite et des pensions pour les conjoints survivants et les enfants de juges décédés. Les juges n'étaient pas obligés de contribuer aux coûts de ces pensions. Le projet de loi déposé par le gouvernement le 19 décembre 1974 ne visait que les première et troisième composantes du régime alors en existence. Le projet de loi prévoyait une augmentation de 39 pour cent du traitement des juges des cours supérieures et une augmentation de 50 pour cent des pensions de leurs conjoints survivants et de leurs enfants. Toutefois, d'autres modifications étaient annoncées; à la date où le projet de loi a été déposé, le ministre fédéral de la Justice a écrit une lettre à tous les juges nommés par le gouvernement fédéral, dans laquelle il affirme notamment:

[TRADUCTION] Toutefois, ces améliorations ont été apportées dans le cadre de la révision globale des politiques fédérales en matière de pensions que l'on vient tout juste de terminer. En conséquence, il est possible que l'on doive dans l'avenir demander aux juges qui exercent

* Dans la version anglaise de la *Loi sur les juges*, les art. 23 à 29 se trouvent sous la rubrique *Annuities* et les prestations à l'intention des juges, conjoints et enfants que prévoient ces articles sont désignées comme des *annuities*. La rubrique qui se trouve au début de la version française de ces articles est «Pensions» et le terme «pension» est utilisé dans tous ces articles. Dans le présent jugement, j'ai utilisé le terme «pension» parce que je crois qu'il correspond mieux à la conception ordinaire qu'on a des prestations qui sont examinées. En outre, l'art. 100 de la *Loi constitutionnelle de 1867*, qui est la disposition constitutionnelle centrale dans le présent pourvoi, utilise le terme «pensions»; pour des motifs d'uniformité et de facilité de compréhension, je l'utiliserai pour décrire les prestations que confère la *Loi sur les juges* et qui sont en cause dans le présent pourvoi.

contribution towards the cost of the improved pensions for widows, and to ask persons who are in the future appointed to judicial office to contribute in some measure to pension benefit costs.

On February 17, 1975 the judicial contribution to pension costs, signalled in the Minister's letter, was initiated. On that date the *Statute Law (Superannuation) Amendment Act, 1975* was introduced. It provided that judges appointed before February 17, 1975 would contribute 1.5 per cent of salary toward the cost of pensions (this was intended to be a contribution toward improved pensions for the spouses and children of judges), and judges appointed after that date would contribute 6 per cent of salary toward the cost of pensions plus ½ per cent, rising later to 1 per cent, toward indexing them to keep pace with inflation. The relevant portion of this amendment, which became s. 29.1 of the *Judges Act*, reads:

29.1(1) Every judge appointed before the 17th day of February, 1975 to hold office as a judge of a superior or county court shall, by reservation from his salary under this Act, contribute to the Consolidated Revenue Fund one and one-half per cent of his salary.

(2) Every judge appointed after the 16th day of February, 1975 to hold office as a judge of a superior or county court, to whom subsection (1) does not apply, shall, by reservation from his salary under this Act,

(*a*) contribute to the Consolidated Revenue Fund an amount equal to six per cent of his salary; and

(*b*) contribute to the Supplementary Retirement Benefits Account established in the accounts of Canada pursuant to the *Supplementary Retirement Benefits Act*,

(i) prior to 1977, an amount equal to one-half of one per cent of his salary, and

(ii) commencing with the month of January 1977, an amount equal to one per cent of his salary.

The next relevant date is July 4, 1975. On that date the bill amending the *Judges Act* to increase salaries by 39 per cent and pensions to surviving spouses and children by 50 per cent became law.

actuellement leur fonction de participer modestement à l'amélioration du régime de pensions pour les conjoints survivants, et aux personnes qui seront à l'avenir nommées à des postes de juge, de contribuer dans une certaine mesure aux coûts du régime de prestations de retraite.

Le 17 février 1975, la contribution des juges aux coûts des pensions, qui avait été mentionnée dans la lettre du Ministre, a été instaurée. La *Loi de 1975 modifiant le droit statutaire (Pensions de retraite)* a été présentée à cette date. Elle prévoyait que les juges nommés avant le 17 février 1975 verseraient une contribution égale à 1,5 pour cent de leur traitement pour les pensions (ce devait être là une participation à l'amélioration des pensions pour les conjoints et les enfants des juges), et que les juges nommés après cette date verseraient une contribution égale à 6 pour cent de leur traitement pour les pensions, plus un demi pour cent qui augmenterait par la suite à 1 pour cent de manière à les indexer en fonction de l'indice d'inflation. La partie pertinente de cette modification, qui est devenue l'art. 29.1 de la *Loi sur les juges* prévoit:

29.1 (1) Les juges nommés avant le 17 février 1975 à une cour supérieure ou de comté versent au Fonds du revenu consolidé une contribution égale à un et demi pour cent de leur traitement, faite sous forme de retenue.

(2) Les juges nommés après le 16 février 1975 à une cour supérieure ou de comté versent, sous forme de retenue,

a) au Fonds du revenu consolidé une contribution égale à six pour cent de leur traitement; et

b) au Compte de prestations de retraite supplémentaires, établi dans les Comptes du Canada conformément à la *Loi sur les prestations de retraite supplémentaires*, une contribution égale

(i) à un demi de un pour cent de leur traitement, avant 1977, et

(ii) à un pour cent de leur traitement, à compter de 1977.

La date suivante qui nous intéresse est le 4 juillet 1975. À cette date, le projet de loi modifiant la *Loi sur les juges* visant à augmenter les traitements de 39 pour cent et les pensions aux conjoints survivants et aux enfants de 50 pour cent est devenu loi.

On July 24, 1975 the respondent, Marc Beauregard, was appointed a judge of the Superior Court of Quebec. The financial arrangements for a superior court judge in Quebec on that date were a salary of $53,000 (an increase of 39 per cent from the salary in effect just three weeks before), entitlement to a non-contributory retirement pension and a pension, in certain circumstances, for his widow and children. When the respondent assumed his position on July 24, 1975 the *Statute Law (Superannuation) Amendment Act, 1975* had not been enacted. It was still before Parliament and had been before Parliament since the previous February. The respondent contended, however, and the Crown conceded, that he did not know of its existence when he accepted his judicial appointment. In other words, on July 24, 1975 the 'salary and increased benefits' component of the proposed amendments to the *Judges Act* was in place but the negative aspect of the package (from the perspective of the respondent and, presumably, other superior court judges) was not.

The contributory requirement of the pension scheme became effective on the last relevant date in the chronology, December 20, 1975. On that date the amendments introduced on February 17, 1975 were enacted. Although the respondent's salary remained at $53,000, as a consequence of the amendments he was required to contribute 6½ per cent of his total salary to his pension plan until 1977 and 7 per cent thereafter.

The respondent, as plaintiff, challenged the constitutionality of the new s. 29.1 of the *Judges Act*. His challenge was two-pronged. First, he alleged that s. 29.1 violated s. 100 of the *Constitution Act, 1867* which provides:

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

Le 24 juillet 1975, l'intimé, Marc Beauregard, a été nommé juge de la Cour supérieure du Québec. Les conditions pécuniaires liées au poste de juge d'une cour supérieure au Québec à cette date comportaient un traitement de 53 000 $ (une augmentation de 39 pour cent par rapport au traitement en vigueur juste trois semaines auparavant), le droit à une pension de retraite sans participation et à une pension, sous réserve de certaines conditions, pour son épouse et ses enfants à son décès. Lorsque l'intimé est entré en fonction le 24 juillet 1975, la *Loi de 1975 modifiant le droit statutaire (Pensions de retraite)* n'avait pas été adoptée. Elle était toujours devant le Parlement, et ce, depuis le mois de février précédent. Toutefois, l'intimé a soutenu, ce qui a été reconnu par le ministère public, qu'il n'en connaissait pas l'existence lorsqu'il a accepté sa nomination comme juge. En d'autres termes, le 24 juillet 1975 la composante «rémunération et augmentation de prestations» du projet de modification de la *Loi sur les juges* était en place, mais l'aspect négatif du programme (du point de vue de l'intimé et, présumément, d'autres juges de cours supérieures) ne l'était pas.

L'exigence en matière de participation au régime de pensions est entrée en vigueur à la dernière date pertinente de la suite des événements, savoir le 20 décembre 1975. À cette date, les modifications présentées le 17 février 1975 ont été adoptées. Bien que son traitement soit demeuré à 53 000 $, l'intimé s'est vu, à la suite de ces modifications, obligé de contribuer 6,5 pour cent de sa rémunération totale à son régime de retraite jusqu'en 1977 et 7 pour cent par la suite.

L'intimé, en tant que demandeur, a contesté la constitutionnalité du nouvel art. 29.1 de la *Loi sur les juges*. Sa contestation comportait deux volets. Premièrement, il a allégué que l'art. 29.1 violait l'art. 100 de la *Loi constitutionnelle de 1867* qui prévoit:

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

Secondly, the respondent contended that the words "before the 17th day of February, 1975" in s. 29.1(1) of the *Judges Act* and the whole of s. 29.1(2) were inoperative because they violated his right to equality before the law recognized by s. 1(*b*) of the *Canadian Bill of Rights* which provides:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely

. . .

(*b*) the right of the individual to equality before the law and the protection of the law;

II

Judgments

Federal Court, Trial Division

In his judgment, reported at [1981] 2 F.C. 543, Addy J. held that s. 29.1(2) of the *Judges Act* was *ultra vires* in so far as it applied to the respondent. He said that the effect of this provision was to reduce the salaries of incumbent judges and that this was unconstitutional for two reasons: first, because it intruded into provincial jurisdiction under s. 92(14) of the *Constitution Act, 1867* with respect to the 'administration of justice' (i.e. reductions in salary for superior court judges would require a constitutional amendment in which both the federal and provincial governments would participate); and secondly, because non-reduction of the salaries of incumbent judges is a fundamental principle of constitutional law which Canada inherited from the United Kingdom.

Addy J. dismissed the respondent's argument based on s. 1(*b*) of the *Canadian Bill of Rights*. He said that that provision was not concerned with issues relating to the "mere quantum of remuneration for services rendered". Additionally, following the language of McIntyre J. of this Court in *MacKay v. The Queen*, [1980] 2 S.C.R. 370 at p. 406, he held that the requirement of making contributions for pension and survivor benefits was not

Deuxièmement, l'intimé a soutenu que les termes «avant le 17 février 1975», que l'on trouve au par. 29.1(1) de la *Loi sur les juges*, et l'ensemble du par. 29.1(2) étaient inopérants parce qu'ils violaient le droit à l'égalité devant la loi que lui reconnaît l'al. 1*b*) de la *Déclaration canadienne des droits* qui prévoit:

1. Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe:

. . .

b) le droit de l'individu à l'égalité devant la loi et à la protection de la loi;

II

Les jugements

Cour fédérale, Division de première instance

Dans son jugement, publié à [1981] 2 C.F. 543, le juge Addy a conclu que le par. 29.1(2) de la *Loi sur les juges* était *ultra vires* dans la mesure où il s'appliquait à l'intimé. Il a dit que cette disposition avait pour effet de réduire le traitement des juges qui étaient en fonction et que cela était inconstitutionnel pour deux motifs: premièrement parce que cela empiétait sur la compétence que confère aux provinces le par. 92(14) de la *Loi constitutionnelle de 1867* en ce qui a trait à «l'administration de la justice» (c'est-à-dire que les réductions du traitement des juges des cours supérieures exigeraient une modification constitutionnelle à laquelle devraient participer à la fois les gouvernements fédéral et provinciaux); et deuxièmement parce que la non-réduction du traitement des juges en fonction est un principe fondamental de droit constitutionnel que le Canada a hérité du Royaume-Uni.

Le juge Addy a rejeté l'argument de l'intimé fondé sur l'al. 1*b*) de la *Déclaration canadienne des droits*. Il a dit que cette disposition ne visait pas les questions portant sur le «simple quantum de rémunération pour services rendus». De plus, reprenant les termes utilisés par le juge McIntyre de cette Cour dans l'arrêt *MacKay c. La Reine*, [1980] 2 R.C.S. 370, à la p. 406, il a conclu que l'exigence de verser des contributions pour les

"arbitrary, capricious or unnecessary" and therefore did not constitute a denial of equality before the law.

Federal Court of Appeal

The majority of the Federal Court of Appeal, in a decision reported at [1984] 1 F.C. 1010, agreed with the conclusion of Addy J. but disagreed with his reasoning (and with the reasoning of each other).

Thurlow C.J. held that Parliament had the power under s. 100 of the *Constitution Act, 1867* to fix the salaries of superior court judges. He further held that the power to fix salaries included the power to reduce them and that this reduction could be achieved by federal statute and did not require constitutional amendment. Thurlow C.J. concluded, however, that s. 100 of the *Constitution Act, 1867* does not give Parliament the power to dictate how judges use their salaries. Both parts of s. 29.1 of the *Judges Act* impermissibly do this by compulsorily taking from judges part of their salaries to help pay for their pension and survivor benefits.

Heald J. concluded that the clear wording of s. 100 of the *Constitution Act, 1867* meant that Parliament had to pay the total cost of the pensions of superior court judges. It followed that s. 29.1(2) of the *Judges Act* was *ultra vires* because it compelled a contribution to the pensions of judges by the judges themselves. Section 29.1(1) of the *Judges Act*, however, was *intra vires* because it was dedicated exclusively to the cost of the improved pensions for widowed spouses and other dependants of judges.

Pratte J. dissented. He held that the words "fixed and provided" in s. 100 of the *Constitution Act, 1867* gave Parliament a plenary power with respect to the salaries of superior court judges. This included the power to change them.

pensions et les prestations des survivants n'était pas «arbitraire, fantaisiste ou superflue» et, par conséquent, ne constituait pas un déni de l'égalité devant la loi.

Cour d'appel fédérale

La Cour d'appel fédérale à la majorité, dans un arrêt publié à [1984] 1 C.F. 1010, s'est dite d'accord avec la conclusion du juge Addy mais non avec son raisonnement (chacun des juges formant la majorité ayant formulé son propre raisonnement).

Le juge en chef Thurlow a conclu que le Parlement avait, en vertu de l'art. 100 de la *Loi constitutionnelle de 1867*, le pouvoir de fixer les traitements des juges des cours supérieures. Il a en outre conclu que le pouvoir de fixer les traitements comprenait le pouvoir de les réduire et que cette réduction pouvait être accomplie au moyen d'une loi fédérale et n'exigeait pas une modification constitutionnelle. Toutefois, le juge en chef Thurlow a conclu que l'art. 100 de la *Loi constitutionnelle de 1867* ne donne pas au Parlement le pouvoir de dicter aux juges comment ils doivent utiliser leur traitement. Les deux parties de l'art. 29.1 de la *Loi sur les juges* le font d'une manière inadmissible en retenant obligatoirement une partie du traitement des juges pour aider à payer une partie de leurs pensions et des prestations des survivants.

Le juge Heald a conclu que le texte clair de l'art. 100 de la *Loi constitutionnelle de 1867* a pour but d'obliger le Parlement à payer la totalité des pensions des juges des cours supérieures. Il s'ensuit que le par. 29.1(2) de la *Loi sur les juges* est *ultra vires* parce qu'il oblige les juges à contribuer eux-mêmes à leurs propres pensions. Toutefois, le par. 29.1(1) de la *Loi sur les juges* est *intra vires* parce qu'il est consacré exclusivement au coût de l'amélioration des pensions destinées aux conjoints et autres personnes à charge des juges décédés.

Le juge Pratte a exprimé une dissidence. Il a conclu que les mots «fixés et payés» employés à l'art. 100 de la *Loi constitutionnelle de 1867* confèrent au Parlement un pouvoir absolu en ce qui a trait aux traitements des juges des cours supérieures. Cela comprenait le pouvoir de les modifier.

Although the three justices of the Federal Court of Appeal disagreed sharply on the interpretation of s. 100 of the *Constitution Act, 1867* and its application to s. 29.1 of the *Judges Act* they were in agreement, both amongst themselves and with Addy J., that the respondent's argument based on s. 1(*b*) of the *Canadian Bill of Rights* failed.

In summary, the respondent's *Canadian Bill of Rights* attack on s. 29.1 of the *Judges Act* failed in both the Federal Court, Trial Division and the Federal Court of Appeal. He was, however, successful in both courts in his argument based on s. 100 of the *Constitution Act, 1867*. Addy J. held that s. 100 prevented Parliament from reducing the compensation paid to incumbent judges. The majority of the Court of Appeal held that it would be unconstitutional for Parliament to require any superior court judge to contribute to his or her pension plan.

III

Issues

Although there are a myriad of legal issues to be addressed, they are all subsumed in the two constitutional questions stated by this Court on March 22, 1984:

1. Is section 29.1 of the *Judges Act*, as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 100 of the *Constitution Act, 1867* and, therefore, in whole or in part, *ultra vires* the Parliament of Canada?

2. Is section 29.1 of the *Judges Act* as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 1(*b*) of the *Canadian Bill of Rights* and to the extent of the inconsistency is it of no force or effect?

IV

Section 100 of the *Constitution Act, 1867* and s. 29.1 of the *Judges Act*

For convenience of reference I set out again s. 100 of the *Constitution Act, 1867*:

Bien que les trois juges de la Cour d'appel fédérale aient été nettement en désaccord quant à l'interprétation de l'art. 100 de la *Loi constitutionnelle de 1867* et à son application à l'égard de l'art. 29.1 de la *Loi sur les juges*, ils ont été d'accord, à la fois entre eux et avec le juge Addy, pour dire que l'argument de l'intimé fondé sur l'al. 1*b*) de la *Déclaration canadienne des droits* devait échouer.

En résumé, l'intimé a échoué tant devant la Division de première instance de la Cour fédérale que devant la Cour d'appel fédérale dans sa contestation de l'art. 29.1 de la *Loi sur les juges*, fondée sur la *Déclaration canadienne des droits*. Toutefois, il a eu gain de cause devant ces deux cours quant à son argument fondé sur l'art. 100 de la *Loi constitutionnelle de 1867*. Le juge Addy a conclu que l'art. 100 interdit au Parlement de réduire la rémunération versée aux juges en fonction. La Cour d'appel à la majorité a statué qu'il serait inconstitutionnel pour le Parlement d'exiger que tout juge d'une cour supérieure contribue à son régime de retraite.

III

Les questions en litige

Bien qu'un grand nombre de questions juridiques doivent être tranchées, elles sont toutes subsumées dans les deux questions constitutionnelles formulées par cette Cour le 22 mars 1984:

1. L'article 29.1 de la *Loi sur les juges*, telle que modifiée par l'art. 100 de la *Loi de 1975 modifiant le droit statutaire (Pensions de retraite)*, S.C. 1974-75-76, chap. 81, est-il incompatible avec l'art. 100 de la *Loi constitutionnelle de 1867* et, par conséquent, en totalité ou en partie *ultra vires* du Parlement du Canada?

2. L'article 29.1 de la *Loi sur les juges*, telle que modifiée par l'art. 100 de la *Loi de 1975 modifiant le droit statutaire (Pensions de retraite)*, S.C. 1974-75-76, chap. 81, est-il incompatible avec l'al. 1*b*) de la *Déclaration canadienne des droits* et inopérant dans la mesure de cette incompatibilité?

IV

L'article 100 de la *Loi constitutionnelle de 1867* et l'art. 29.1 de la *Loi sur les juges*

Afin de faciliter le renvoi, je cite de nouveau l'art. 100 de la *Loi constitutionnelle de 1867*:

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

In the context of this appeal, it seems to me that three introductory points can be made about this provision. First, it deals explicitly with both judicial salaries and pensions. Secondly, it stands as a constitutional affirmation that superior, district and county court judges will receive at least some salary and pension benefits. Thirdly, it assigns the responsibility, in both a federalism sense and a separation of powers sense, for providing judicial salaries and pensions. In the federalism sense, the assignment is to Parliament, not the provincial governments. In the separation of powers sense, the assignment is to the federal legislative branch, Parliament, not to any component of the executive branch.

The respondent makes three distinct arguments about the relationship between s. 100 of the *Constitution Act, 1867* and s. 29.1 of the *Judges Act*. These arguments correspond quite closely to the different bases for decision in the judgments of Addy J. at trial and Thurlow C.J. and Heald J. on appeal. They include:

(1) Under the Constitution, Parliament could not, on December 20, 1975, diminish, reduce or impair the established benefits of the respondent.

(2) Section 100 of the *Constitution Act, 1867* requires Parliament to provide to superior court judges non-contributory retirement pensions.

(3) Section 100 does not authorize Parliament to compel superior court judges to contribute to a fund through deductions from their salaries.

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

Dans le contexte du présent pourvoi, il me semble qu'on peut souligner trois points en guise d'introduction au sujet de cette disposition. Premièrement, elle traite de manière explicite des salaires et des pensions des juges. Deuxièmement, elle constitue une affirmation constitutionnelle que les juges des cours supérieures, de district et de comté recevront au moins un certain salaire et des prestations de retraite. Troisièmement, elle attribue la responsabilité, tant dans le sens du fédéralisme et que dans celui de la séparation des pouvoirs, d'assurer les traitements et les pensions des juges. Dans le sens du fédéralisme, cette responsabilité incombe au Parlement et non aux gouvernements provinciaux. Dans le sens de la séparation des pouvoirs, elle incombe au pouvoir législatif fédéral, le Parlement, et non à une composante du pouvoir exécutif.

L'intimé soumet trois arguments distincts au sujet du rapport qui existe entre l'art. 100 de la *Loi constitutionnelle de 1867* et l'art. 29.1 de la *Loi sur les juges*. Ces arguments correspondent de très près aux différents fondements sur lesquels s'appuient les jugements du juge Addy en première instance et du juge en chef Thurlow et du juge Heald en appel. Ce sont les suivants:

(1) En vertu de la Constitution, le Parlement ne pouvait pas, le 20 décembre 1975, diminuer, réduire ou modifier les prestations établies de l'intimé.

(2) L'article 100 de la *Loi constitutionnelle de 1867* exige que le Parlement verse aux juges des cours supérieures des pensions de retraite sans participation des intéressés.

(3) L'article 100 n'autorise pas le Parlement à obliger les juges des cours supérieures à verser dans un fonds des contributions faites sous forme de retenues.

Although different points are made under each of these arguments, there is a common thread running through all three. This common thread is the principle of judicial independence. The respondent contends that judicial independence is an important principle of Canadian constitutional law which must be interpreted to invalidate the legislation under review. Before assessing the merits of the specific arguments above, it is important to examine the principle of judicial independence.

V

Judicial Independence

1. *General Considerations*

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider—be it government, pressure group, individual or even another judge—should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence. Nevertheless, it is not the entire content of the principle.

Of recent years the general understanding of the principle of judicial independence has grown and been transformed to respond to the modern needs and problems of free and democratic societies. The ability of individual judges to make decisions in discrete cases free from external interference or influence continues, of course, to be an important and necessary component of the principle. Today, however, the principle is far broader. In the words of a leading academic authority on judicial independence, Professor Shimon Shetreet: "The judiciary has developed from a dispute-resolution mechanism, to a significant social institution with an important constitutional role which participates along with other institutions in shaping the life of its community" ("The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration", in S. She-

Bien que ces trois arguments soulèvent différents points, ils sont reliés par un trait commun. Ce trait commun est le principe de l'indépendance judiciaire. L'intimé soutient que l'indépendance judiciaire constitue un principe important du droit constitutionnel canadien qui doit être interprété de manière à invalider la mesure législative faisant l'objet de l'examen. Avant d'évaluer le bien-fondé de chacun des arguments mentionnés ci-dessus, il importe d'examiner le principe de l'indépendance judiciaire.

V

L'indépendance judiciaire

1. *Considérations d'ordre général*

Historiquement, ce qui a généralement été accepté comme l'essentiel du principe de l'indépendance judiciaire a été la liberté complète des juges pris individuellement d'instruire et de juger les affaires qui leur sont soumises: personne de l'extérieur—que ce soit un gouvernement, un groupe de pression, un particulier ou même un autre juge—ne doit intervenir en fait, ou tenter d'intervenir, dans la façon dont un juge mène l'affaire et rend sa décision. Cet élément essentiel continue d'être au centre du principe de l'indépendance judiciaire. Néanmoins, ce n'est pas là tout le contenu du principe.

Ces dernières années, la conception générale du principe de l'indépendance judiciaire a évolué et s'est transformée de manière à répondre aux besoins et aux problèmes modernes des sociétés libres et démocratiques. La possibilité pour les juges pris individuellement de rendre des décisions dans des affaires distinctes en étant libres de toute intervention ou influence de l'extérieur continue évidemment d'être une composante importante et nécessaire du principe qui, de nos jours, est cependant beaucoup plus large. Selon les termes d'un des auteurs les plus importants en matière d'indépendance judiciaire, le professeur Shimon Shetreet: [TRADUCTION] «Le système judiciaire est passé d'un mécanisme de règlement des litiges pour devenir une institution sociale essentielle dotée d'un rôle constitutionnel important, qui participe avec d'autres institutions au façonnement de

treet and J. Deschênes (eds.), *Judicial Independence: The Contemporary Debate* (1985), at p. 393).

There is, therefore, both an individual and a collective or institutional aspect to judicial independence. As stated by Le Dain J. in *Valente v. The Queen*, [1985] 2 S.C.R. 673, at pp. 685 and 687:

[Judicial independence] connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

. . .

It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government.

The rationale for this two-pronged modern understanding of judicial independence is recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it—rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute-resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies.

2. *Foundations of Judicial Independence in Canada*

It is trite history that the Canadian court system has its primary antecedents in the United Kingdom. (This is not true of our substantive law which

la vie de sa société» («The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration», dans S. Shetreet et J. Deschênes (éd.), *Judicial Independence: The Contemporary Debate* (1985), à la p. 393).

Par conséquent, l'indépendance judiciaire comporte à la fois un aspect individuel et un aspect collectif ou institutionnel. Comme l'affirme le juge Le Dain dans l'arrêt *Valente c. La Reine*, [1985] 2 R.C.S. 673, aux pp. 685 et 687:

[L'indépendance judiciaire] connote non seulement un état d'esprit ou une attitude dans l'exercice concret des fonctions judiciaires, mais aussi un statut, une relation avec autrui, particulièrement avec l'organe exécutif du gouvernement, qui repose sur des conditions ou garanties objectives.

. . .

On admet généralement que l'indépendance judiciaire fait intervenir des rapports tant individuels qu'institutionnels: l'indépendance individuelle d'un juge, qui se manifeste dans certains de ses attributs, telle l'inamovibilité, et l'indépendance institutionnelle de la cour ou du tribunal qu'il préside, qui ressort de ses rapports institutionnels ou administratifs avec les organes exécutif et législatif du gouvernement.

La raison d'être de cette conception moderne à deux volets de l'indépendance judiciaire est la reconnaissance que les tribunaux ne sont pas chargés uniquement de statuer sur des affaires individuelles. Il s'agit là évidemment d'un rôle. C'est également le contexte pour un second rôle différent et également important, celui de protecteur de la constitution et des valeurs fondamentales qui y sont enchâssées—la primauté du droit, la justice fondamentale, l'égalité, la préservation du processus démocratique, pour n'en nommer peut-être que les plus importantes. En d'autres termes, l'indépendance judiciaire est essentielle au règlement juste et équitable des litiges dans les affaires individuelles. Il constitue également l'élément vital du caractère constitutionnel des sociétés démocratiques.

2. *Fondement de l'indépendance judiciaire au Canada*

Il est bien établi dans l'histoire que le système judiciaire canadien tire ses origines du Royaume-Uni. (Ce n'est pas vrai en ce qui concerne notre

has deep roots in both the United Kingdom and France.) In the United Kingdom the cornerstone of the constitutional system has been for centuries, and still is today, the principle of parliamentary supremacy. But it is not the only principle. The rule of law is another. Judicial independence is a third. The history of the Constitution of the United Kingdom reveals continuous growth towards independent judicial authority. That history is well-described in Professor Lederman's classic article, "The Independence of the Judiciary" (1956), 34 *Can. Bar Rev.* 769-809 and 1139-1179. Judicial authority in the United Kingdom has matured into a strong and effective means of ensuring that governmental power is exercised in accordance with law. Judicial independence is the essential prerequisite for this judicial authority. In the recent words of Lord Lane: "Few constitutional precepts are more generally accepted there in England, the land which boasts no written constitution, than the necessity for the judiciary to be secure from undue influence and autonomous within its own field" ("Judicial Independence and the Increasing Executive Role in Judicial Administration", in S. Shetreet and J. Deschênes (eds.), *Judicial Independence: The Contemporary Debate* (1985), at p. 525).

droit positif qui a des racines profondes à la fois au Royaume-Uni et en France.) Au Royaume-Uni, la pierre angulaire du système constitutionnel a été pendant des siècles, et est toujours aujourd'hui, le principe de la suprématie du Parlement. Toutefois, ce n'est pas le seul principe. La primauté du droit en est un autre. L'indépendance judiciaire en est un troisième. L'histoire de la Constitution du Royaume-Uni révèle une évolution continue vers l'indépendance du pouvoir judiciaire. Cette histoire est bien décrite dans l'article classique du professeur Lederman, intitulé «The Independence of the Judiciary» (1956), 34 *R. du B. can.*, aux pp. 769 à 809 et 1139 à 1179. Le pouvoir judiciaire au Royaume-Uni est devenu un moyen solide et efficace d'assurer que le pouvoir gouvernemental est exercé en conformité avec la loi. L'indépendance judiciaire est la condition préalable essentielle de ce pouvoir judiciaire. Comme l'a dit récemment lord Lane: [TRADUCTION] «Peu de préceptes constitutionnels sont plus généralement acceptés en Angleterre, le pays qui se glorifie de n'avoir aucune constitution écrite, que la nécessité pour le pouvoir judiciaire d'être à l'abri de toute influence indue et d'être autonome dans son propre domaine de compétence» («Judicial Independence and the Increasing Executive Role in Judicial Administration», dans S. Shetreet et J. Deschênes (éd.), *Judicial Independence: The Contemporary Debate* (1985), à la p. 525).

In Canada, the constitutional foundation for the principle of judicial independence is derived from many sources. Because the sources for the principle are both varied and powerful, the principle itself is probably more integral and important in our constitutional system than it is in the United Kingdom.

Au Canada, le fondement constitutionnel du principe de l'indépendance judiciaire découle de plusieurs sources. Étant donné que les sources du principe sont à la fois diverses et importantes, le principe lui-même est probablement plus complet et important dans notre système constitutionnel qu'il ne l'est au Royaume-Uni.

Indeed, two of the sources of, or reasons for, judicial independence in Canada do not exist in the United Kingdom. First, Canada is a federal country with a constitutional distribution of powers between federal and provincial governments. As in other federal countries, there is a need for an impartial umpire to resolve disputes between two levels of government as well as between governments and private individuals who rely on the distribution of powers. In most federal countries

En fait, deux des sources ou raisons d'être de l'indépendance judiciaire au Canada n'existent pas au Royaume-Uni. Premièrement, le Canada est un État fédéral doté d'un partage constitutionnel des compétences entre le gouvernement fédéral et les gouvernements provinciaux. Comme dans d'autres États fédéraux, il est nécessaire d'avoir un arbitre impartial pour régler les litiges aussi bien entre les deux paliers de gouvernement qu'entre les gouvernements et les citoyens qui invoquent le partage

the courts play this umpiring role. In Canada, since Confederation, it has been assumed and agreed that the courts would play an important constitutional role as umpire of the federal system. Initially, the role of the courts in this regard was not exclusive; in the early years of Confederation the federal government's disallowance power contained in s. 55 of the *Constitution Act, 1867* was also central to federal-provincial dispute-resolution. In time, however, the disallowance power fell into disuse and the courts emerged as the ultimate umpire of the federal system. That role, still fundamental today, requires that the umpire be autonomous and completely independent of the parties involved in federal-provincial disputes.

Secondly, the enactment of the *Canadian Charter of Rights and Freedoms* (although admittedly not relevant to this case because of its date of origin) conferred on the courts another truly crucial role: the defense of basic individual liberties and human rights against intrusions by all levels and branches of government. Once again, in order to play this deeply constitutional role, judicial independence is essential.

Beyond these two fundamental sources of, or reasons for, judicial independence there is also textual recognition of the principle in the *Constitution Act, 1867*. The preamble to the *Constitution Act, 1867* states that Canada is to have a Constitution "similar in Principle to that of the United Kingdom". Since judicial independence has been for centuries an important principle of the Constitution of the United Kingdom, it is fair to infer that it was transferred to Canada by the constitutional language of the preamble. Furthermore, s. 129 of the *Constitution Act, 1867* continued the courts previously in existence in the federating provinces into the new Dominion. The fundamental traditions of those courts, including judicial independence, were also continued. Additionally, the judicature provisions of the *Constitution Act, 1867*, especially ss. 96, 99 and 100,

des compétences. Dans la plupart des États fédéraux, les tribunaux jouent ce rôle d'arbitre. Au Canada, depuis la Confédération, on admet que les tribunaux jouent un rôle constitutionnel important en tant qu'arbitres du système fédéral. Au départ, le rôle des tribunaux à cet égard n'était pas exclusif; au cours des premières années de la Confédération, le pouvoir de désaveu que confère au gouvernement fédéral l'art. 55 de la *Loi constitutionnelle de 1867* jouait également un rôle capital en matière de règlement des litiges entre le gouvernement fédéral et les provinces. Avec le temps toutefois, le pouvoir de désaveu est tombé en désuétude et les tribunaux sont devenus les arbitres ultimes du système fédéral. Ce rôle, qui est toujours fondamental à l'heure actuelle, exige que l'arbitre soit autonome et complètement indépendant des parties concernées dans les litiges entre le gouvernement fédéral et les provinces.

Deuxièmement, l'adoption de la *Charte canadienne des droits et libertés* (bien que, de toute évidence, elle ne soit pas pertinente en l'espèce à cause de sa date d'entrée en vigueur) a conféré aux tribunaux un autre rôle vraiment important: la défense des libertés individuelles fondamentales et des droits de la personne contre les ingérences de tout palier et organe de gouvernement. Encore une fois, l'indépendance judiciaire est essentielle pour jouer ce rôle profondément constitutionnel.

Outre ces deux sources fondamentales ou raisons d'être de l'indépendance judiciaire, il y a également une reconnaissance écrite du principe dans la *Loi constitutionnelle de 1867*. Le préambule de la *Loi constitutionnelle de 1867* établit que le Canada doit avoir une constitution «reposant sur les mêmes principes que celle du Royaume-Uni». Étant donné que l'indépendance judiciaire est depuis des siècles un principe important de la Constitution du Royaume-Uni, on peut à juste titre déduire que ce principe a été transféré au Canada par le texte constitutionnel du préambule. En outre, en vertu de l'art. 129 de la *Loi constitutionnelle de 1867*, les tribunaux qui existaient déjà dans les provinces qui se fédéraient ont continué d'exister dans le nouveau Dominion. Les traditions fondamentales de ces tribunaux, y compris l'indépendance judiciaire, ont également été maintenues.

support judicial authority and independence, at least at the level of superior, district and county courts. As Lord Atkin said in *Toronto Corporation v. York Corporation*, [1938] A.C. 415 at p. 426:

> While legislative power in relation to the constitution, maintenance and organization of Provincial Courts of Civil Jurisdiction, including procedure in civil matters, is confided to the Province, the independence of the judges is protected by provisions that the judges of the Superior, District, and County Courts shall be appointed by the Governor-General (s. 96 of the British North America Act, 1867), that the judges of the Superior Courts shall hold office during good behaviour (s. 99), and that the salaries of the judges of the Superior, District, and County Courts shall be fixed and provided by the Parliament of Canada (s. 100). These are three principal pillars in the temple of justice, and they are not to be undermined.

(Emphasis added.)

In summary, Canadian constitutional history and current Canadian constitutional law establish clearly the deep roots and contemporary vitality and vibrancy of the principle of judicial independence in Canada. The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system.

I emphasize the word 'all' in the previous sentence because, although judicial independence is usually considered and discussed in terms of the relationship between the judiciary and the executive branch, in this appeal the relevant relationship is between the judiciary and Parliament. Nothing turns on this contextual difference. Although particular care must be taken to preserve the independence of the judiciary from the executive branch (because the executive is so often a litigant before the courts), the principle of judicial independence must also be maintained against all other potential intrusions, including any from the legislative branch. In *McEvoy v. Attorney General for New*

De plus, les dispositions de la *Loi constitutionnelle de 1867* relatives aux juges, particulièrement les art. 96, 99 et 100, appuient le pouvoir et l'indépendance judiciaire, du moins au niveau des cours supérieures, de district et de comté. Comme l'affirme lord Atkin dans l'arrêt *Toronto Corporation v. York Corporation*, [1938] A.C. 415, à la p. 426:

> [TRADUCTION] Alors que le pouvoir législatif relatif à la création, au maintien et à l'organisation de tribunaux de justice pour la province, y compris la procédure en matière civile dans ces tribunaux, est confié à la province, l'indépendance des juges est protégée par les dispositions prévoyant que les juges des cours supérieures, de district et de comté sont nommés par le gouverneur général (art. 96 de l'Acte de l'Amérique du Nord britannique, 1867), que les juges des cours supérieures seront inamovibles (art. 99), et que les salaires, allocations et pensions des juges des cours supérieures, de district et de comté seront fixés et payés par le Parlement du Canada (art. 100). Ce sont là trois piliers principaux du temple de la justice, et il ne faut pas les détruire.

(C'est moi qui souligne.)

En résumé, l'histoire de la Constitution du Canada et le droit constitutionnel canadien actuel établissent clairement les racines profondes, la vitalité et le caractère vibrant contemporains du principe de l'indépendance judiciaire au Canada. Le rôle des tribunaux en tant qu'arbitres des litiges, interprètes du droit et défenseurs de la Constitution exige qu'ils soient complètement séparés, sur le plan des pouvoirs et des fonctions, de tous les autres participants au système judiciaire.

Je mets l'accent sur le mot «tous» dans la phrase précédente parce que, bien que l'indépendance judiciaire soit habituellement étudiée et analysée en fonction du rapport qui existe entre le pouvoir judiciaire et le pouvoir exécutif, dans le présent pourvoi le rapport pertinent est celui qui existe entre le pouvoir judiciaire et le Parlement. Rien ne dépend de cette différence contextuelle. Bien qu'un soin particulier doive être pris pour préserver l'indépendance de la magistrature vis-à-vis du pouvoir exécutif (du fait que le pouvoir exécutif soit si souvent partie aux litiges devant les tribunaux), le principe de l'indépendance judiciaire doit également être maintenu face à toute autre ingérence

Brunswick, [1983] 1 S.C.R. 704, the Court said, at p. 720:

> The judicature sections of the *Constitution Act, 1867* guarantee the independence of the Superior Courts; they apply to Parliament as well as to the Provincial Legislatures.

In a similar vein, these sections, including s. 100, apply to both the executive and legislative branches of government.

3. *Content of the Principle of Judicial Independence*

Turning from the general definition and constitutional foundations of judicial independence, it becomes necessary to consider its content or conditions in a Canadian setting. In the context of this appeal, it is particularly important to discuss the question of financial security as a component of judicial independence.

There is, and has been at least since the *Act of Settlement*, 1700 (Engl.), 12 & 13 Will. 3, c. 2, agreement that judicial independence requires security of tenure and financial security. In recent years, important international documents have fleshed out in more detail the content of the principle of judicial independence in free and democratic societies: see, for example, the thirty-two articles in the *Syracuse Draft Principles on the Independence of the Judiciary* (1981), the forty-seven standards enunciated in the *International Bar Association Code of Minimum Standards of Judicial Independence* (1982), and, especially, the *Universal Declaration of the Independence of Justice* (adopted at the final plenary session of the First World Conference on the Independence of Justice held in Montréal in 1983). Invariably, financial security has been recognized as a central component of the international concept of judicial independence. For a recent example, the *Universal Declaration of the Independence of Justice* (the Montreal Declaration) provides:

possible, y compris celle du pouvoir législatif. Dans l'arrêt *McEvoy c. Procureur général du Nouveau-Brunswick*, [1983] 1 R.C.S. 704, la Cour affirme à la p. 720:

> Les articles de la *Loi constitutionnelle de 1867* qui portent sur l'organisation judiciaire garantissent l'indépendance des cours supérieures; ils s'appliquent aussi bien au Parlement qu'aux législatures provinciales.

Dans le même sens, ces articles, y compris l'art. 100, s'appliquent aux organes exécutif et législatif du gouvernement.

3. *Contenu du principe de l'indépendance judiciaire*

Si l'on s'écarte de la définition générale et du fondement constitutionnel de l'indépendance judiciaire, il devient nécessaire d'examiner son contenu ou ses modalités dans le contexte canadien. Dans le cadre du présent pourvoi, il est particulièrement important d'analyser la question de la sécurité financière en tant que composante de l'indépendance judiciaire.

On s'accorde et on s'est toujours accordé, du moins depuis l'*Act of Settlement*, 1700 (Engl.), 12 & 13 Will. 3, chap. 2, pour dire que l'indépendance judiciaire exige l'inamovibilité et la sécurité financière. Au cours des dernières années, des documents internationaux importants ont établi d'une manière plus détaillée le contenu du principe de l'indépendance judiciaire dans les sociétés libres et démocratiques: voir, par exemple, les trente-deux articles du *Syracuse Draft Principles on the Independence of the Judiciary* (1981), les quarante-sept normes énoncées dans *International Bar Association Code of Minimum Standards of Judicial Independence* (1982), et, particulièrement la *Déclaration universelle sur l'indépendance de la Justice* (adoptée lors de la session plénière finale de la Première conférence mondiale sur l'indépendance de la Justice tenue à Montréal en 1983). Invariablement, la sécurité financière a été reconnue comme une composante essentielle du concept international de l'indépendance judiciaire. À titre d'exemple récent, la *Déclaration universelle sur l'indépendance de la Justice* (la Déclaration de Montréal) prévoit:

2.21 a) During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions.

b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and be regularly adjusted to account fully for price increases.

c) Judicial salaries shall not be decreased during the judges' term of office, except as a coherent part of an overall public economic measure.

This international understanding of one of the essential features of judicial independence is, in my opinion, given powerful expression in a Canadian context by s. 100 of the *Constitution Act, 1867*, earlier quoted. Speaking of financial security in *Valente*, Le Dain J. said, at p. 704:

> The second essential condition of judicial independence ... is ... what may be referred to as financial security. That means security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence.

I agree with this passage, although I believe it requires a somewhat broader expression by reason of the circumstances of this appeal. *Valente* dealt substantially, although not exclusively, with the relationship between the executive branch of a provincial government and a statutory court. In that context, Le Dain J.'s discussion of judicial independence in terms of the prevention of arbitrary interference "by the Executive" is, in my opinion, both apposite and correct. In this appeal, the relevant relationship is different; it is between the legislative branch of the federal government and a superior court with its combination of a constitutional position and statutory and equitable jurisdiction. In the context of this appeal it must be declared that the essence of judicial independence for superior court judges is complete freedom from arbitrary interference by both the executive and the legislature. Neither the executive nor the legislature can interfere with the financial security of superior court judges. That

2.21 a) Durant leur mandat, les juges reçoivent un traitement et, à leur retraite, ils touchent une pension;

b) Les traitements et pensions des juges sont adéquats, correspondent à leur situation ainsi que la dignité et la responsabilité de leur poste et sont régulièrement ajustés en fonction de l'augmentation de l'indice des prix;

c) Le traitement des juges ne peut être réduit au cours de leur mandat, sauf dans le cadre de mesures économiques touchant l'ensemble des citoyens.

Cette conception internationale de l'une des caractéristiques essentielles de l'indépendance judiciaire est, à mon avis, exprimée vigoureusement dans le contexte canadien par l'art. 100 de la *Loi constitutionnelle de 1867*, précité. Voici ce qu'affirme le juge Le Dain au sujet de la sécurité financière, à la p. 704 de l'arrêt *Valente*:

> La deuxième condition essentielle de l'indépendance judiciaire [...] est [...] ce que l'on pourrait appeler la sécurité financière. Cela veut dire un traitement ou autre rémunération assurés et, le cas échéant, une pension assurée. Cette sécurité consiste essentiellement en ce que le droit au traitement et à la pension soit prévu par la loi et ne soit pas sujet aux ingérences arbitraires de l'exécutif, d'une manière qui pourrait affecter l'indépendance judiciaire.

Je suis d'accord avec ce passage, bien que j'estime qu'il exige une expression un peu plus large en raison des circonstances du présent pourvoi. L'arrêt *Valente* traitait principalement, quoique non exclusivement, du rapport qui existait entre l'organe exécutif d'un gouvernement provincial et un tribunal créé par la loi. Dans ce contexte, l'analyse de l'indépendance judiciaire qu'a faite le juge Le Dain en termes de prévention des ingérences arbitraires «de l'exécutif» est, à mon avis, pertinente et juste. En l'espèce, le rapport pertinent est différent; il s'agit du rapport qui existe entre l'organe législatif du gouvernement fédéral et une cour supérieure qui comporte un mélange de statut constitutionnel et de compétence en vertu de la loi et de l'*equity*. Dans le contexte du présent pourvoi, il faut déclarer que l'indépendance des juges des cours supérieures réside essentiellement dans le fait qu'ils doivent être complètement libres de toute ingérence arbitraire tant de la part du pouvoir exécutif que de la législature. Ni le pouvoir

security is crucial to the very existence and preservation of judicial independence as we know it.

Against this background of the historical foundations for, and contemporary content of, judicial independence in Canada it is now possible to consider the three specific grounds of attack on s. 29.1 of the *Judges Act*.

VI

Grounds of Attack

1. *Parliament cannot diminish, reduce or impair established salary or remunerative benefits*

Of the three arguments made by the respondent this is the one, in my opinion, deserving of special consideration. It is contended that Parliament cannot impair or diminish the established salary or benefits of incumbent judges because this might interfere in fact, or be perceived as interfering, with the independence of those judges. Since I have already concluded that judicial independence is an important constitutional value in Canada, the relevant question becomes: does the scheme for contributory pensions established in s. 29.1 of the *Judges Act* violate this principle?

The starting point in this inquiry is recognition that someone must provide for judicial salaries and benefits and that, by virtue of s. 100 of the *Constitution Act, 1867*, that someone is, explicitly, Parliament.

What then can Parliament do and not do in meeting its constitutional obligation to provide salaries and pensions to superior court judges? As a general observation, Canadian judges are Canadian citizens and must bear their fair share of the financial burden of administering the country. Thus, for example, judges must pay the general taxes of the land. See *Judges v. Attorney-General of Saskatchewan*, [1937] 2 D.L.R. 209 (P.C.) Judges also have an amount deducted from their salaries as a contribution to the Canada Pension

exécutif ni la législature ne peuvent toucher à la sécurité financière des juges des cours supérieures. Cette sécurité est d'une importance cruciale pour ce qui est de l'existence même et de la préservation de l'indépendance judiciaire telle que nous la connaissons.

Compte tenu de cet exposé du fondement historique et du contenu contemporain de l'indépendance judiciaire au Canada, il est maintenant possible d'examiner les trois moyens précis de contestation de l'art. 29.1 de la *Loi sur les juges*.

VI

Moyens de contestation

1. *Le Parlement ne peut diminuer, réduire ou modifier un traitement ou des prestations de rémunération établis*

Des trois arguments soumis par l'intimé c'est celui qui, à mon avis, mérite une attention spéciale. On soutient que le Parlement ne peut modifier ou diminuer le traitement ou les prestations établis des juges en fonction pour le motif que cela pourrait en fait porter atteinte ou être perçu comme portant atteinte à l'indépendance de ces juges. Étant donné que j'ai déjà conclu que l'indépendance judiciaire est une valeur constitutionnelle importante au Canada, la question qu'il faut se poser devient: le régime de pensions avec participation des intéressés établi à l'art. 29.1 de la *Loi sur les juges* viole-t-il ce principe?

Tout d'abord dans cette enquête il faut reconnaître que quelqu'un doit payer les traitements et les prestations des juges et que, en vertu de l'art. 100 de la *Loi constitutionnelle de 1867*, ce quelqu'un est explicitement le Parlement.

Alors qu'est-ce que le Parlement a le droit de faire ou de ne pas faire pour remplir son obligation constitutionnelle de payer des traitements et des pensions aux juges des cours supérieures? À titre d'observation générale, les juges canadiens sont des citoyens canadiens et doivent assumer leur juste part du fardeau financier de l'administration du pays. Ainsi, par exemple, les juges doivent payer les taxes générales du pays. Voir *Judges v. Attorney-General of Saskatchewan*, [1937] 2 D.L.R. 209 (C.P.) Un montant est également

Plan. These two liabilities are, of course, general in the sense that all citizens are subject to them whereas the contributions demanded by s. 29.1 of the *Judges Act* are directed at judges only. (Other legislation, federal and provincial, establishes similar pension schemes for a substantial number of other Canadians.) Conceding the factual difference that s. 29.1 of the *Judges Act* is directed only at judges, I fail to see that this difference translates into any legal consequence. As I have earlier indicated, the essential condition of judicial independence at the individual level is the necessity of having judges who feel totally free to render decisions in the cases that come before them. On the institutional plane, judicial independence means the preservation of the separateness and integrity of the judicial branch and a guarantee of its freedom from unwarranted intrusions by, or even intertwining with, the legislative and executive branches. It is very difficult for me to see any connection between these essential conditions of judicial independence and Parliament's decision to establish a pension scheme for judges and to expect judges to make contributions toward the benefits established by the scheme. At the end of the day, all s. 29.1 of the *Judges Act* does, pursuant to the constitutional obligation imposed by s. 100 of the *Constitution Act, 1867*, is treat judges in accordance with standard, widely used and generally accepted pension schemes in Canada. From that factual reality it is far too long a stretch, in my opinion, to the conclusion that s. 29.1 of the *Judges Act* violates judicial independence.

I want to qualify what I have just said. The power of Parliament to fix the salaries and pensions of superior court judges is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges *vis-à-vis* other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be *ultra vires* s. 100 of the *Constitution Act, 1867*.

déduit du salaire des juges à titre de cotisation au Régime de pensions du Canada. Évidemment, ces deux obligations sont générales en ce sens que tous les citoyens y sont assujettis, alors que les contributions imposées par l'art. 29.1 de la *Loi sur les juges* ne visent que les juges. (D'autres mesures législatives, fédérales et provinciales, établissent des régimes de pensions semblables pour de nombreux autres Canadiens.) Tout en reconnaissant la différence factuelle que l'art. 29.1 de la *Loi sur les juges* ne vise que les juges, je ne vois pas comment cette différence entraîne des conséquences juridiques. Comme je l'ai indiqué précédemment, la condition essentielle de l'indépendance judiciaire au niveau individuel est la nécessité que les juges se sentent tout à fait libres de rendre des décisions dans les affaires dont ils sont saisis. Sur le plan institutionnel, l'indépendance judiciaire s'entend de la préservation de l'indépendance et de l'intégrité du pouvoir judiciaire et d'une garantie de son immunité contre toute ingérence injustifiée des pouvoirs législatif et exécutif ou même contre toute cohabitation trop étroite avec ceux-ci. Il m'est très difficile de voir un lien entre ces conditions essentielles de l'indépendance judiciaire et la décision du Parlement d'établir un régime de pensions pour les juges et de s'attendre à ce que les juges contribuent aux prestations établies par le régime. En fin de compte, l'art. 29.1 de la *Loi sur les juges*, en vertu de l'obligation constitutionnelle imposée par l'art. 100 de la *Loi constitutionnelle de 1867*, ne fait que traiter les juges à la manière des régimes de pensions normaux qui sont généralement répandus et acceptés au Canada. À mon avis, cette réalité factuelle est bien loin de justifier la conclusion que l'art. 29.1 de la *Loi sur les juges* viole l'indépendance judiciaire.

Je tiens à nuancer ce que je viens tout juste de dire. Le pouvoir du Parlement de fixer les traitements et les pensions des juges des cours supérieures n'est pas illimité. S'il y avait un indice qu'une loi fédérale traitant de ces questions avait été adoptée dans un but malhonnête ou spécieux, ou si les juges étaient traités d'une manière discriminatoire par rapport aux autres citoyens, de graves questions se poseraient alors concernant l'indépendance judiciaire et la loi en question pourrait très bien être jugée *ultra vires* de l'art. 100 de la *Loi constitutionnelle de 1867*.

There is no suggestion, however, of any of these considerations in the present appeal. First, the motive underlying s. 29.1 of the *Judges Act*, especially when viewed in the context of the substantial increase in salaries received by superior court judges at virtually the same time, was, without question, to try to deal fairly with judges and with judicial salaries and pensions. Secondly, although superior court judges were required to contribute to their pension benefits commencing December 20, 1975, the contributory scheme was effectively introduced as part of a remuneration package which included a 39 per cent salary increase and a 50 per cent increase in pensions to dependants. The salary and pension changes were intended to be complementary and, as a comprehensive package, did not diminish, reduce or impair the financial position of federally-appointed judges. Thirdly, there was no discriminatory treatment of judges. Contributory pension schemes are now widespread in Canada; s. 29.1 of the *Judges Act* merely moved superior court judges into the mainstream of Canadian pension schemes. Recognition of that reality draws me, by way of conclusion on this point, to the words of Holmes and Frankfurter JJ. in two American cases. Article III, section 1 of the Constitution of the United States also protects judicial tenure and financial security. Speaking generally about this article, and admittedly in the context of a 'taxation', not a 'pension', fact situation, Holmes J. (dissenting) said in *Evans v. Gore*, 253 U.S. 245 (1920), at p. 265:

I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depends.

In the same vein, Frankfurter J. said in *O'Malley v. Woodrough*, 307 U.S. 277 (1939), at p. 282:

Toutefois, ces considérations ne sont nullement proposées dans le présent pourvoi. Premièrement, le motif sous-jacent à l'art. 29.1 de la *Loi sur les juges*, particulièrement lorsqu'on le considère dans le contexte de l'augmentation importante de traitement qu'ont reçue les juges des cours supérieures pratiquement au même moment, était, sans aucun doute, d'essayer de traiter d'une manière équitable les juges ainsi que leurs traitements et pensions. Deuxièmement, bien que les juges des cours supérieures aient été tenus de contribuer à leurs prestations de retraite à compter du 20 décembre 1975, le régime avec participation des intéressés a été présenté en fait dans le cadre d'un programme de rémunération qui comportait une augmentation de traitement de 39 pour cent et une augmentation de 50 pour cent des pensions versées aux personnes à charge. Les modifications apportées aux traitements et aux pensions étaient destinées à être complémentaires et, dans l'ensemble, ne diminuaient ni ne modifiaient la situation financière des juges nommés par le gouvernement fédéral. Troisièmement, les juges n'étaient pas traités de manière discriminatoire. Les régimes de pensions avec participation sont maintenant très répandus au Canada; l'art. 29.1 de la *Loi sur les juges* mettait simplement les juges des cours supérieures au diapason des régimes de pensions canadiens. La reconnaissance de cette réalité m'amène, en guise de conclusion sur ce point, aux propos tenus par les juges Holmes et Frankfurter dans deux affaires américaines. La section 1 de l'article III de la Constitution des États-Unis protège aussi l'inamovibilité et la sécurité financière des juges. Parlant d'une manière générale au sujet de cet article et certes dans le contexte d'une situation de fait relative à un «impôt» et non à une «pension», le juge Holmes (dissident) affirme ceci dans *Evans v. Gore*, 253 U.S. 245 (1920), à la p. 265:

[TRADUCTION] Je ne vois rien dans l'objet de cette clause de la Constitution qui indique que les juges doivent constituer une catégorie privilégiée de personnes qui ne soient pas tenues d'assumer leur part du coût des institutions dont dépend leur bien-être sinon leur vie.

Dans le même sens, le juge Frankfurter affirme dans *O'Malley v. Woodrough*, 307 U.S. 277 (1939), à la p. 282:

To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, s. 1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.

[TRADUCTION] Laisser entendre que cela empiète sur l'indépendance des juges qui sont entrés en fonction après que le Congrès leur a ainsi imposé les obligations ordinaires de la citoyenneté, en leur faisant assumer leur quote-part du coût de l'administration du gouvernement, a pour effet de diminuer l'importance de la grande expérience historique sur laquelle les législateurs ont fondé les garanties de la section 1 de l'article III. Les assujettir à un impôt général revient simplement à reconnaître que les juges sont également des citoyens et que, en raison de leurs fonctions particulières dans le gouvernement, ils ne sont pas exemptés de partager avec leurs concitoyens le lourd fardeau du gouvernement dont ils sont chargés d'appliquer la Constitution et les lois.

2. *Section 100 mandates non-contributory retirement pensions*

There are two separate arguments that have been advanced in support of the claim that Parliament must provide non-contributory retirement pensions to superior court judges. I would label one the 'federalism' argument and the other the 'strict construction' argument.

The 'federalism' argument is that s. 100 of the *Constitution Act, 1867* must be read against the backdrop of s. 92(14) of the *Constitution Act, 1867* which gives provincial legislatures jurisdiction to make laws in relation to 'the administration of justice in the province'. Since that phrase includes matters relating to the judiciary, it follows that Parliament alone cannot change the basis of judicial pensions from non-contributory to contributory. Such a change would require a constitutional amendment following on from the proper degree of legal participation and consent of the federal and provincial governments.

It is true that s. 92(14) of the *Constitution Act, 1867* gives the provincial governments jurisdiction over the field of the administration of justice. It is also true that, even more specifically, s. 92(14) entrusts to the provinces "the constitution, maintenance and organization of provincial courts" which, without question, includes superior courts. Without more, it would not be a large step to move

2. *L'article 100 attribue des pensions de retraite sans participation*

Deux arguments distincts ont été présentés à l'appui de l'affirmation selon laquelle le Parlement doit fournir aux juges des cours supérieures des pensions de retraite sans participation. Je désignerais l'un comme étant l'argument du «fédéralisme» et l'autre, comme l'argument de l'«interprétation stricte».

L'argument du «fédéralisme» porte que l'art. 100 de la *Loi constitutionnelle de 1867* doit être interprété en fonction de la toile de fond du par. 92(14) de la *Loi constitutionnelle de 1867* qui confère aux législatures provinciales le pouvoir de légiférer relativement à «l'administration de la justice dans la province». Étant donné que cette expression comprend des questions qui se rapportent aux juges, il s'ensuit que le Parlement seul ne peut modifier le fondement des pensions des juges en les faisant passer de pensions sans participation à pensions avec participation. Une telle modification nécessiterait une modification constitutionnelle découlant d'un degré approprié de participation juridique et de consentement des gouvernements fédéral et provinciaux.

Il est vrai que le par. 92(14) de la *Loi constitutionnelle de 1867* confère aux gouvernements provinciaux la compétence dans le domaine de l'administration de la justice. Il est également vrai que, encore plus précisément, le par. 92(14) confère aux provinces «la création, le maintien et l'organisation de tribunaux de justice pour la province», ce qui comprend incontestablement les cours supé-

from these constitutional foundations to recognition of a provincial role in setting salaries and providing benefits, including pensions, to superior court judges. But s. 92(14) of the *Constitution Act, 1867* cannot be read in isolation. Although it is "intended to have [a] wide meaning" (*Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152 at p. 204), it must be read in light of other provisions of the Constitution. There are subtractions from what would appear, without more, to be complete provincial jurisdiction with respect to the justice system. One such subtraction, and it is a major one, is federal jurisdiction by virtue of s. 91(27) of the *Constitution Act, 1867* over criminal law and criminal procedure. See *Di Iorio*, at p. 199. A second subtraction flows from s. 96 of the same Act. Although provincial governments have the power to establish, maintain and organize provincial superior courts, s. 96 explicitly provides that only the Governor General, in effect the Governor General in Council, has power to appoint the judges of those courts. See, among many cases, *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220.

rieures. Sans plus, il serait facile de passer de ce fondement constitutionnel à la reconnaissance d'un rôle provincial dans la fixation des traitements et le paiement de prestations, y compris de pensions, aux juges des cours supérieures. Toutefois, le par. 92(14) de la *Loi constitutionnelle de 1867* ne peut être interprété de manière isolée. Bien qu'il soit «destiné [. . .] à avoir une portée étendue» (*Di Iorio c. Gardien de la prison de Montréal*, [1978] 1 R.C.S. 152, à la p. 204), nous devons l'interpréter en fonction des autres dispositions de la Constitution. Il existe des restrictions à ce qui paraîtrait, sans plus, être la plénitude des pouvoirs de la province en ce qui a trait au système de justice. Une de ces restrictions, non la moindre, est la compétence que le par. 91(27) de la *Loi constitutionnelle de 1867* confère au Parlement fédéral relativement au droit criminel et à la procédure en matière criminelle. Voir l'arrêt *Di Iorio*, à la p. 199. Une deuxième restriction découle de l'art. 96 de la même Loi. Bien que les gouvernements provinciaux aient le pouvoir de constituer, de maintenir et d'organiser les cours supérieures des provinces, l'art. 96 prévoit expressément que seul le gouverneur général, en fait le gouverneur général en conseil, a le pouvoir de nommer les juges de ces tribunaux. Voir notamment *Re Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714, *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220.

Section 100 of the *Constitution Act, 1867* provides a third, and particularly explicit, subtraction from provincial jurisdiction with respect to the administration of justice. It states that the salaries and pensions of superior court judges shall be fixed and provided by the Parliament of Canada. It is difficult to conceive of clearer words. To attempt to create a provincial role in the determination of the salaries and pensions of superior court judges is blithely to ignore this clear mandate. Indeed, it turns s. 100 on its head. Just as s. 96 of the *Constitution Act, 1867* provides for federal appointment of superior court judges, so s. 100 provides for federal jurisdiction over their salaries and pensions. Both the intent and the actual wording of s. 100 are clear. There is no 'federalism' limitation on Parliament's capacity to change the

L'article 100 de la *Loi constitutionnelle de 1867* prévoit une troisième restriction, particulièrement explicite, à la compétence provinciale en matière d'administration de la justice. Il déclare que les traitements et les pensions des juges des cours supérieures seront fixés et payés par le Parlement du Canada. Il est difficile de concevoir des termes plus clairs. Tenter de créer un rôle pour les provinces dans la détermination des traitements et des pensions des juges des cours supérieures revient à ignorer allègrement ce mandat clair. En fait, on ferait dire à l'art. 100 le contraire de ce qu'il dit. Tout comme l'art. 96 de la *Loi constitutionnelle de 1867* prévoit la nomination des juges des cours supérieures par le fédéral, l'art. 100 prescrit la compétence fédérale en ce qui a trait à leurs traitements et pensions. L'intention et le texte

basis of pensions for superior court judges from non-contributory to contributory.

I turn now to what I have labelled the 'strict construction' argument. It has two dimensions. First, it is contended that, since judges received non-contributory pensions before and at Confederation, the word 'pensions' in s. 100 of the *Constitution Act, 1867* meant then, and must continue to mean today, non-contributory pensions. Secondly, it is contended that the words 'fixed and provided' mean that Parliament must pay for the full cost of the pensions of superior court judges, which rules out a contributory scheme.

With respect to the first of these arguments, I do not think s. 100 imposes on Parliament the duty to continue to provide judges with precisely the same type of pension they received in 1867. The Canadian Constitution is not locked forever in a 119-year old casket. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people. Accordingly, if the Constitution can accommodate, as it has, many subjects unknown in 1867—airplanes, nuclear energy, hydroelectric power—it is surely not straining s. 100 too much to say that the word 'pensions', admittedly understood in one sense in 1867, can today support federal legislation based on a different understanding of 'pensions'.

The second 'strict construction' argument is, as noted above, that the words "Pensions ... shall be fixed and provided" in s. 100 impose on Parliament an obligation to pay the full cost of the pension. This is the argument which Heald J. accepted in the Federal Court of Appeal. He was particularly drawn to this argument because of the contrast he saw between the wording of s. 100 dealing with judicial pensions ("shall be fixed and provided") and s. 91(8) dealing with pensions for

même de l'art. 100 sont clairs. Il n'y a aucune restriction fondée sur le «fédéralisme» à la capacité du Parlement de modifier le fondement des pensions des juges des cours supérieures en les faisant passer de pensions sans participation à pensions avec participation.

J'examine maintenant ce que j'ai désigné comme étant l'argument de l'«interprétation stricte». Il comporte deux volets. D'abord on soutient que, puisque les juges recevaient des pensions sans participation au moment de la Confédération et avant celle-ci, le terme «pensions» que l'on trouve à l'art. 100 de la *Loi constitutionnelle de 1867* désignait alors et doit continuer de désigner aujourd'hui des pensions sans participation. Ensuite, on soutient que les termes «fixés et payés» signifient que le Parlement doit assumer le coût total des pensions des juges des cours supérieures, ce qui écarte un régime avec participation.

En ce qui a trait au premier volet de cet argument, je ne crois pas que l'art. 100 impose au Parlement l'obligation de continuer à assurer aux juges précisément le même genre de pension qu'ils recevaient en 1867. La Constitution canadienne n'est pas enfermée pour toujours dans un cercueil de 119 ans. Elle vit et respire et est capable de se développer pour tenir compte de la croissance du pays et de sa population. Par conséquent, si la Constitution peut viser, comme elle le fait, un grand nombre de sujets inconnus en 1867, comme les avions, l'énergie nucléaire, l'énergie hydro-électrique, ce n'est certainement pas trop élargir le sens de l'art. 100 que de dire que le terme «pensions», qui était de toute évidence interprété dans un sens en 1867, peut aujourd'hui appuyer une loi fédérale fondée sur une interprétation différente de ce même terme.

Le second volet de l'argument de l'«interprétation stricte» porte, comme je l'ai déjà souligné, que les termes «pensions [...] seront fixé[e]s et payé[e]s», que l'on trouve à l'art. 100, imposent au Parlement l'obligation d'assumer le coût total de la pension. C'est l'argument que le juge Heald a adopté en Cour d'appel fédérale. Il a particulièrement été attiré par cet argument à cause du contraste qu'il a vu entre le texte de l'art. 100 qui traite des pensions des juges («seront fixé[e]s et

federal public servants ("The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada"). In his words, at p. 1040:

> In my view, subsection 91(8) is in no way analogous or comparable to section 100. Subsection 91(8) is an enabling section. It empowers Parliament to provide for the salaries of civil servants but does not require it to do so. There is no provision in the subsection at all for the pensions of civil servants. Section 100, on the other hand, imposes a responsibility, *inter alia*, to provide the pensions of judges. The word "for" in subsection 91(8) is absent from section 100. In my view, the obligation imposed by section 100 to provide pensions imposes a duty on Parliament to provide the total amount of those pensions.

I accept Heald J.'s description of the mandatory—permissive distinction between ss. 100 and 91(8). Section 100 makes it clear that superior court judges will have some salary and pension benefits. Section 91(8) does not go that far. It merely authorizes, in a federalism sense, Parliament to make laws respecting salaries and pensions for federal public servants; it does not require Parliament to legislate.

Agreement with the mandatory—permissive distinction between the two provisions, however, does not necessarily entail acceptance of the conclusion which Heald J. suggests flows from it, namely that Parliament must pay the total cost of the pensions of superior court judges. I fail to see how the absence of the word 'for' in s. 100 leads to this conclusion. My view is that what emerges clearly from the word 'provided' in s. 100 is that Parliament must provide salaries and pensions to superior court judges. What does not emerge clearly from this word is any constitutional qualification on the type, scheme or even amount of these salaries or pensions. In light of the modern-day reality that a great many people pay for a portion of their pension benefits, it is, in my opinion, construing too literally the word 'provided' to say

payé[e]s») et celui du par. 91(8) qui traite des pensions des fonctionnaires fédéraux («La fixation et le paiement des salaires et honoraires des officiers civils et autres du gouvernement du Canada»). Voici ce qu'il affirme à la p. 1040:

> À mon avis, le paragraphe 91(8) n'est en aucune façon analogue ou comparable à l'article 100. Le paragraphe 91(8) est une disposition habilitante qui confère au Parlement le pouvoir de payer (*provide for*) les traitements des fonctionnaires mais ne l'oblige pas à le faire. Ce paragraphe ne renferme aucune disposition concernant les pensions des fonctionnaires. En revanche, l'article 100 impose au fédéral la responsabilité, notamment, de payer les pensions des juges. Le mot «*for*» du texte anglais du paragraphe 91(8) n'apparaît pas à l'article 100. À mon avis, l'obligation imposée par l'article 100 de payer les pensions impose au Parlement le devoir de payer le montant total desdites pensions.

Je souscris à la description qu'a faite le juge Heald de la distinction entre le caractère impératif et facultatif qui existe entre l'art. 100 et le par. 91(8). L'article 100 prévoit clairement que les juges des cours supérieures auront un certain traitement et des prestations de retraite. Le paragraphe 91(8) ne va pas aussi loin. Il autorise simplement, dans un sens fédéraliste, le Parlement à adopter des lois concernant les traitements et les pensions des fonctionnaires fédéraux; il n'oblige pas le Parlement à légiférer.

Toutefois, le fait d'être d'accord avec la distinction entre le caractère impératif et facultatif qui existe entre les deux dispositions n'entraîne pas nécessairement l'acceptation de la conclusion qui selon le juge Heald en découle, savoir que le Parlement doit assumer le coût total des pensions des juges des cours supérieures. Je ne vois pas comment l'absence du mot *for* dans le texte anglais de l'art. 100 entraîne cette conclusion. À mon avis, ce qui ressort clairement du mot «payés» à l'art. 100, c'est que le Parlement doit payer des traitements et des pensions aux juges des cours supérieures. Ce qui ne ressort pas clairement de ce terme, c'est une restriction constitutionnelle applicable au genre, au régime ou même au montant de ces traitements ou pensions. Compte tenu de la réalité d'aujourd'hui, suivant laquelle un grand nombre de personnes payent une partie de leurs prestations de retraite, j'estime que c'est donner

that it means that Parliament must pay every cent of the pensions of superior court judges.

In my view, strict construction is rarely controlling in constitutional interpretation. My conclusion on the respondent's 'strict construction' arguments is simply that the word 'pensions' in s. 100 of the *Constitution Act, 1867* is not limited to the type of pensions known and in existence for the judiciary in 1867 and the word 'provided' does not necessarily mean that Parliament must pay the total cost of judicial pensions. Parliament's ability to implement a widely used and accepted latter-day pension model is not constrained by either of these words in terms of their strict construction.

3. *Parliament cannot dictate how judges spend their salaries by requiring pension contributions*

The respondent's argument here is that nothing in the *Constitution Act, 1867*, including s. 100, authorizes Parliament to make any deductions from the salaries of superior court judges because such deductions constitute an unconstitutional direction as to how judges are to spend their salaries and therefore a direct interference on judicial independence. For three reasons, I cannot accept what the respondent tries to read into s. 100.

First, there is a close relationship between salaries and pensions. They are both remunerative benefits. Superior court judges are not in any sense 'employees' of anyone, including the federal government. Yet, as I have noted, they must be paid by someone and that someone, according to s. 100, is Parliament. In fulfilling its constitutional obligation to establish salaries and pensions for superior court judges, it is reasonable that Parliament would ask: what is an appropriate total benefit package and what components should constitute the package? Salary and pension must be two of the components and Parliament must consider the

une interprétation trop littérale au mot «payés» que de dire qu'il signifie que le Parlement doit payer chaque cent des pensions des juges des cours supérieures.

À mon avis, une interprétation stricte est rarement déterminante en matière d'interprétation constitutionnelle. Ma conclusion à l'égard des deux volets de l'argument de l'«interprétation stricte» invoqué par l'intimé est simplement que le mot «pensions» à l'art. 100 de la *Loi constitutionnelle de 1867* ne se limite pas au genre de pensions connues et qui existaient pour les juges en 1867 et le mot «payés» ne signifie pas nécessairement que le Parlement doit assumer le coût total des pensions des juges. La capacité du Parlement de mettre en œuvre un modèle de pension moderne généralement utilisé et accepté n'est pas limitée par l'un ou l'autre de ces mots sur le plan de leur interprétation stricte.

3. *Le Parlement ne peut dicter aux juges la façon de dépenser leurs traitements en exigeant qu'ils contribuent à leurs pensions*

L'intimé soutient sur ce point que rien dans la *Loi constitutionnelle de 1867*, y compris l'art. 100, n'autorise le Parlement à effectuer des retenues sur les traitements des juges des cours supérieures parce que de telles retenues constituent une directive inconstitutionnelle sur la manière dont les juges doivent dépenser leurs traitements et, par conséquent, une atteinte directe à l'indépendance judiciaire. Il y a trois motifs pour lesquels je ne puis accepter l'interprétation que l'intimé tente de donner à l'art. 100.

Premièrement, il existe un rapport étroit entre les traitements et les pensions. Il s'agit dans les deux cas de prestations de rémunération. Les juges des cours supérieures ne sont d'aucune façon les «employés» de qui que ce soit, pas même du gouvernement fédéral. Il reste que, comme je l'ai souligné, ils doivent être payés par quelqu'un qui est, selon l'art. 100, le Parlement. En remplissant son obligation constitutionnelle de fixer les traitements et les pensions des juges des cours supérieures, il est raisonnable que le Parlement se pose la question suivante: qu'est-ce qui constitue un programme de prestations complet et convenable et

relationship between them. It did this in 1975; the 1975 'package' significantly raised judicial salaries and increased certain benefits but, at the same time, compelled judges to contribute to their own pension schemes. Parliament could have reached precisely the same financial result by leaving the former non-contributory pension scheme in place but not raising salaries as much as it did. No one contests that this would have been constitutional. But if that is so, I see no reason why Parliament cannot achieve the same result in the way it chose. There is nothing in the wording of s. 100 to suggest the limitation on Parliament's jurisdiction contended for by the respondent.

quelles doivent en être les composantes? Les traitements et les pensions doivent être deux des composantes et le Parlement doit examiner le rapport qui existe entre elles. Il l'a fait en 1975; le «programme» de 1975 a augmenté sensiblement les traitements des juges et a augmenté certaines prestations mais, en même temps, il a obligé les juges à contribuer à leur propre régime de pensions. Le Parlement aurait pu obtenir précisément le même résultat financier en maintenant l'ancien régime de pensions sans participation mais sans augmenter les traitements comme il l'a fait. Nul ne conteste qu'une telle mesure aurait été constitutionnelle. Toutefois, s'il en est ainsi, je ne vois pas pourquoi le Parlement ne peut parvenir au même résultat de la manière qu'il a choisie. Rien dans le texte de l'art. 100 ne laisse supposer qu'il y a, comme le soutient l'intimé, une restriction à la compétence du Parlement.

Indeed, there is wording in s. 100 that points the other way, which brings me to the second reason for holding against the respondent on this issue. The fatal defect of the respondent's argument is that it ignores the word 'pensions' in s. 100 of the *Constitution Act, 1867*. Although it might well be unconstitutional in most contexts for Parliament to direct how judges are to spend their salaries, the word 'pensions' in s. 100 specifically authorizes Parliament to deal with this subject-matter. In exercising that jurisdiction Parliament must legislate with respect to both the quantum and the scheme of judicial pensions. The 1975 law dealt with the scheme. Since the scheme chosen was a widely used and accepted one and since it was introduced in conjunction with other changes to judicial benefits in 1975, I see no objection to it on the ground contended for by the respondent.

En fait, certains termes utilisés dans l'art. 100 indiquent le contraire, ce qui m'amène au deuxième motif pour lequel je rejette l'argument de l'intimé sur cette question. Le défaut fatal de l'argument de l'intimé est qu'il ne tient pas compte du terme «pensions» que l'on trouve à l'art. 100 de la *Loi constitutionnelle de 1867*. Même s'il pourrait bien être inconstitutionnel dans la plupart des contextes que le Parlement dicte aux juges la façon de dépenser leur traitement, le terme «pensions» à l'art. 100 autorise expressément le Parlement à traiter de cette question. En exerçant ce pouvoir, le Parlement doit légiférer en ce qui a trait à la fois au montant et au régime des pensions des juges. La loi de 1975 traitait du régime. Étant donné que le régime choisi était généralement utilisé et accepté et puisqu'il a été introduit conjointement avec d'autres modifications aux prestations des juges en 1975, je suis incapable de m'y opposer pour le motif invoqué par l'intimé.

Thirdly, the limitation proposed by the respondent would have nothing to do with my understanding of proper governmental respect for the independent role of the courts; neither would it bear directly upon the relationship between the judiciary and either Parliament or the executive; nor would it have any meaning in a federal-provincial sense. In short, I simply do not see any

Troisièmement, la restriction que propose l'intimé n'aurait rien à avoir avec ma conception du respect que doit avoir le gouvernement à l'égard du rôle indépendant des tribunaux; elle ne porterait pas non plus directement sur le rapport qui existe entre le pouvoir judiciaire et le Parlement ou le pouvoir exécutif; elle serait également vide de sens dans un contexte fédéral-provincial. Bref, je ne

conceptual, principled or practical reason for drawing a line in the place contended for by the respondent.

For all of these reasons I conclude that s. 29.1 of the *Judges Act* does not violate s. 100 of the *Constitution Act, 1867*.

VII

Section 1(*b*) of the *Canadian Bill of Rights* and s. 29.1 of the *Judges Act*

For convenience of reference I set out again the relevant part of s. 1(*b*) of the *Canadian Bill of Rights*:

> **1.** It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> . . .
>
> (*b*) the right of the individual to equality before the law and the protection of the law;

I commence by noting that the respondent calls this his subsidiary argument and that it was dismissed by all four of the judges of the Federal Court, Trial Division and Federal Court of Appeal who heard the case.

The respondent's argument is not that he or other superior court judges are being treated differently and more harshly than other Canadians. As discussed above, because of the broad use throughout the country of contributory pension schemes, such an argument would not be possible. Rather, the respondent's argument is that s. 29.1 of the *Judges Act* treats him more harshly than other superior court judges and that s. 1(*b*) of the *Canadian Bill of Rights* protects him from this treatment.

The fact situation underlying this claim is somewhat complex and needs to be understood clearly before proceeding. There are three, not two, categories of judges affected by s. 29.1 of the *Judges Act* because, although the section was introduced into Parliament on February 17, 1975 and that date was selected as the cut-off for imposition of the contributory payments on judges, the

vois simplement aucune raison pratique, théorique ou de principe de tracer une ligne à l'endroit proposé par l'intimé.

Pour tous ces motifs, je conclus que l'art. 29.1 de la *Loi sur les juges* ne viole pas l'art. 100 de la *Loi constitutionnelle de 1867*.

VII

L'alinéa 1*b*) de la *Déclaration canadienne des droits* et l'art. 29.1 de la *Loi sur les juges*

Afin de faciliter le renvoi je cite de nouveau la partie pertinente de l'al. 1*b*) de la *Déclaration canadienne des droits*:

> **1.** Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe:
>
> . . .
>
> *b*) le droit de l'individu à l'égalité devant la loi et à la protection de la loi;

Je commence par souligner que l'intimé appelle cela son argument subsidiaire et qu'il a été rejeté par tous les quatre juges de la Cour fédérale, Division de première instance, et de la Cour d'appel fédérale qui ont entendu l'affaire.

L'argument de l'intimé ne porte pas que lui-même ou les autres juges des cours supérieures sont traités différemment et plus durement que les autres Canadiens. Comme je l'ai déjà mentionné, étant donné l'usage répandu dans tout le pays des régimes de pensions avec participation, un tel argument ne tiendrait pas. L'argument de l'intimé porte plutôt que l'art. 29.1 de la *Loi sur les juges* le traite plus durement que d'autres juges des cours supérieures et que l'al. 1*b*) de la *Déclaration canadienne des droits* le protège contre ce traitement.

La situation de fait qui est à l'origine de cette affirmation est quelque peu complexe et doit être clarifiée avant de continuer. Il y a trois et non deux catégories de juges touchés par l'art. 29.1 de la *Loi sur les juges* parce que, bien que l'article ait été présentée au Parlement le 17 février 1975 et que cette date ait été choisie comme la date limite pour l'imposition des contributions des juges, l'ar-

section was not enacted until December 20, 1975. Accordingly, the three categories of judges are:

1. Judges appointed before February 17, 1975 (they are 'grandfathered' from the contributory schemes in s. 29.1(2); they must, however, pay 1½ per cent of their salaries toward improving pension benefits for their spouses and children).

2. Judges appointed after December 20, 1975 (the law would be in force; they must pay under s. 29.1(2) of the Act).

3. Judges appointed after February 17, 1975 but before December 20, 1975 (the law would not be in force when they were appointed but, once enacted, it purports to reach backward and apply to them).

The respondent is in the third category which, I understand, consists of a relatively small number of judges.

The respondent's argument is that "equality before the law" in s. 1(*b*) of the *Canadian Bill of Rights* prohibits the different statutory treatment of some judges *vis-à-vis* other judges with respect to their pensions. In assessing this argument it is important to be aware of the cases in which s. 1(*b*) has been considered by this Court and the conclusion reached in each such case.

Only in *R. v. Drybones*, [1970] S.C.R. 282, did a majority of the Court hold a federal statute to be inconsistent with s. 1(*b*) of the *Canadian Bill of Rights*. In that case, a provision of the *Indian Act* made it an offence for an Indian to be intoxicated outside an Indian reserve. The gist of Ritchie J.'s reasons is summarized in the following passage at p. 297:

> . . . I am therefore of opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.

ticle n'a pas été adoptée avant le 20 décembre 1975. Par conséquent, les trois catégories de juges sont les suivantes:

1. Les juges nommés avant le 17 février 1975 (ils sont exclus des régimes de pensions avec participation que prévoit le par. 29.1(2) pour préserver le statu quo; toutefois, ils doivent payer 1,5 pour cent de leur traitement pour améliorer les prestations de pensions pour leurs conjoints et leurs enfants).

2. Les juges nommés après le 20 décembre 1975 (après l'entrée en vigueur de la loi; ils doivent payer en vertu du par. 29.1(2) de la Loi).

3. Les juges nommés après le 17 février 1975, mais avant le 20 décembre 1975 (la loi n'était pas en vigueur lorsqu'ils ont été nommés mais, une fois adoptée, elle leur serait devenue applicable rétroactivement).

L'intimé se situe dans la troisième catégorie qui, d'après ce que je comprends, est composée d'un nombre relativement peu élevé de juges.

L'intimé fait valoir que «l'égalité devant la loi» prévue par l'al. 1*b*) de la *Déclaration canadienne des droits* interdit au législateur d'accorder à certains juges un traitement en matière de pensions différent de celui réservé à d'autres juges. En appréciant cet argument, il importe d'être au courant des affaires dans lesquelles l'al. 1*b*) a été examiné par cette Cour et de la conclusion tirée dans chacun de ces cas.

Seul dans l'arrêt *R. c. Drybones*, [1970] R.C.S. 282, cette Cour à la majorité a-t-elle jugé une loi fédérale incompatible avec l'al. 1*b*) de la *Déclaration canadienne des droits*. Dans cette affaire, il était question d'une disposition de la *Loi sur les Indiens*, selon laquelle constituait une infraction le fait pour un Indien d'être ivre hors d'une réserve. L'essentiel des motifs du juge Ritchie est résumé dans le passage suivant, à la p. 297:

> J'en conclus donc qu'une personne est privée de l'égalité devant la loi, si pour elle, à cause de sa race, un acte qui, pour ses concitoyens canadiens, n'est pas une infraction et n'appelle aucune sanction devient une infraction punissable en justice.

There is not the faintest resemblance between *Drybones*, which involved racial discrimination regarding a quasi-criminal offence, and the present case, which involves a legislative distinction on the basis of the appointment date of judges.

In *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349, the Court had occasion to consider another provision of the *Indian Act*. The legislation under review stipulated that an Indian woman who married a non-Indian man lost her Indian status, although an Indian man who married a non-Indian woman retained his Indian status. A majority of the Court held that this did not offend "equality before the law" under s. 1(*b*).

A third provision of the *Indian Act* was assessed against s. 1(*b*) of the *Canadian Bill of Rights* in *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170. In this case the legislation denied the widow of a deceased Indian the right to administer the estate of her late husband. A majority of the Court rejected the claim that such differential treatment of Indians violated the equality provision of the *Canadian Bill of Rights*, noting that this type of legislative distinction was within federal competence under s. 91(24) of the *Constitution Act, 1867*.

In *R. v. Burnshine*, [1975] 1 S.C.R. 693, the majority again found no violation of equality before the law under the *Canadian Bill of Rights*. A provision in the *Prisons and Reformatories Act* called for sentences of "indeterminate" length for offenders under the age of twenty-two. A person older than twenty-two would not in the circumstances have been subjected to indeterminate sentences under the *Criminal Code*. The law had application only in Ontario and British Columbia since the requisite special correctional facilities were unavailable in other provinces. The legislation thus created distinctions on the basis of both

Il n'y a pas la moindre ressemblance entre l'affaire *Drybones*, où il était question de discrimination raciale dans le contexte d'une infraction quasi criminelle, et la présente instance, où il s'agit d'une distinction établie par le législateur en fonction de la date de nomination de juges.

Dans l'arrêt *Procureur général du Canada c. Lavell*, [1974] R.C.S. 1349, cette Cour a été appelée à étudier une autre disposition de la *Loi sur les Indiens*. Suivant cette disposition, une Indienne qui épousait un non-Indien perdait son statut d'Indienne, tandis qu'un Indien qui épousait une non-Indienne conservait son statut d'Indien. La Cour à la majorité a conclu que cela ne constituait pas une atteinte au droit à «l'égalité devant la loi» reconnu par l'al. 1*b*).

Dans l'arrêt *Procureur général du Canada c. Canard*, [1976] 1 R.C.S. 170, une troisième disposition de la *Loi sur les Indiens* a été examinée en fonction de l'al. 1*b*) de la *Déclaration canadienne des droits*. La disposition législative en cause dans cette affaire refusait à la veuve d'un Indien le droit d'administrer la succession de celui-ci. La Cour a la majorité a rejeté l'argument selon lequel un tel traitement distinctif réservé aux Indiens constituait une violation du droit à l'égalité énoncé par la *Déclaration canadienne des droits* et a fait remarquer que le par. 91(24) de la *Loi constitutionnelle de 1867* habilitait le Parlement fédéral à établir ce type de distinction dans une loi.

Dans l'arrêt *R. c. Burnshine*, [1975] 1 R.C.S. 693, la Cour à la majorité a conclu une fois de plus qu'il n'y avait pas eu d'atteinte au droit à l'égalité devant la loi énoncé par la *Déclaration canadienne des droits*. Une disposition de la *Loi sur les prisons et les maisons de correction* prévoyait des peines d'emprisonnement d'une durée «indéterminée» pour les contrevenants âgés de moins de vingt-deux ans. Or, dans les mêmes circonstances, le *Code criminel* ne rendait pas une personne de plus de vingt-deux ans passible d'une peine d'une durée indéterminée. La loi en cause ne s'appliquait qu'en Ontario et en Colombie-Britannique parce que les autres provinces ne disposaient pas des établissements correctionnels spéciaux nécessaires. La Loi établissait donc des distinctions fondées à la fois sur l'âge et sur la province de résidence. Le

age and province of residence. Martland J., writing for the majority, noted at p. 702:

> I am not prepared to accept the respondent's submission as to the meaning of the phrase "equality before the law" in s. 1(*b*) of the *Bill of Rights*. Section 1 of the Bill declared that six defined human rights and freedoms "have existed" and that they should "continue to exist". All of them had existed and were protected under the common law. The Bill did not purport to define new rights and freedoms. What it did was to declare their existence in a statute, and, further, by s. 2, to protect them from infringement by any federal statute.

He referred with approval to the passage in the judgment of Ritchie J. in *Lavell*, in which equality before the law was said to mean that the law must apply to all individuals without exemption from the duty to obey it. Martland J. also quoted with approval the following passage from *Curr v. The Queen*, [1972] S.C.R. 889 at p. 899:

> ... compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the *British North America Act*.

The majority concluded with the observation that in order to have succeeded Burnshine would have to have demonstrated that Parliament was not seeking to achieve a "valid federal objective".

In *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376, the appellant claimed that a limitation on the discretionary power of the Immigration Appeal Board to quash a deportation order on compassionate grounds was contrary to equality before the law. The limitation was triggered by the filing of a certificate by the Minister, based upon intelligence reports, that it would be contrary to the national interest for the Board to so exercise its discretion. The prospective

juge Martland, s'exprimant au nom de la majorité, fait remarquer, à la p. 702:

> Je ne suis pas prêt à accepter la prétention de l'intimé quant à la signification de la phrase «égalité devant la loi» dans l'al. *b*) de l'art. 1 de la *Déclaration des droits*. L'art. 1 de la *Déclaration* déclare que des droits de l'homme et des libertés fondamentales, au nombre de six, «ont existé» et qu'ils devraient «continuer à exister». Tous ces droits et libertés existaient et étaient protégés sous le régime de la *common law*. Le but de la *Déclaration* n'est pas de définir de nouveaux droits ou de nouvelles libertés. Ce qu'elle fait est de proclamer leur existence dans une loi, et, de plus, par l'art. 2, de les protéger contre la transgression par une loi fédérale, quelle qu'elle soit.

Il a mentionné en l'approuvant le passage des motifs du juge Ritchie dans l'affaire *Lavell*, où on dit que l'égalité devant la loi signifie que celle-ci doit s'appliquer à tous sans que personne ne soit exempté de l'obligation d'y obéir. Le juge Martland a également cité en l'approuvant l'extrait suivant de l'arrêt *Curr c. La Reine*, [1972] R.C.S. 889, aux pp. 899 et 900:

> ... il faudrait avancer des raisons convaincantes pour que la Cour soit fondée à exercer en l'espèce une compétence conférée par la loi (par opposition à une compétence conférée par la constitution) pour enlever tout effet à une disposition de fond dûment adoptée par un Parlement compétent à cet égard en vertu de la constitution et exerçant ses pouvoirs conformément au principe du gouvernement responsable, lequel constitue le fondement de l'exercice du pouvoir législatif en vertu de l'*Acte de l'Amérique du Nord britannique*.

La Cour à la majorité a conclu en faisant observer que, pour obtenir gain de cause, il aurait fallu que Burnshine démontre que le Parlement ne cherchait pas à réaliser un «objectif fédéral régulier ou valable».

Dans l'affaire *Prata c. Ministre de la Main-d'œuvre et de l'Immigration*, [1976] 1 R.C.S. 376, l'appelant a fait valoir qu'une restriction imposée au pouvoir discrétionnaire de la Commission d'appel de l'immigration d'annuler une ordonnance d'expulsion pour des motifs de compassion allait à l'encontre de l'égalité devant la loi. La restriction s'appliquait dès le dépôt par le Ministre d'un certificat, fondé sur des rapports de police, portant qu'il serait contraire à l'intérêt national que la

deportee had no statutory right to a hearing to go behind the Minister's certificate to challenge the accuracy of the intelligence reports. The Court disposed of the s. 1(*b*) claim easily, saying that the limitation sought to achieve a valid federal objective.

Bliss v. Attorney General of Canada, [1979] 1 S.C.R. 183, involved provisions in the *Unemployment Insurance Act, 1971* which denied the standard unemployment insurance benefits to persons whose employment was interrupted by pregnancy. Although the Act provided maternity benefits, it required a longer qualification period for maternity benefits than for standard benefits. Mrs. Bliss had satisfied the qualification period for standard benefits, but not for maternity benefits. In holding that these provisions did not offend the appellant's right to equality before the law, the judgment of the Court, delivered by Ritchie J., emphasized that s. 91 of the *British North America Act, 1867* had been amended in 1940 by the addition of unemployment insurance as a class of subjects reserved to Parliament. Since the impugned legislation was an integral part of Parliament's unemployment insurance scheme it was enacted for the purpose of achieving a valid federal objective. Ritchie J. also quoted the excerpt from *Curr* which I have reproduced above.

The last case is *MacKay v. The Queen*, *supra*. The legislation under review created a special criminal procedure and forum for servicemen charged with criminal offences. Amongst other attributes, the court martial procedure deprived the accused serviceman of a preliminary hearing, the right to a jury trial, and in some circumstances the plea of *autrefois convict*. The majority judgment again relied on the "valid federal objective" test in denying any conflict between the *National Defence Act* and s. 1(*b*) of the *Canadian Bill of Rights*.

Commission exerce ainsi son pouvoir discrétionnaire. La loi ne conférait à la personne visée par l'ordonnance d'expulsion aucun droit à une audience pour vérifier le certificat du Ministre et pour contester l'exactitude des rapports susmentionnés. Quant à l'argument fondé sur l'al. 1*b*), la Cour a conclu sans difficulté que la restriction visait la réalisation d'un objectif fédéral régulier.

L'arrêt *Bliss c. Procureur général du Canada*, [1979] 1 R.C.S. 183, concernait des dispositions de la *Loi de 1971 sur l'assurance-chômage* qui refusait les prestations ordinaires d'assurance-chômage aux personnes qui avaient dû cesser de travailler pour cause de grossesse. La Loi prévoyait des prestations de maternité, mais la période de référence ouvrant droit à celles-ci était plus longue que dans le cas des prestations ordinaires. M^me^ Bliss avait travaillé assez longtemps pour toucher des prestations ordinaires, mais pas assez pour recevoir des prestations de maternité. En concluant que les dispositions en cause ne portaient pas atteinte au droit de l'appelante à l'égalité devant la loi, la Cour, dont le jugement a été rendu par le juge Ritchie, a souligné que l'art. 91 de l'*Acte de l'Amérique du Nord britannique, 1867* avait été modifié en 1940 par l'ajout de l'assurance-chômage comme chef de compétence exclusive du Parlement. Puisque les dispositions attaquées faisaient partie intégrante du régime d'assurance-chômage du Parlement, il s'ensuivait qu'elles avaient été adoptées pour atteindre un objectif fédéral régulier. Le juge Ritchie a en outre cité l'extrait de l'arrêt *Curr* que j'ai déjà reproduit.

Examinons en dernier lieu l'arrêt *MacKay c. La Reine*, précité. La loi en cause dans cette affaire créait une procédure criminelle et un tribunal spéciaux pour les militaires accusés d'infractions criminelles. La procédure devant la cour martiale avait notamment comme caractéristique de priver les militaires inculpés de la tenue d'une enquête préliminaire, du droit à un procès devant un jury et, dans certaines circonstances, de la possibilité d'invoquer le plaidoyer d'autrefois convict. La Cour à la majorité s'est de nouveau fondée sur le critère de l'«objectif fédéral régulier ou valable» pour affirmer que la *Loi sur la défense nationale* n'était pas incompatible avec l'al. 1*b*) de la *Déclaration canadienne des droits*.

This short history of "equality before the law" under s. 1(*b*) of the *Canadian Bill of Rights* demonstrates that a majority of the Court was never prepared to review impugned legislation according to an exacting standard which would demand of Parliament the most carefully tailored, finely crafted legislation. On the contrary, a majority of the Court was consistently prepared to look in a general way to whether the legislation was in pursuit of a valid federal legislative objective. This approach was followed in cases involving legislative distinctions on the basis of race, sex and age, and in cases involving profoundly important interests of the person asserting the equality right. The passages which I have quoted from these cases indicate that the Court was concerned with the merely statutory status of the *Canadian Bill of Rights* and the declaratory nature of the rights it conferred. I believe the day has passed when it might have been appropriate to re-evaluate those concerns and to reassess the direction this Court has taken in interpreting that document.

Against this background of previous cases under s.1(b), the questions in this appeal are: Was it discriminatory for Parliament to choose any cut-off date in s. 29.1 of the *Judges Act*? Was the specific cut-off date chosen, February 17, 1975, legal?

I have no trouble with the first question. Parliament could have imposed the new scheme on all superior court judges, including those appointed before 1975. However, taking into account the settled expectations of those earlier appointees, Parliament decided to 'grandfather' them. I can see no objection to this decision. Nor, in fairness, does the respondent. His complaint is not so much against the 'old judge/new judge' line drawn by Parliament. Rather, his complaint is against Parliament's assignment of him, by virtue of the February 17, 1975 cut-off date, to the 'new judge' side of the line.

Il se dégage de ce bref historique du droit à «l'égalité devant la loi» reconnu par l'al. 1*b*) de la *Déclaration canadienne des droits* que la majorité en cette Cour ne s'est jamais montrée disposée à réviser une loi contestée en fonction d'une norme sévère qui exigerait du législateur fédéral qu'il apporte à la rédaction législative le plus de soin et le plus de minutie possible. Au contraire, la majorité a été toujours prête à se demander si, de façon générale, la loi visait à atteindre un objectif législatif fédéral régulier ou valable. Cette attitude a été adoptée dans des affaires où il était question de distinctions législatives fondées sur la race, le sexe et l'âge, ainsi que dans des affaires mettant en cause des intérêts extrêmement importants de la personne invoquant le droit à l'égalité. Les extraits de ces arrêts, que j'ai cités, révèlent que la Cour s'est préoccupée du statut de simple texte législatif de la *Déclaration canadienne des droits* et de la nature déclaratoire des droits qu'elle confère. Or, je crois que le temps est révolu où il aurait pu convenir de procéder à une réévaluation de ces préoccupations et de l'orientation que la Cour a adoptée dans l'interprétation de ce document.

Compte tenu de cette jurisprudence relative à l'al. 1*b*), les questions qui se posent dans le présent pourvoi sont les suivantes: Le Parlement pouvait-il sans commettre de discrimination choisir n'importe quelle date limite dans l'art. 29.1 de la *Loi sur les juges*? La date limite précise qui a été choisie, savoir le 17 février 1975, était-elle fondée en droit?

La première question ne me pose aucune difficulté. Le Parlement aurait pu imposer le nouveau régime à tous les juges des cours supérieures, y compris ceux nommés avant 1975. Toutefois, compte tenu des attentes fondées de ces juges, le Parlement a décidé de les exclure pour préserver le statu quo. Je ne vois aucune objection à cette décision, pas plus que l'intimé en toute équité. Celui-ci ne se plaint pas tant de la ligne de démarcation établie par le Parlement entre «les anciens juges et les nouveaux juges». Il se plaint plutôt de ce que le Parlement l'a placé, en vertu de la date limite du 17 février 1975, dans le groupe des «nouveaux juges».

That brings me to the second question, which is whether the February 17, 1975 cut-off date chosen by Parliament and reflected in s. 29.1 of the *Judges' Act* unlawfully discriminates against the respondent. I cannot see how it does. Once it is accepted that the general substance of the law is consistent with the valid federal objective of providing for remuneration of s. 96 judges and that it is not discriminatory of Parliament to draw some line between present incumbents and future appointees, I do not think the jurisprudence I have summarized above allows the courts to be overly critical in reviewing the precise line drawn by Parliament in *Canadian Bill of Rights* cases. Some line is fair and is not discriminatory. From the respondent's perspective a line drawn on December 20, 1975 would obviously be preferable. But that does not mean that the choice of a different date, February 17, 1975, is illegal. In light of the validity of the overall policy reflected in the 1975 amendments and the legality and fairness of Parliament's attempt to protect the settled expectations of incumbent judges, I cannot say that the choice of February 17, 1975 as the cut-off date was contrary to the *Canadian Bill of Rights*.

For these reasons, I conclude that s. 29.1 of the *Judges Act* does not violate s. 1(*b*) of the *Canadian Bill of Rights*. Accordingly, in my view, neither Addy J. at trial nor any of the justices of the Federal Court of Appeal erred in this aspect of their judgments.

VIII

Conclusion

I would answer the constitutional questions stated in this appeal as follows:

1. Question: Is section 29.1 of the *Judges Act*, as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 100 of the *Constitution Act, 1867* and,

Cela m'amène à la deuxième question, qui est de savoir si la date limite du 17 février 1975 choisie par le Parlement et indiquée à l'art. 29.1 de la *Loi sur les juges* établit une distinction injuste et illégale contre l'intimé. Je ne puis voir comment cela est possible. Une fois que l'on a admis que l'esprit général de la loi est compatible avec l'objectif fédéral régulier qui consiste à pourvoir à la rémunération des juges visés par l'art. 96 et que le Parlement n'établit pas de distinction injuste en traçant une certaine ligne entre les juges qui sont actuellement en fonction et ceux qui seront nommés à l'avenir, je ne crois pas que la jurisprudence résumée plus haut autorise les tribunaux à être trop critiques en examinant la ligne précise tracée par le Parlement dans les affaires relevant de la *Déclaration canadienne des droits*. Une certaine ligne est juste et n'est pas discriminatoire. Du point de vue de l'intimé, il aurait été de toute évidence préférable de tracer une ligne le 20 décembre 1975. Mais cela ne signifie pas que le choix d'une date différente, le 17 février 1975, soit illégal. Compte tenu de la validité de la politique globale qui ressort des modifications de 1975, et de la légalité et du caractère équitable de la tentative du Parlement de protéger les attentes fondées des juges qui étaient déjà en fonction, je ne puis dire que le choix du 17 février 1975 comme date limite était contraire à la *Déclaration canadienne des droits*.

Pour ces motifs, je conclus que l'art. 29.1 de la *Loi sur les juges* ne viole pas l'al. 1*b*) de la *Déclaration canadienne des droits*. Par conséquent, j'estime que ni le juge Addy en première instance ni aucun des juges de la Cour d'appel fédérale n'ont commis d'erreur à cet égard dans leurs jugements.

VIII

Conclusion

Je suis d'avis de répondre ainsi aux questions constitutionnelles formulées dans le présent pourvoi:

1. Question: L'article 29.1 de la *Loi sur les juges*, telle que modifiée par l'art. 100 de la *Loi de 1975 modifiant le droit statutaire (Pensions de retraite)*, S.C. 1974-75-76, chap. 81, est-il incompatible avec l'art. 100 de la

therefore, in whole or in part, *ultra vires* the Parliament of Canada?

Answer: No.

2. Question: Is section 29.1 of the *Judges Act* as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 1(*b*) of the *Canadian Bill of Rights* and to the extent of the inconsistency is it of no force or effect?

Answer: No.

The appeal should be allowed, the judgments below set aside and the action dismissed. There should be no costs payable in this Court or in the courts below.

The reasons of Beetz and McIntyre JJ. were delivered by

BEETZ J. (dissenting in part)—This is an appeal from a judgment of the Federal Court of Appeal, [1984] 1 F.C. 1010 (Thurlow C.J., Heald J., concurring in the result but for different reasons, and Pratte J., dissenting), which upheld (but on different grounds) the judgment of the Federal Court, Trial Division, [1981] 2 F.C. 543, wherein Addy J. ordered and declared that s. 29.1(2) of the *Judges Act*, R.S.C. 1970, c. J-1, as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, is, in so far as the respondent is concerned, *ultra vires* the Parliament of Canada.

I—The Facts

As was put by the trial judge (at p. 545):

> The facts in this case are undisputed: no witnesses were called and the case was tried on the basis of admissions in the pleadings, an agreed statement of facts and certain exhibits which were filed on consent.

On July 24, 1975, the respondent, now a judge of the Quebec Court of Appeal, accepted to be and was appointed a puisne judge of the Superior Court for the District of Montréal, with, as stated

Loi constitutionnelle de 1867 et, par conséquent, en totalité ou en partie *ultra vires* du Parlement du Canada?

Réponse: Non.

2. Question: L'article 29.1 de la *Loi sur les juges*, telle que modifiée par l'art. 100 de la *Loi de 1975 modifiant le droit statutaire (Pensions de retraite)*, S.C. 1974-75-76, chap. 81, est-il incompatible avec l'al. 1*b*) de la *Déclaration canadienne des droits* et inopérant dans la mesure de cette incompatibilité?

Réponse: Non.

Je suis d'avis d'accueillir le pourvoi, d'annuler les jugements des cours d'instance inférieure et de rejeter l'action. Aucuns dépens ne sont accordés en cette Cour ni dans les cours d'instance inférieure.

Version française des motifs des juges Beetz et McIntyre rendus par

LE JUGE BEETZ (dissident en partie)—Il s'agit d'un pourvoi contre un arrêt de la Cour d'appel fédérale, [1984] 1 C.F. 1010 (le juge en chef Thurlow, le juge Heald, qui est arrivé à la même conclusion mais pour des raisons différentes, et le juge Pratte, dissident), qui a confirmé (mais pour des motifs différents) le jugement de la Division de première instance de la Cour fédérale, [1981] 2 C.F. 543, dans lequel le juge Addy a déclaré que le par. 29.1(2) de la *Loi sur les juges*, S.R.C. 1970, chap. J-1, modifiée par l'art. 100 de la *Loi de 1975 modifiant le droit statutaire (Pensions de retraite)*, S.C. 1974-75-76, chap. 81, est, dans la mesure où l'intimé est concerné, *ultra vires* du Parlement du Canada.

I—Les faits

Comme l'a dit le juge de première instance (à la p. 545):

> Les faits ne sont pas contestés: aucun témoin n'a été cité et l'affaire a été jugée à partir d'admissions faites dans les actes de procédure, d'un exposé conjoint des faits et de certaines pièces qui furent déposées sur consentement.

Le 24 juillet 1975, l'intimé, maintenant juge de la Cour d'appel du Québec, a accepté d'être nommé juge puîné de la Cour supérieure pour le district de Montréal, avec, comme le déclarent les

in the commission issued to him under the Great Seal of Canada in the name of Her Majesty the Queen,

> . . . all and every the powers, rights, authority, privileges, profits, emoluments and advantages unto the said office of right and by law appertaining during your good behaviour . . . .

On the date of the respondent's appointment, the *Judges Act*, R.S.C. 1970, c. J-1, as amended by R.S.C. 1970 (2nd Supp.), c. 16; S.C. 1972, c. 17: S.C. 1973-74, c. 17; S.C. 1974-75-76, c. 19; S.C. 1974-75-76, c. 48, and the *Supplementary Retirement Benefits Act*, R.S.C. 1970 (1st Supp.), c. 43 as amended by R.S.C. 1970 (2nd Supp.), c. 30 and by S.C. 1973-74, c. 36, provided that puisne judges of the Superior Court in and for the Province of Quebec enjoyed the following "profits, emoluments and advantages":

1. Global salaries of $53,000 (*Judges Act*, as amended, ss. 9 and 20);
2. Non-contributory retirement annuities (*Judges Act*, as amended, s. 23);
3. Non-contributory annuities for the judges' widows and children (*Judges Act*, as amended, s. 25);
4. Non-contributory supplementary retirement benefits (the *Supplementary Retirement Benefits Act* as amended).

The *Judges Act* was enacted pursuant to s. 100 of the *Constitution Act, 1867* which provides:

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

It will be observed that the pensions of judges' widowed spouses and children are not a benefit mentioned in s. 100 of the *Constitution Act, 1867*.

lettres patentes qui lui ont été délivrées sous le Grand Sceau du Canada au nom de Sa Majesté la Reine,

> . . . tous les pouvoirs, droits, autorisations, prérogatives, bénéfices, émoluments et avantages attachés de droit et de par la loi auxdites fonctions durant votre bonne conduite . . .

À la date de la nomination de l'intimé, la *Loi sur les juges*, S.R.C. 1970, chap. J-1, modifiée par S.R.C. 1970 (2e Supp.), chap. 16; S.C. 1972, chap. 17; S.C. 1973-74, chap. 17; S.C. 1974-75-76, chap. 19; S.C. 1974-75-76, chap. 48, et la *Loi sur les prestations de retraite supplémentaires*, S.R.C. 1970 (1er Supp.), chap. 43, modifiée par S.R.C. 1970 (2e Supp.), chap. 30 et par S.C. 1973-74, chap. 36, prévoyaient que les juges puînés de la Cour supérieure de la province de Québec jouissaient des «bénéfices, émoluments et avantages» suivants:

1. Des traitements globaux de 53 000 $ (*Loi sur les juges*, telle que modifiée, art. 9 et 20);
2. Pensions de retraite sans participation des intéressés (*Loi sur les juges*, telle que modifiée, art. 23);
3. Des pensions sans participation des intéressés pour les conjoints survivants et les enfants de juges décédés (*Loi sur les juges*, telle que modifiée, art. 25);
4. Prestations de retraite supplémentaires sans participation des intéressés (*Loi sur les prestations de retraite supplémentaires*, telle que modifiée).

La *Loi sur les juges* a été adoptée conformément à l'art. 100 de la *Loi constitutionnelle de 1867*, dont voici le texte:

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

On peut constater que les pensions des conjoints survivants et des enfants de juges décédés ne constituent pas un avantage mentionné à l'art. 100 de la *Loi constitutionnelle de 1867*.

Subsequent to the date of his appointment, namely from July 24 to December 20, 1975, the respondent's net monthly income was calculated and paid on the basis of the foregoing salary of $53,000 per annum, the same salary as that of all his fellow puisne judges of the Quebec Superior Court. In addition, he was not required any more than any one of them to contribute or pay anything towards the cost of his pension or that of his widow and children.

On December 20, 1975, approximately five months after the respondent's appointment, Parliament enacted the legislative provisions impugned in this case, s. 29.1 of the *Judges Act*, added to this Act by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, an enactment which, it is important to note, was introduced in the House of Commons and given first reading on February 17, 1975.

Section 29.1 of the *Judges Act* provides in part:

29.1 (1) Every judge appointed before the 17th day of February, 1975 to hold office as a judge of a superior or county court shall, by reservation from his salary under this Act, contribute to the Consolidated Revenue Fund one and one-half per cent of his salary.

(2) Every judge appointed after the 16th day of February, 1975 to hold office as a judge of a superior or county court, to whom subsection (1) does not apply, shall, by reservation from his salary under this Act.

(*a*) contribute to the Consolidated Revenue Fund an amount equal to six per cent of his salary; and

(*b*) contribute to the Supplementary Retirement Benefits Account established in the accounts of Canada pursuant to the *Supplementary Retirement Benefits Act*,

(i) prior to 1977, an amount equal to one-half of one per cent of his salary, and

(ii) commencing with the month of January 1977, an amount equal to one per cent of his salary.

Here is how the trial judge characterized the effect of s. 29.1(2) upon the respondent:

Its effect was to oblige the plaintiff thenceforth to contribute six per cent of his salary toward the cost of his own retirement and the annuities for his widow and children as well as one-half of one per cent prior to the 1st of January, 1977 and thereafter one per cent, for the

Postérieurement à la date de sa nomination, plus précisément du 24 juillet au 20 décembre 1975, le traitement mensuel net de l'intimé fut calculé et payé en fonction du traitement annuel susmentionné de 53 000 $, soit le même traitement que celui que touchaient tous ses collègues juges puînés de la Cour supérieure du Québec. De plus, il n'était pas tenu, pas plus qu'eux, de contribuer aux coûts de sa pension ou de celle de son conjoint survivant et de ses enfants.

Le 20 décembre 1975, environ cinq mois après la nomination de l'intimé, le Parlement a adopté les dispositions législatives attaquées en l'espèce, savoir l'art. 29.1 de la *Loi sur les juges*, ajouté à cette loi par l'art. 100 de la *Loi de 1975 modifiant le droit statutaire (Pensions de retraite)*, S.C. 1974-75-76, chap. 81, une mesure législative qui, il importe de le souligner, a été déposée devant la Chambre des communes et est passée en première lecture le 17 février 1975.

L'article 29.1 de la *Loi sur les juges* prévoit notamment:

29.1 (1) Les juges nommés avant le 17 février 1975 à une cour supérieure ou de comté versent au Fonds du revenu consolidé une contribution égale à un et demi pour cent de leur traitement, faite sous forme de retenue.

(2) Les juges nommés après le 16 février 1975 à une cour supérieure ou de comté versent, sous forme de retenue,

a) au Fonds du revenu consolidé une contribution égale à six pour cent de leur traitement; et

b) au Compte de prestations de retraite supplémentaires, établi dans les Comptes du Canada conformément à la *Loi sur les prestations de retraite supplémentaires*, une contribution égale

(i) à un demi de un pour cent de leur traitement, avant 1977, et

(ii) à un pour cent de leur traitement, à compter de 1977.

Voici comment le juge de première instance a décrit l'effet du par. 29.1(2) sur l'intimé:

[Il] a eu pour effet d'obliger le demandeur à verser désormais six pour cent de son traitement à titre de cotisation à sa propre pension de retraite et aux pensions de son conjoint survivant et de ses enfants ainsi qu'un demi de un pour cent avant le 1er janvier 1977 et de un

indexing of retirement annuities under the *Supplementary Retirement Benefits Act*. He thus suffered a reduction of seven per cent of the salary to which he was entitled as of the date of his appointment and for some five months following that appointment.

The extent of a more global effect upon the respondent has been agreed upon by the parties in the pleadings as amended by the agreed statement of facts:

The Plaintiff's contribution towards his retirement pension plan for the year 1977 will amount to $3,815.00 and for the year of 1978 to $3,955.00 and in subsequent years such contribution, it is to be expected, will be calculated on any and all adjustments to the Plaintiff's salary. On the assumption that the Plaintiff retires at the minimum age of 65, after 27 years in office, his contribution towards such annuities and supplementary retirement benefits will be at least $100,000.00 and in the light of adjustments from time to time to the Plaintiff's salary, his contribution is likely to be in the order of $125,000.00.

. . .

Upon his retirement, the Plaintiff's minimum contribution of $3,815.00 per annum with interest compounded annually using a rate of interest of ten per cent per annum will have established in the hands of the defendant a capital sum in the order of $400,000.00 an amount more than sufficient to take care of the Plaintiff's retirement annuities and the Plaintiff's supplementary retirement benefits.

On the other hand all the respondent's fellow puisne judges of the Superior Court appointed before February 17, 1975 and who until then had received the same salary as that of the respondent and had not been required to contribute and pay anything towards the cost of their pensions or that of their widowed spouses and children, remained entitled to the same salary as well as dispensed from contributions except, under s. 29.1(1), to the extent of one and one-half per cent of their salary, a contribution described as being "in respect of the cost of the improved annuities for widowed spouses and other dependants" in a letter sent on February 17, 1975, by the Minister of Justice and Attorney General of Canada to all federally appointed judges.

pour cent par la suite au titre de l'indexation des pensions de retraite conformément à la *Loi sur les prestations de retraite supplémentaires*. Le traitement auquel il avait droit à la date de sa nomination et pendant quelque cinq mois par la suite a donc subi une réduction de sept pour cent.

Les parties se sont entendues sur l'étendue d'un effet plus global sur l'intimé dans les procédures écrites modifiées par l'exposé conjoint des faits:

[TRADUCTION] La contribution du demandeur à son régime de pension de retraite pour l'année 1977 s'élèvera à 3 815 $ et pour l'année 1978 à 3 955 $. Pour les années subséquentes, on peut s'attendre à ce que cette contribution soit calculée en fonction de tout rajustement du traitement du demandeur. À supposer que le demandeur se retire à l'âge minimal de 65 ans, après 27 années en fonction, sa contribution à ces pensions et à ces prestations de retraite supplémentaires sera d'au moins 100 000 $ et, compte tenu des rajustements apportés à l'occasion au traitement du demandeur, sa contribution atteindra vraisemblablement les 125 000 $.

. . .

Lorsque le demandeur prendra sa retraite, sa contribution annuelle minimale de 3 815 $ avec intérêts composés annuellement calculés au taux de dix pour cent l'an aura permis à la défenderesse d'accumuler un capital de l'ordre de 400 000 $, somme plus que suffisante pour pourvoir aux pensions de retraite et aux prestations de retraite supplémentaires du demandeur.

Par contre, tous ses collègues juges puînés de la Cour supérieure nommés avant le 17 février 1975, qui avaient jusqu'alors touché le même traitement que l'intimé sans être obligés de contribuer aux coûts de leurs pensions ou de celles de leurs conjoints survivants et de leurs enfants, continuaient d'avoir droit au même traitement, tout en étant exemptés de toute contribution, sauf celle de un et demi pour cent de leur traitement prévue au par. 29.1(1), laquelle, dans une lettre en date du 17 février 1975 envoyée par le ministre de la Justice et Procureur général du Canada à tous les juges nommés par le gouvernement fédéral, est décrite comme étant [TRADUCTION] «au titre du coût de l'amélioration des pensions destinées aux conjoints survivants et autres personnes à charge».

In other words, the new measure "grandfathered" incumbent superior court judges, but it did not "grandfather" them all; a small minority of them, including the respondent, that is those appointed after February 16, 1975, but before December 20, 1975, were not so "grandfathered": the impugned provisions were not in force when these judges were appointed, but they were retroactive to the date of first reading and reached the judges in question *ex post facto* on the date of enactment. Until the latter date, the respondent belonged to the class of incumbent puisne superior court judges, all the members of which were treated equally under the *Judges Act*. With respect to non-contributory and contributory retirement annuities, the impugned enactment transferred him from that class into the class of judges who were not incumbent judges at the time of the enactment and who were not treated as favourably as judges who had been "grandfathered". The respondent was no longer the equal of his colleagues. Where there had been equality, the impugned provisions introduced inequality.

En d'autres termes, la nouvelle mesure excluait les juges de cour supérieure déjà en fonction pour préserver le statu quo, mais ne faisait pas bénéficier tous les juges de cette exclusion. En effet, une faible minorité de juges, dont l'intimé, c'est-à-dire ceux nommés après le 16 février 1975 mais avant le 20 décembre 1975, n'étaient pas ainsi exclus: les dispositions attaquées n'étaient pas en vigueur au moment où ces juges ont été nommés, mais elles rétroagissaient à la date de la première lecture et, en conséquence, s'appliquaient aux juges en question *ex post facto* dès la date de leur adoption. Jusqu'à cette dernière date, l'intimé appartenait à la catégorie des juges puînés en fonction de la Cour supérieure, auxquels la *Loi sur les juges* s'appliquait d'une manière égale. Mais aux fins des pensions de retraite sans participation des intéressés et de celles exigeant leur participation, la mesure législative attaquée faisait passer l'intimé de cette catégorie à la catégorie des juges qui n'étaient pas en fonction au moment de son adoption et qui n'étaient pas traités d'une manière aussi favorable que les juges exclus pour préserver le statu quo. L'intimé n'était plus désormais sur un pied d'égalité avec ses collègues. Là où il y avait eu égalité, les dispositions attaquées créaient l'inégalité.

On the date of his appointment, July 24, 1975, the respondent was unaware of the existence of the bill which was to amend the *Judges Act* by adding s. 29.1 thereto, and the Minister of Justice did not mention the existence of the bill to the respondent at the time that his appointment was discussed.

À la date de sa nomination, le 24 juillet 1975, l'intimé ignorait l'existence du projet de loi visant à modifier la *Loi sur les juges* en y ajoutant l'art. 29.1, et le ministre de la Justice n'en avait pas fait mention au moment où il discutait avec l'intimé de sa nomination.

I should state at once however that the respondent's unawareness of the existence of the bill is in my view irrelevant. The bill was before Parliament and was not yet law. One is presumed to know the law and to act accordingly, but not a bill which may or may not become law.

Toutefois, je dois préciser immédiatement que j'estime que l'ignorance par l'intimé de l'existence du projet de loi est sans importance. Le projet de loi était à l'étude devant le Parlement et n'était pas encore devenu loi. Tous sont censés connaître la loi et agir en conséquence, mais non pas un projet de loi qui peut ou non devenir loi.

In November 1977, the respondent launched a declaratory action in the Trial Division of the Federal Court. The statement of claim concludes with the following prayer for relief:

En novembre 1977, l'intimé a intenté, devant la Division de première instance de la Cour fédérale, une action visant à obtenir un jugement déclaratoire. La déclaration se termine par la demande de redressement suivante:

WHEREFORE the Plaintiff claims:

[TRADUCTION] À CES CAUSES le demandeur réclame:

a) A declaration that the words "before February 17, 1975" of Section 29.1 and that the whole of Section 29.1(2) of the *Judges Act*, as enacted by Section 100 of 1974-75-76, c. 81 are

i) *ultra vires* of the Parliament of Canada, or,

in the alternative:

ii) *ultra vires* of the Parliament of Canada insofar as the Plaintiff is concerned:

or, in the alternative,

b) A declaration that the words "before February 17, 1975" of Section 29.1 and the whole Section 29.1 (2) of the *Judges Act*, as enacted by Section 100 of 1974-75-76, c. 81 are inoperative insofar as the Plaintiff is concerned;

c) His costs of the within proceedings;

d) Such further and other relief as to this Honourable Court may seem meet.

The declaration claimed in paragraph a) of the prayer for relief is allegedly founded upon s. 99 of the *Constitution Act, 1867*, relating to the tenure of office of judges as well as upon s. 100 of the same Act, quoted above and relating to the salaries, allowances, and pensions of judges.

The declaration claimed in paragraph b) of the prayer for relief is allegedly founded upon s. 1(*b*) of the *Canadian Bill of Rights* which provides:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

. . .

(*b*) the right of the individual to equality before the law and the protection of the law;

II—The Judgments of the Courts Below

In the Trial Division, Addy J. found that the effect of the impugned amendment to the *Judges Act* was to reduce the salary of the respondent and held that Parliament has no legislative authority to reduce the salary of a judge during his or her tenure of office. However he rejected the submission that s. 29.1 of the *Judges Act* contravened

a) Un jugement déclarant les mots «avant le 17 février 1975» à l'article 29.1 et la totalité du paragraphe 29.1(2) de la *Loi sur les juges*, tel qu'édicté par l'article 100 du chap. 81, 1974-75-76,

i) *ultra vires* du Parlement du Canada, ou,

subsidiairement:

ii) *ultra vires* du Parlement du Canada dans la mesure où le demandeur est concerné;

ou, subsidiairement,

b) Un jugement déclarant que les mots «avant le 17 février 1975» à l'article 29.1 et la totalité du paragraphe 29.1(2) de la *Loi sur les juges*, tel qu'édicté par l'article 100 du chap. 81, 1974-75-76, sont inopérants dans la mesure où le demandeur est concerné;

c) Ses dépens pour les procédures visées aux présentes;

d) Tout autre redressement que cette Cour peut juger à propos.

Le jugement déclaratoire sollicité à l'alinéa a) de la demande de redressement serait fondé sur l'art. 99 de la *Loi constitutionnelle de 1867*, portant sur la durée des fonctions des juges, ainsi que sur l'art. 100 précité de la même loi, relatif aux salaires, aux allocations et aux pensions des juges.

Le jugement déclaratoire sollicité à l'alinéa b) de la demande de redressement serait fondé sur l'al. 1*b*) de la *Déclaration canadienne des droits*, qui porte:

1. Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe:

. . .

b) le droit de l'individu à l'égalité devant la loi et à la protection de la loi;

II—Les jugements des tribunaux d'instance inférieure

En Division de première instance, le juge Addy a conclu que la modification attaquée de la *Loi sur les juges* avait pour effet de réduire le traitement de l'intimé et que le Parlement n'a pas la compétence législative pour diminuer le traitement d'un juge pendant la durée de ses fonctions. Rejetant toutefois l'argument voulant que l'art. 29.1 de la

s. 1(*b*) of the *Canadian Bill of Rights*. He granted the respondent a declaration that s. 29.1(2) of the *Judges Act* was *ultra vires* of the Parliament of Canada in so far as the respondent was concerned.

The appellant appealed to the Federal Court of Appeal and the respondent cross-appealed from the refusal of the trial judge to grant him a declaration that the impugned enactment was inoperative because it infringed s. 1(*b*) of the *Canadian Bill of Rights*.

The Federal Court of Appeal dismissed the appeal by a majority judgment but was unanimous in dismissing the cross-appeal. All three judges of the Federal Court of Appeal held, contrarily to the trial judge, that Parliament can reduce judges' salaries, provided it is not for a colourable purpose such, for instance, as to undermine the independance of the judiciary, which nobody has suggested was the case with respect to the impugned legislation. However, the majority of the Federal Court of Appeal held that it is *ultra vires* of Parliament to require any judge appointed pursuant to s. 96 of the *Constitution Act, 1867*, whenever appointed, to participate in a contributory pension plan for his own or her own pension, an issue not dealt with by the trial judge.

Thurlow C.J., who characterized the impugned enactment as effecting a forced contribution to a pension scheme rather than a reduction in salary, took the view that whereas under s. 100 of the *Constitution Act, 1867* Parliament must fix and provide judges salaries, it "has no authority to dictate how they are to be used by the recipient or to require that they be used for any particular purpose". Thurlow C.J. accordingly held that s. 29.1 of the *Judges Act* is wholly *ultra vires*, including s. 29.1(1), which, as stated above, was said to be "in respect of the cost of the improved annuities for widowed spouses and other dependants".

Loi sur les juges contrevienne à l'al. 1*b*) de la *Déclaration canadienne des droits*, il a accordé un jugement déclaratoire portant que le par. 29.1(2) de la *Loi sur les juges* était *ultra vires* du Parlement du Canada dans la mesure où l'intimé était concerné.

L'appelante a interjeté appel devant la Cour d'appel fédérale et l'intimé a formé un appel incident contre le refus du juge de première instance de déclarer la mesure législative attaquée inopérante pour le motif qu'elle enfreignait l'al. 1*b*) de la *Déclaration canadienne des droits*.

La Cour d'appel fédérale à la majorité a rejeté l'appel, mais c'est à l'unanimité qu'elle a rejeté l'appel incident. Chacun des trois juges composant la formation de la Cour d'appel fédérale a conclu, contrairement à ce qu'avait décidé le juge de première instance, que le Parlement peut réduire les traitements des juges, pourvu que ce ne soit pas pour un motif spécieux comme, par exemple, l'affaiblissement de l'indépendance de la magistrature, ce que personne n'a prétendu être le cas pour ce qui est de la mesure législative attaquée en l'espèce. Cependant, la Cour d'appel fédérale à la majorité a conclu qu'il est *ultra vires* du Parlement d'exiger qu'un juge nommé conformément à l'art. 96 de la *Loi constitutionnelle de 1867*, peu importe le moment de sa nomination, contribue à sa propre pension dans le cadre d'un régime de retraite avec participation de l'intéressé, une question qui n'a pas été abordée par le juge de première instance.

Le juge en chef Thurlow, qui a dit des dispositions attaquées qu'elles créaient une obligation de contribuer à un régime de retraite plutôt qu'une réduction de traitement, a estimé que le Parlement doit en vertu de l'art. 100 de la *Loi constitutionnelle de 1867* fixer et payer les traitements des juges, mais qu'il «n'a aucune autorité pour dicter aux bénéficiaires comment ils doivent les utiliser, ni pour les obliger à s'en servir à des fins particulières». Le juge en chef Thurlow a donc conclu que l'art. 29.1 de la *Loi sur les juges* était entièrement *ultra vires*, y compris le par. 29.1(1) dont on a dit, comme je l'ai fait remarquer précédemment, qu'il était «au titre du coût de l'amélioration des pensions destinées aux conjoints survivants et autres personnes à charge».

Heald J., for his part, was of the opinion that the obligation set out in s. 100 of the *Constitution Act, 1867* imposes a duty on Parliament to provide the total amount of judges' pensions and s. 29.1(2) is contrary to s. 100 of the *Constitution Act, 1867* and *ultra vires* in that it requires judges to pay a portion of the cost of their own pension. However, s. 29.1(1) of the *Judges Act* is not *ultra vires* in his view since the deduction provided for therein is dedicated to the cost of improved annuities for widowed spouses and other dependants of judges.

Pratte J., dissenting, found that s. 29.1 of the *Judges Act* does not affect the judges' right to a pension but rather their right to salaries. The real question then was whether Parliament has the power to reduce the salaries of incumbent judges. He held that Parliament has this power.

In the result, the declaration of unconstitutionality granted by the trial judge with respect to s. 29.1(2) of the *Judges Act* remained undisturbed.

The appellant appealed to this Court by leave of this Court. The respondent cross-appealed pursuant to s. 29(1) of the Rules of this Court asking for the declaration claimed in paragraph b) of his prayer for relief on the basis of s. 1(*b*) of the *Canadian Bill of Rights*.

III—Constitutional Questions

On March 22, 1984, Dickson J., as he then was, stated the two following constitutional questions:

1. Is section 29.1 of the *Judges Act*, as amended by section 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 100 of the *Constitution Act, 1867* and therefore in whole or in part, *ultra vires* the Parliament of Canada?
2. Is section 29.1 of the *Judges Act* as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 1(*b*) of the *Canadian Bill of Rights* and to the extent of the inconsistency is it of no force or effect?

Le juge Heald pour sa part a estimé que l'art. 100 de la *Loi constitutionnelle de 1867* impose au Parlement l'obligation de payer la totalité des pensions des juges et que le par. 29.1(2) va à l'encontre de l'art. 100 de la *Loi constitutionnelle de 1867* et est *ultra vires* en ce qu'il exige des juges qu'ils paient une partie du coût de leur propre pension. Toutefois, selon lui, le par. 29.1(1) de la *Loi sur les juges* n'est pas *ultra vires* puisque la déduction qu'il prévoit est destinée à subvenir au coût de l'amélioration des pensions destinées aux conjoints survivants et autres personnes à charge des juges décédés.

Le juge Pratte, dissident, a conclu que l'art. 29.1 de la *Loi sur les juges* touche non pas le droit des juges à une pension, mais leur droit à un traitement. La question véritable est alors de savoir si le Parlement est habilité à réduire le traitement de juges en fonction. Il a conclu que le Parlement possède ce pouvoir.

En définitive, le jugement de première instance déclarant inconstitutionnel le par. 29.1(2) de la *Loi sur les juges* est resté inchangé.

L'appelante s'est pourvue devant cette Cour avec l'autorisation de cette dernière. L'intimé a formé, en vertu du par. 29(1) des Règles de cette Cour, un pourvoi incident en vue d'obtenir, sur le fondement de l'al. 1*b*) de la *Déclaration canadienne des droits*, le jugement déclaratoire sollicité à l'alinéa b) de sa demande de redressement.

III—Les questions constitutionnelles

Le 22 mars 1984, le juge Dickson, maintenant Juge en chef, a formulé les deux questions constitutionnelles suivantes:

1. L'article 29.1 de la *Loi sur les juges*, telle que modifiée par l'art. 100 de la *Loi de 1975 modifiant le droit statutaire (Pensions de retraite)*, S.C. 1974-75-76, chap. 81, est-il incompatible avec l'art. 100 de la *Loi constitutionnelle de 1867* et, par conséquent, en totalité ou en partie *ultra vires* du Parlement du Canada?
2. L'article 29.1 de la *Loi sur les juges*, telle que modifiée par l'art. 100 de la *Loi de 1975 modifiant le droit statutaire (Pensions de retraite)*, S.C. 1974-75-76, chap. 81, est-il incompatible avec l'al. 1*b*) de la *Déclaration canadienne des droits* et inopérant dans la mesure de cette incompatibilité?

With the greatest of respect for those who hold a contrary view, I have reached the conclusion that, subject to one qualification to be mentioned later, the second constitutional question should receive an affirmative answer. However, this may not be sufficient to dispose of the entire case, given the declaration of unconstitutionality granted by the trial judge. In any event, the variety of opinions expressed in the courts below on the issues raised by the first constitutional question and the need for certainty in this important area of the law make it preferable that I also answer the first constitutional question.

IV—The *Constitution Act, 1867* and s. 29.1 of the *Judges Act*

I have had the advantage of reading the reasons for judgment written by the Chief Justice. I agree with his general considerations on judicial independance, on the foundation of judicial independance in Canada and on the content of the principle of judicial independance. I also agree with him that the first constitutional question should be answered in the negative, and I agree with his reasons for so answering it.

I now turn to the second constitutional question.

V—Section 1(*b*) of the *Canadian Bill of Rights* and s. 29.1 of the *Judges Act*

As was already stated above, all the judges in the courts below held that s. 29.1 of the *Judges Act* was not inconsistent with s. 1(*b*) of the *Canadian Bill of Rights*. They had different reasons for so deciding however.

The reasons of the trial judge read in part as follows at pp. 554 to 557 of the Federal Court Reports:

The plaintiff, in arguing that the words "before the 17th day of February, 1975" in subsection 29.1(1) and "after the 16th day of February, 1975" in subsection 29.1(2) offend the principle of equality before the law, relied on and referred to the following cases: *The Queen v. Drybones*, [1970] S.C.R. 282; *Curr v. The Queen*,

Avec les plus grands égards pour les tenants du point de vue contraire, je suis arrivé à la conclusion que, sous réserve d'une nuance que je mentionnerai plus loin, la seconde question constitutionnelle doit recevoir une réponse affirmative. Toutefois, étant donné la déclaration d'inconstitutionnalité accordée par le juge de première instance, cela ne suffit peut-être pas pour statuer sur l'affaire dans son ensemble. En tout état de cause, la diversité des opinions exprimées par les tribunaux d'instance inférieure sur les points soulevés par la première question constitutionnelle et le besoin de certitude dans ce domaine important du droit font qu'il est préférable que je réponde aussi à la première question constitutionnelle.

IV—La *Loi constitutionnelle de 1867* et l'art. 29.1 de la *Loi sur les juges*

J'ai eu l'avantage de lire les motifs de jugement qu'a rédigés le Juge en chef. Je souscris à ses observations générales sur l'indépendance judiciaire, sur le fondement de l'indépendance judiciaire au Canada et sur le contenu du principe de l'indépendance judiciaire. Je suis également d'accord avec lui pour dire qu'il y a lieu de répondre à la première question constitutionnelle par la négative et j'approuve les raisons données à l'appui de cette réponse.

Cela m'amène à la seconde question constitutionnelle.

V—L'alinéa 1*b*) de la *Déclaration canadienne des droits* et l'art. 29.1 de la *Loi sur les juges*

Comme je l'ai déjà indiqué, tous les juges des tribunaux d'instance inférieure ont conclu que l'art. 29.1 de la *Loi sur les juges* n'était pas incompatible avec l'al. 1*b*) de la *Déclaration canadienne des droits*. Cependant, les raisons de leurs conclusions sont différentes.

Les motifs du juge de première instance portent notamment, aux pp. 554 à 557 du Recueil des arrêts de la Cour fédérale:

Dans le cadre de son argumentation pour démontrer que les mots «avant le 17 février 1975» au paragraphe 29.1(1) et «après le 16 février 1975» au paragraphe 29.1(2) sont contraires aux principes de l'égalité devant la loi, le demandeur s'est fondé sur les arrêts suivants qu'il a cités: *La Reine c. Drybones*, [1970] R.C.S. 282;

[1972] S.C.R. 889; *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349; *The Queen v. Burnshine*, [1975] 1 S.C.R. 693; *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376; *Bliss v. The Attorney General of Canada*, [1979] 1 S.C.R. 183; and *MacKay v. The Queen*, [1980] 2 S.C.R. 370.

All of these cases with the exception of the *Bliss* case, which dealt with entitlement to unemployment insurance benefits and where in fact the *Canadian Bill of Rights* was held not to apply, dealt with loss or denial of very substantive fundamental rights of some kind or involved criminal or quasi-criminal responsibility and had nothing to do with the mere quantum of remuneration for services rendered.

"Equality before the law" in the *Canadian Bill of Rights* has, since its enactment, been interpreted as understood by Dicey, namely, that there are no exemptions from the ordinary law of the land for any privileged class. As Ritchie J. stated in *Curr v. The Queen*, *supra*, at page 916:

> . . . I prefer to base this conclusion on my understanding that the meaning to be given to the language employed in the *Bill of Rights* is the meaning which it bore at the time when the Bill was enacted . . .

The trial judge then referred to and quoted reasons to the same effect written by Ritchie J. in *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349, including the second meaning proposed by Dicey for the principle of the "rule of law":

> It means again equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary courts.

The trial judge noted that these reasons of Ritchie J. had been quoted with approval by Martland J. speaking for the majority in *R. v. Burnshine*, [1975] 1 S.C.R. 693. The trial judge continued:

> Even section 3 of the *Canadian Human Rights Act*, S.C. 1976-1977, c. 33 which has been enacted since then (proclaimed in force on the 14th of July, 1977) and by means of which counsel for the plaintiff sought to draw an analogy with the *Canadian Bill of Rights*, does not

Curr c. La Reine, [1972] R.C.S. 889; *Le Procureur général du Canada c. Lavell*, [1974] R.C.S. 1349; *La Reine c. Burnshine*, [1975] 1 R.C.S. 693; *Prata c. Le Ministre de la Main-d'œuvre et de l'Immigration*, [1976] 1 R.C.S. 376; *Bliss c. Le procureur général du Canada*, [1979] 1 R.C.S. 183; et *MacKay c. La Reine*, [1980] 2 R.C.S. 370.

À l'exception de l'affaire *Bliss* qui porte uniquement sur le droit de recevoir des prestations d'assurance-chômage et où il a été jugé que la *Déclaration canadienne des droits* ne s'appliquait pas, tous ces arrêts portent sur la perte ou la dénégation de divers droits fondamentaux très importants ou sur la responsabilité pénale ou quasi pénale et n'ont rien à voir avec le simple quantum de rémunération pour services rendus.

Le concept d'«égalité devant la loi» que l'on trouve dans la *Déclaration canadienne des droits* a, depuis son adoption, été interprété dans le sens où l'entendait Dicey, c'est-à-dire qu'aucune classe privilégiée n'est exempte de l'application du droit commun du pays. Voici ce que dit le juge Ritchie dans *Curr c. La Reine*, précité, à la page 916:

> . . . je préfère fonder ma conclusion sur le fait que, à mon avis, le sens des termes de la *Déclaration des droits* est le sens qu'ils avaient au Canada au moment de l'adoption de la Déclaration . . .

Le juge de première instance mentionne ensuite et cite les motifs dans le même sens rédigés par le juge Ritchie dans l'arrêt *Procureur général du Canada c. Lavell*, [1974] R.C.S. 1349, où il est question notamment du deuxième sens proposé par Dicey pour le principe de la «primauté du droit»:

> [TRADUCTION] Un autre sens est celui d'égalité devant la loi ou d'assujettissement égal de toutes les classes au droit commun du pays appliqué par les tribunaux ordinaires; la «primauté du droit», dans ce sens, exclut l'idée d'une exemption de fonctionnaires ou d'autres personnes du devoir d'obéissance à la loi auquel sont assujettis les autres citoyens, ou de la compétence des tribunaux ordinaires.

Le juge de première instance fait remarquer que ce passage du juge Ritchie avait été cité et approuvé par le juge Martland au nom de la Cour à la majorité dans l'arrêt *R. c. Burnshine*, [1975] 1 R.C.S. 693. Le juge de première instance poursuit:

> Même l'article 3 de la *Loi canadienne sur les droits de la personne*, S.C. 1976-77, chap. 33, qui a été adoptée depuis (promulguée le 14 juillet 1977), et que l'avocat du demandeur a cité pour tenter d'établir un parallèle entre cette loi et la *Déclaration canadienne des droits*,

prohibit discrimination generally on grounds other than "race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted and, in matters related to employment, physical handicap . . . . " It seems obvious that, in the case at bar, there exists no discrimination on any of the above-mentioned grounds.

Counsel for the plaintiff emphasized particularly the following statement of McIntyre J. in the *MacKay* case, *supra*, which is found at page 406 of the above-mentioned report:

> The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class—here the military—is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.

This statement, in my view, does not support the proposition advanced on behalf of the plaintiff. As Martland J. stated in delivering the judgment for the Supreme Court of Canada in the *Prata* case, *supra*, at page 382 of the above-cited report of the case:

> This Court has held that s. 1(*b*) of the *Canadian Bill of Rights* does not require that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective (*R. v. Burnshine* (1974), 44 D.L.R. (3d) 584).

Since I find that the plaintiff cannot succeed under paragraph 1(*b*) of the *Canadian Bill of Rights* because the term "equality before the law" as used in that enactment does not refer and was never intended to refer to a question of equal pay for equal work, I shall refrain from dealing with the further answer advanced on behalf of the defendant to the effect that, even if "inequality" is found to exist, it in effect arises in the pursuit of a valid federal objective and that, in addition, the plaintiff has failed to discharge the onus of establishing that the requirement of making contributions is arbitrary, capricious or unnecessary.

To summarize the trial judge's reasons on this issue, as I understand them, s. 29.1 does not contravene the *Canadian Bill of Rights* because: first, s. 29.1 does not offend the kind of equality

n'interdit que les distinctions illicites qui sont fondées sur «la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, la situation de famille ou l'état de personne graciée et, en matière d'emploi, sur un handicap physique.» Il semble évident qu'en l'espèce, il n'existe aucune distinction illicite fondée sur un des motifs susmentionnés.

L'avocat du demandeur a insisté particulièrement sur les paroles suivantes du juge McIntyre dans l'arrêt *MacKay*, précité, que l'on trouve à la page 406 du recueil cité:

> La question à résoudre dans chaque cas est celle de savoir si l'inégalité qui peut être créée par la loi vis-à-vis d'une catégorie particulière—ici les militaires—est arbitraire, fantaisiste ou superflue, ou si elle a un fondement rationnel et acceptable en tant que dérogation nécessaire au principe général de l'application universelle de la loi pour faire face à des conditions particulières et atteindre un objectif social nécessaire et souhaitable.

Selon moi, ces paroles ne corroborent pas la proposition mise de l'avant pour le compte du demandeur. Comme le dit le juge Martland dans les motifs du jugement qu'il prononçait au nom de la Cour suprême du Canada dans l'arrêt *Prata*, précité, à la page 382 du recueil cité:

> Cette Cour a décidé que l'al. *b*) du par. (1) de la *Déclaration canadienne des droits* n'exige pas que toutes les lois fédérales doivent s'appliquer de la même manière à tous les individus. Une loi qui vise une catégorie particulière de personnes est valide si elle est adoptée en cherchant l'accomplissement d'un objectif fédéral régulier (*R. v. Burnshine* (1974), 44 D.L.R. (3d) 584).

Puisque je conclus qu'il ne peut être fait droit à la demande du demandeur en vertu de l'alinéa 1*b*) de la *Déclaration canadienne des droits* parce que l'expression «égalité devant la loi» employée dans cette loi ne vise pas et n'a jamais été conçue pour viser des questions de salaire égal pour un travail égal, je n'examinerai pas la réponse soumise pour le compte de la défenderesse selon laquelle même si on concluait à l'existence d'une «inégalité», elle survient dans le cadre de mesures prises pour atteindre un objectif fédéral valable et que, en outre, le demandeur n'a pas réussi à prouver que l'exigence de verser des contributions est arbitraire, déraisonnable ou inutile.

Pour résumer, si je comprends bien, les motifs du juge de première instance sur cette question, l'art. 29.1 ne contrevient pas à la *Déclaration canadienne des droits* parce que: premièrement,

defined by Dicey in the second meaning he gave to the rule of law; second, the provisions of the *Canadian Bill of Rights* cannot be held to apply to "the mere quantum of remuneration for services rendered" without trivializing these provisions. Furthermore, the trial judge may also have suggested as is indicated by his reference to the *Canadian Human Rights Act*, that discrimination is not prohibited by the *Canadian Bill of Rights*, except on specifically mentioned grounds.

In the Federal Court of Appeal, Thurlow C.J. speaking for himself and for Heald J. had this to say on the *Canadian Bill of Rights* issue, at pp. 1016-17 of the Federal Court Reports:

> The argument on the last-mentioned point, as I understood it, was that inequality before the law was created by the enactment because under it the respondent no longer enjoyed his right to salary without deductions for contributions to the same extent as other judges who held office before December 20, 1975. Reliance was placed on the reasoning of McIntyre J., in *MacKay v. The Queen*, [1980] 2 S.C.R. 370, at page 406, and it was said that there was no valid federal objective to be attained by discriminating on December 20, 1975 between judges appointed on or before and those appointed after February 16, 1975, and that to do so was arbitrary, capricious and unnecessary.
>
> . . .
>
> The submission is thus based on the assumption that the legislation is within the legislative powers of Parliament. On that basis it seems to me that it cannot be said that Parliament, in requiring judges to participate in and contribute to a contributory pension scheme, was not seeking to achieve a valid federal objective. Moreover, the distinction made in the statute between judges appointed before a fixed date, for whom non-contributory pension provisions were already in existence, and judges to be appointed after that date so as ultimately, by the attrition of senior appointees through deaths and resignations, the whole body of the judiciary would be participants in and contributors to the contributory pension scheme seems to me to be but a manner of achieving the otherwise valid federal objective. Difficulty arises from the fact that the particular date chosen was earlier than the date of the coming into force of the Act but, harsh as the result may seem to be to one who did

l'art. 29.1 n'est pas contraire au type d'égalité défini par Dicey dans le deuxième sens qu'il a prêté à la «primauté du droit»; deuxièmement, on ne saurait, sans les banaliser, conclure que les dispositions de la *Déclaration canadienne des droits* s'appliquent au «simple quantum de rémunération pour services rendus». De plus, le juge de première instance a peut-être aussi laissé entendre, comme l'indique sa référence à la *Loi canadienne sur les droits de la personne*, que la *Déclaration canadienne des droits* n'interdit pas la discrimination, si ce n'est dans les cas expressément visés.

En Cour d'appel fédérale, le juge en chef Thurlow, s'exprimant en son propre nom et en celui du juge Heald, affirme ceci au sujet de la question de la *Déclaration canadienne des droits*, aux pp. 1016 et 1017 du Recueil des arrêts de la Cour fédérale:

> Le dernier argument, si j'ai bien compris, revenait à dire que l'adoption de la loi de 1975 avait eu pour effet de dénier à l'intimé son droit à l'égalité devant la loi parce qu'en vertu de ladite Loi, ce dernier ne perdait pas (*sic*) dans la même mesure que les juges qui occupaient leur poste avant le 20 décembre 1975 le droit de recevoir son traitement libre de retenue. L'intimé, s'appuyant sur le raisonnement du juge McIntyre dans l'arrêt *MacKay c. La Reine*, [1980] 2 R.C.S. 370, à la page 406, a allégué que le fait d'établir le 20 décembre 1975 une distinction entre les juges nommés le 16 février 1975 ou avant et ceux nommés après cette date ne visait pas un objectif fédéral valable et que le fait d'agir ainsi était arbitraire, déraisonnable et inutile.
>
> . . .
>
> L'argument est donc fondé sur l'hypothèse que le Parlement avait le pouvoir législatif nécessaire pour adopter ladite Loi. Il me semble donc qu'on ne peut affirmer que le Parlement ne cherchait pas à atteindre un objectif fédéral valable lorsqu'il a obligé les juges à contribuer à un régime de pensions à participation. En outre, la distinction qu'a établie la loi entre les juges nommés avant une date déterminée, en faveur desquels il existait déjà des dispositions prévoyant un régime de pensions sans participation, et les juges nommés après cette date, afin qu'ultimement, à la suite du décès ou de la démission des juges exempts, l'ensemble de la magistrature participe au régime de pensions à cotisation, m'apparaît comme un moyen d'atteindre un objectif fédéral valable. Le problème qui se pose découle du fait que la date choisie est antérieure à la date d'entrée en vigueur de la Loi mais, aussi injuste que puisse sembler le résultat à quiconque n'était pas au courant, contraire-

not know, as opposed to one who did know when appointed, that a contributory scheme to be applicable to all judges appointed after the date of the introduction of the bill was to be imposed, I do not think it can on that account be said that it has been established, in the sense referred to by Ritchie J., in the same case (*MacKay v. The Queen*, [1980] 2 S.C.R. 370, at page 393, citing *The Queen v. Burnshine*, [1975] 1 S.C.R. 693), that the provisions of the bill, including the choice of the date, were not enacted for the purpose of achieving the valid federal objective or that it was arbitrary or capricious or unnecessary for Parliament to have defined the class required to make contributions by reference to their being appointed after the date of the introduction of the bill. Accordingly, I would reject the contention and dismiss the cross-appeal.

At pages 1035 and 1036 of the Federal Court Reports, Pratte J. agreed with Addy J. that the Dicey concept of equality before the law had not been offended by the impugned provision. He also agreed that the whole of s. 29.1 of the *Judges Act* has been enacted by Parliament for the purpose of achieving a valid federal objective.

In this Court, counsel for the appellant did not reply upon the reasons of the trial judge to support their submission that the second constitutional question should be answered in the negative. They relied essentially upon the reasons of Thurlow C.J. on this point. They quoted part of these reasons in their factum and amplified them as follows:

> The policy decision reflected in section 29.1 is that all federally funded and administered pension plans should be on a contributory basis, so that all those who might eventually receive retirement benefits from the Consolidated Revenue Fund will have contributed toward the cost of those benefits and thereby reduce the financial burden on future taxpayers. It is submitted that a decision to shift part of the costs of the plan to its beneficiaries cannot be considered arbitrary, capricious or unnecessary.

> If the policy that the beneficiary should contribute is not unreasonable it is submitted that the means chosen to implement that policy do not render it objectionable or invalid in relation to the right to equality before the law. Parliament could have chosen to impose a contribu-

ment à celui qui le savait au moment de sa nomination, qu'un régime de pensions à cotisation s'imposerait à tous les juges nommés après la date de présentation du projet de loi, je ne crois pas que l'on puisse en déduire qu'il a été établi, au sens où l'entendait le juge Ritchie dans la même affaire (*MacKay c. La Reine*, [1980] 2 R.C.S. 370, à la page 393, citant *La Reine c. Burnshine*, [1975] 1 R.C.S. 693), que les dispositions du projet de loi, y compris le choix de la date, n'ont pas été adoptées en vue d'atteindre un objectif fédéral valable ou que le Parlement a agi de façon arbitraire, déraisonnable ou inutile en établissant que la catégorie de juges obligée de verser des contributions serait formée de juges ayant été nommés après la date de présentation du projet de loi. Je déclarerais donc l'argument irrecevable et rejetterais l'appel incident.

Aux pages 1035 et 1036 du Recueil des arrêts de la Cour fédérale, le juge Pratte s'accorde avec le juge Addy pour dire que la disposition attaquée ne contrevient pas au concept de l'égalité devant la loi énoncé par Dicey. Il est également d'accord pour soutenir que l'ensemble de l'art. 29.1 de la *Loi sur les juges* a été adopté par le Parlement afin de réaliser un objectif fédéral valable ou régulier.

En cette Cour, les avocats de l'appelante n'ont pas invoqué les motifs du juge de première instance pour étayer leur argument selon lequel la seconde question constitutionnelle doit recevoir une réponse négative. Sur ce point, ils se sont appuyés essentiellement sur les motifs du juge en chef Thurlow, qu'ils ont reproduits en partie dans leur mémoire, les étoffant de la manière suivante:

> [TRADUCTION] La décision de principe qui ressort de l'art. 29.1 porte que tous les régimes de retraite financés et administrés par le gouvernement fédéral doivent être des régimes avec participation des intéressés, de manière que toutes les personnes qui pourront éventuellement toucher des prestations de retraite à même le Fonds du revenu consolidé auront contribué au coût de ces prestations, réduisant ainsi le fardeau fiscal des futurs contribuables. Nous soutenons qu'on ne saurait qualifier d'arbitraire, de déraisonnable ou d'inutile une décision de faire assumer une partie des coûts du régime par ses propres bénéficiaires.
>
> À supposer que la politique voulant que le bénéficiaire soit tenu de contribuer ne soit pas déraisonnable, nous soutenons que les moyens retenus pour la mettre en œuvre ne la rendent ni inacceptable ni invalide par rapport au droit à l'égalité devant la loi. Le Parlement

tory requirement at the full rate of 6½% and then 7% on all judges. However, it chose to protect the position of judges who were appointed prior to the introduction of the amending legislation and to phase in the contributory requirements progressively, by requiring contributions at the higher rate only from newly appointed judges. This progressive implementation of full contributions protected the legitimate expectations of the judges appointed prior to April [*sic*] 17, 1975, but it necessarily put them in a different position from that of judges appointed after the "trigger date" for the higher contributions.

While no submissions were made to us by counsel for the appellant with respect to the reasons of the trial judge on the *Canadian Bill of Rights* issue, I feel that these reasons should be addressed.

I first wish to dispel any suggestion that, in order to offend the *Canadian Bill of Rights*, a discriminatory provision must be discriminatory on some specifically mentioned ground such as race, national origin, colour, etc. The learned trial judge erred in this respect. In *Curr v. The Queen*, [1972] S.C.R. 889, Laskin J. as he then was, speaking for himself and six other members of the Court stated at pp. 896-97:

> In considering the reach of ... s. 1(*b*) ... I do not read it as making the existence of any of the forms of prohibited discrimination a *sine qua non* of its operation. Rather, the prohibited discrimination is an additional lever to which federal legislation must respond. Putting the matter another way, federal legislation which does not offend s. 1 in respect of any of the prohibited kinds of discrimination may nonetheless be offensive to s. 1 if it is violative of what is specified in any of the clauses (*a*) to (*f*) of s. 1. It is, *a fortiori*, offensive if there is discrimination by reason of race so as to deny equality before the law. That is what this Court decided in *Regina* v. *Drybones* and I need say no more on this point.

It is, therefore, not an answer to reliance by the appellant on ... s. 1(*b*) of the *Canadian Bill of Rights* that [a particular provision] does not discriminate against any person by reason of race, national origin, colour, religion or sex. The absence of such discrimination still leaves open the question whether [a particular

aurait pu choisir d'imposer à tous les juges une obligation de contribuer au taux plein de 6,5 pour cent et puis de 7 pour cent. Il a toutefois décidé d'exempter les juges nommés avant le dépôt des dispositions modificatives et d'introduire progressivement l'obligation de contribuer en n'assujettissant au taux plus élevé que les juges nouvellement nommés. Cette introduction graduelle de la pleine participation protégeait les attentes légitimes des juges nommés avant le 17 avril (*sic*) 1975, mais elle les plaçait nécessairement dans une situation différente de celle des juges nommés après la date d'entrée en vigueur des contributions plus élevées.

Bien que les avocats de l'appelante ne nous aient adressé aucune observation concernant ce qu'a dit le juge de première instance relativement à la question de la *Déclaration canadienne des droits*, j'estime qu'il convient d'examiner cet aspect de ses motifs.

Écartons de prime abord l'idée que, pour enfreindre la *Déclaration canadienne des droits*, une disposition discriminatoire doit constituer une distinction illicite fondée sur un motif expressément mentionné, tel que la race, l'origine nationale, la couleur, etc. Le savant juge de première instance a commis une erreur à cet égard. Dans l'arrêt *Curr c. La Reine*, [1972] R.C.S. 889, le juge Laskin, alors juge puîné, s'exprimant en son propre nom et en celui de six autres membres de la Cour, affirme aux pp. 896 et 897:

> En ce qui concerne la portée [de l'alinéa] [...] (*b*) de l'art. 1 [...], je n'interprète pas cet article comme s'appliquant uniquement lorsque existe l'une ou l'autre forme de discrimination interdite. La discrimination interdite est plutôt une norme supplémentaire que la législation fédérale doit respecter. En d'autres termes, une loi fédérale qui ne viole pas l'article 1 en ce qui concerne l'un ou l'autre des genres interdits de discrimination, peut néanmoins le violer si elle porte atteinte à l'un des droits garantis par les alinéas (*a*) à (*f*) de l'art. 1. Elle constitue *a fortiori* une violation s'il y a discrimination en raison de la race d'une personne, de façon à priver celle-ci du droit à l'égalité devant la loi. C'est ce qu'a décidé cette Cour dans l'arrêt *Regina c. Drybones*; je n'ai rien d'autre à ajouter sur ce point.

Par conséquent, on ne saurait répondre à l'argument de l'appelant, fondé sur [l'alinéa] [...] (*b*) de l'art. 1 de la *Déclaration canadienne des droits*, en disant [qu'une disposition donnée] ne fait aucune distinction entre les particuliers en raison de leur race, de leur origine nationale, de leur couleur, de leur religion ou de leur sexe. En

provision] can be construed and applied without abrogating, abridging or infringing the rights of the individual listed in . . . s. 1(*b*).

See also the *Burnshine* case, *supra*, at p. 700, and *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183, at p. 191.

As for the Diceyan concept of equality and the rule of law, perhaps its most classical application in Canadian jurisprudence was in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, a case which antedates the *Canadian Bill of Rights*. It is true that this concept was sometimes adopted for the purposes of the *Canadian Bill of Rights*, but the early *dicta* in *Curr* and in *Lavell*, *supra*, to which Addy J. refers, do not represent the opinion of the majority of this Court in those cases. However, that concept was adopted by the majority of this Court in *Burnshine*, *supra*, although the extent to which the latter case turned on this adoption is not clear.

The adoption of Dicey's concept of equality for the purposes of the *Canadian Bill of Rights* was criticized in some doctrinal works. Dicey's concept of equality was said to be outdated, unduly narrow and otherwise inappropriate for the purposes of the *Canadian Bill of Rights*: W. S. Tarnopolsky, *The Canadian Bill of Rights* (2nd ed. 1975), pp. 120, 158 to 160, 297 and 298.

Of the five equality cases decided by this Court after the *Burnshine* case, *supra*, on the basis of the *Canadian Bill of Rights* that is, *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170, *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376, the *Bliss* case, *supra*, and *MacKay v. The Queen*, [1980] 2 S.C.R. 370, only one, the *Bliss* case, alludes to the Dicey concept of equality, at p. 192. But on the same page, Ritchie J., who delivered the judgment of the Court, mentioned a broader test applied by Pratte J. of the Federal Court of Appeal:

l'absence de pareille discrimination, il reste encore à déterminer si [une disposition donnée] peut s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre les droits mentionnés [à l'alinéa] [. . .] (*b*) de l'art. 1.

Voir aussi l'arrêt *Burnshine*, précité, à la p. 700, et l'arrêt *Bliss c. Procureur général du Canada*, [1979] 1 R.C.S. 183, à la p. 191.

Quant au concept de l'égalité et de la primauté du droit énoncé par Dicey, son application la plus classique dans la jurisprudence canadienne se trouve peut-être dans l'arrêt *Roncarelli v. Duplessis*, [1959] R.C.S. 121, qui a précédé la *Déclaration canadienne des droits*. Il est vrai que ce concept a parfois été adopté pour les fins de la *Déclaration canadienne des droits*, mais les premières opinions incidentes exprimées dans les arrêts *Curr* et *Lavell*, précités, auxquelles se réfère le juge Addy, ne représentent pas l'avis des juges formant la majorité de cette Cour dans ces affaires. Ce concept a toutefois été adopté par cette Cour à la majorité dans l'arrêt *Burnshine*, précité, quoiqu'il ne soit pas très clair dans quelle mesure cette adoption a pu y être déterminante.

L'adoption du concept de l'égalité de Dicey aux fins de la *Déclaration canadienne des droits* a été critiquée dans certains ouvrages de doctrine. On a dit que le concept de Dicey était désuet, trop étroit et par ailleurs inadéquat pour les fins de la *Déclaration canadienne des droits*: W. S. Tarnopolsky, *The Canadian Bill of Rights* (2nd ed. 1975), aux pp. 120, 158 à 160, 297 et 298.

Sur les cinq arrêts en matière d'égalité que cette Cour a rendus après l'arrêt *Burnshine*, précité, en se fondant sur la *Déclaration canadienne des droits*, savoir l'arrêt *Procureur général du Canada c. Canard*, [1976] 1 R.C.S. 170, l'arrêt *Prata c. Ministre de la Main-d'œuvre et de l'Immigration*, [1976] 1 R.C.S. 376, l'arrêt *Bliss*, précité, et l'arrêt *MacKay c. La Reine*, [1980] 2 R.C.S. 370, seul l'arrêt *Bliss*, à la p. 192, fait allusion au concept de l'égalité énoncé par Dicey. Mais, à la même page, le juge Ritchie, qui a prononcé le jugement de la Cour, mentionne un critère plus large appliqué par le juge Pratte de la Cour d'appel fédérale:

> ... the right to equality before the law could be defined as the right of an individual to be treated as well by the legislation as others who, if only relevant facts were taken into consideration, would be judged to be in the same situation.

Mr. Justice Pratte concluded that where difference in treatment of individuals is based on a relevant distinction, the right to equality before the law would not be offended.

Not only did Ritchie J. not disapprove this other test but, on p. 193, he proceeded to apply it to decide that the legislation challenged in that case did not offend the *Canadian Bill of Rights*. Furthermore, in the *Canard* case, *supra*, Ritchie J. with whom Martland and Judson JJ. agreed, in concurring reasons allowing the appeal, took at p. 191, at least in terms if not in the result, a much broader approach than the narrow Diceyan test:

> The *Bill of Rights* was designed to eradicate any discriminatory laws passed by the Parliament of Canada and to guarantee the rights and freedoms therein specified to all Canadian citizens, but these guarantees are expressly declared in the preamble to the Bill to be enacted so as to "reflect the respect of Parliament for its constitution", and s. 91(24) of that document clearly vests in the Parliament of Canada the authority to pass laws concerning Indians which are different from the laws which the provincial legislatures may enact concerning the citizens of the various provinces.

I accordingly think that this Court is not bound by the Dicey test of equality nor prevented from adopting a more egalitarian approach.

Finally I come to the trivialization point made by the trial judge to the effect that the *Canadian Bill of Rights* should not be applied to "the mere quantum of remuneration for services rendered" and "to a question of equal pay for equal work".

Before I do so however, I should perhaps define my position with respect to the characterization of the impugned enactment. The trial judge and Pratte J. dissenting, held that s. 29.1 of the *Judges Act* operated a reduction in the respondent's salary whereas Thurlow C.J., and as it seems, Heald J.,

> ... le droit à l'égalité devant la loi pourrait être défini comme le droit de l'individu d'être traité par la loi comme d'autres que l'on jugerait être dans la même situation, si l'on ne s'en tenait qu'à des faits pertinents.

Le juge Pratte conclut que lorsque la différence de traitement entre des individus repose sur une distinction pertinente, il n'y a pas d'atteinte au droit à l'égalité devant la loi.

Non seulement le juge Ritchie ne désapprouve-t-il pas cet autre critère, mais, à la p. 193, il l'applique pour décider que les dispositions législatives attaquées dans cette affaire ne violaient pas la *Déclaration canadienne des droits*. En outre, dans l'arrêt *Canard*, précité, à la p. 191, le juge Ritchie, à l'avis duquel ont souscrit les juges Martland et Judson, dans des motifs concordants accueillant le pourvoi, adopte, du moins en théorie sinon en pratique, un point de vue beaucoup plus large que le critère étroit de Dicey:

> La *Déclaration des droits* a pour but d'éliminer toutes les lois discriminatoires adoptées par le Parlement du Canada et de garantir à tous les citoyens canadiens les droits et libertés qui y sont énoncés, mais le préambule de la Déclaration prévoit expressément que ces garanties doivent «respecter la compétence législative du Parlement du Canada», et l'art. 91(24) de la constitution confère clairement au Parlement du Canada l'autorité d'adopter à l'égard des Indiens des lois différentes de celles que les législatures provinciales peuvent adopter à l'égard des citoyens des différentes provinces.

Par conséquent, j'estime que cette Cour n'est pas liée par le critère d'égalité de Dicey et que rien ne l'empêche d'adopter un point de vue plus égalitaire.

Finalement, j'arrive à la question de la banalisation que soulève le juge de première instance selon lequel la *Déclaration canadienne des droits* ne devrait pas s'appliquer au «simple quantum de rémunération pour services rendus» et aux «questions de salaire égal pour un travail égal».

Toutefois, avant d'aborder cette question, je devrais peut-être définir ma position en ce qui a trait à la caractérisation de la mesure législative contestée. Le juge de première instance et le juge Pratte, dissident, ont conclu que l'art. 29.1 de la *Loi sur les juges* avait pour effet de réduire le

held that the provision did not reduce the amount credited to the respondent as salary but forced him to contribute to a pension scheme. Given the form of s. 29.1, I am rather inclined to share the view of Thurlow C.J. on this point although, on the *Canadian Bill of Rights* issue, it does not matter whether the respondent suffered a reduction in salary or was forced to contribute to a pension scheme with a corresponding reduction of the amount actually paid to him as his salary.

In my view however, this case has nothing to do with the "equal pay for equal work" principle. It does have to do with money and the financial benefits attached to the respondent's office, but I think that the uneven distribution of financial benefits is quite capable of producing the type of inequality forbidden by s. 1(*b*) of the *Canadian Bill of Rights*. It was the entitlement of women to unemployment insurance benefits that was in issue in the *Bliss* case, *supra*, and nobody suggested that on that ground the case was incapable of or somehow unworthy of giving rise to arguable submissions advanced pursuant to the equality provisions of the *Canadian Bill of Rights*. More individuals were affected by the *Bliss* case, than by the case at bar. However, the amounts involved in the case at bar are considerably more substantial than those in the *Bliss* case.

Furthermore, the benefits involved in the case at bar represent an important incident attached to the status of a high judicial officer and are linked with the dignity of his office, in real as well as in symbolic terms. The following remarks written by Thurlow C.J. are apposite. They are indicative of the gravity of the issues raised by this case, and that is the sole reason I quote them. At pages 1024 and 1025 of the Federal Court Reports, the learned Chief Justice wrote:

> The commission issues upon appointment of a judge by the Governor General under the authority of section 96 and the provincial statute setting up the office. It

traitement de l'intimé alors que le juge en chef Thurlow et, semble-t-il, le juge Heald ont conclu que la disposition ne réduit pas le montant crédité à l'intimé à titre de traitement, mais l'oblige plutôt à contribuer à un régime de retraite. Compte tenu de la forme de l'art. 29.1, je suis plutôt porté à partager l'opinion du juge en chef Thurlow sur ce point bien que, en ce qui a trait à la question de la *Déclaration canadienne des droits*, il n'importe pas de savoir si l'intimé a subi une réduction de traitement ou s'il a été forcé de contribuer à un régime de retraite en se voyant imposer une réduction correspondante du montant qui lui est réellement versé à titre de traitement.

À mon avis toutefois, l'espèce n'a rien à voir avec le principe du «salaire égal pour un travail égal». Elle porte sur l'argent et les avantages financiers qui se rattachent aux fonctions de l'intimé, mais je crois que la répartition inégale des avantages financiers peut très bien engendrer le genre d'inégalité qu'interdit l'al. 1*b*) de la *Déclaration canadienne des droits*. C'est le droit des femmes aux prestations d'assurance-chômage qui était en cause dans l'arrêt *Bliss*, précité, et personne n'a laissé entendre que, pour ce motif, l'arrêt n'était pas susceptible ou ne permettait pas de quelque manière de soulever des arguments relatifs aux dispositions en matière d'égalité de la *Déclaration canadienne des droits*. Un plus grand nombre de personnes étaient touchées par l'arrêt *Bliss*, que ce n'est le cas dans la présente affaire. Toutefois, les montants visés en l'espèce sont beaucoup plus importants que ceux dont il est question dans l'arrêt *Bliss*.

En outre, les avantages visés en l'espèce représentent un accessoire important qui se rattache au statut d'un haut officier de justice et sont liés à la dignité de ses fonctions, tant sur le plan réel que sur le plan symbolique. Les observations suivantes du juge en chef Thurlow sont pertinentes. Elles font ressortir la gravité des questions soulevées en l'espèce et c'est la seule raison pour laquelle je les cite. Aux pages 1024 et 1025 du Recueil des arrêts de la Cour fédérale, le savant Juge en chef écrit:

> La commission du juge débute au moment de sa nomination par le gouverneur général en vertu du pouvoir conféré par l'article 96 et de la loi provinciale créant

constitutes a grant both of the office with its authority and of the salary and other benefits attached by law at that time to the office as fixed by Parliament under section 99. The grant entitles the appointee to the salary so fixed in much the same way as a grant of money or land vests title to the money or the land in the grantee. It is something that cannot be taken from him except by due process of law. Due process may include expropriation by the authority of the legislature, but it is established principle that the legislature is not, in the absence of a clear expression of intent to the contrary, to be taken as intending to expropriate without due compensation. And a taking without compensation is extraordinary. It is something that Parliament, ordinarily at least, avoids. It is, in my view, the reason why, in a number of statutes relating to judges' salaries, provisions referred to as grandfather clauses to protect the position of incumbent judges have been included. But the fact they have been included is not in itself a basis for saying that Parliament does not have the legal power to expropriate without compensation or to take away rights that have been lawfully granted.

As Parliament has under section 100 the responsibility to fix and provide the salaries of judges, it seems to me that as a matter of interpretation of the language of the section Parliament must have a continuing power to fix such salaries and that that power is not restricted to the fixing of salaries for judges to be subsequently appointed. Plainly Parliament can increase the salaries of judges who are in office and it seems to me that as a matter of naked power it can also decrease them even though such decrease may be regarded by the incumbent judges as confiscatory and unjust and may be in substance a derogation from the grant lawfully made by the Governor General in the judge's commission.

Finally if, as I think, the impugned enactment contravenes s. 1(*b*) of the *Canadian Bill of Rights*, it takes on an added dimension in that it treats unevenly judges who are expected to administer justice with an even hand. Furthermore, it emanates from the very Parliament which is the custodian of judges' independence. While the impugned enactment is not sufficiently severe to impair the independence of judges, it is one that tend to affect the serenity of those concerned for

le poste. Par cette commission, le juge se voit octroyer le poste et les pouvoirs y afférents de même que le traitement et les autres avantages fixés par le Parlement en vertu de l'article 99. Le titulaire de la commission acquiert en vertu de cette dernière le droit au traitement ainsi fixé, un peu de la même façon que le cessionnaire d'une somme d'argent ou d'un bien-fonds acquiert le droit de propriété qui s'y rapporte. C'est là quelque chose qu'on ne peut lui retirer sauf par l'application régulière de la loi. L'application régulière de la loi peut prendre la forme de procédures d'expropriation prises par une assemblée législative. Toutefois, suivant un principe reconnu, l'assemblée législative n'est pas, en l'absence d'une disposition expresse au contraire, présumée exproprier sans indemnité appropriée. D'ailleurs, une expropriation sans indemnisation est exceptionnelle. C'est une situation que le Parlement cherche à éviter, du moins normalement. Voilà pourquoi à mon avis on a inséré dans plusieurs lois relatives au traitement des juges des clauses [préservant le statu quo] afin de sauvegarder la position des juges titulaires. Cependant, l'existence de ces clauses ne suffit pas en elle-même pour affirmer que le Parlement n'a pas le pouvoir légal d'exproprier sans indemniser ou de retirer des droits qui avaient été conférés dans le respect de la loi.

Comme le Parlement a, en vertu de l'article 100, la responsabilité de fixer et de payer les traitements des juges, il me semble que, suivant l'interprétation que je donne du libellé de cet article, le Parlement doit avoir un pouvoir continu de fixer ces traitements et que ce pouvoir ne se limite pas uniquement à la fixation des traitements des juges au moment de leur nomination. Manifestement, le Parlement peut hausser les traitements des juges qui sont déjà nommés et il me semble tout aussi évident que, théoriquement, rien ne l'empêche de les réduire même si un tel geste pourrait prendre aux yeux des juges titulaires l'allure d'une confiscation et d'une injustice et qu'il pourrait même constituer en substance une dérogation aux avantages légalement consentis par le gouverneur général dans la commission du juge.

Finalement si, comme je le crois, la mesure législative attaquée contrevient à l'al. 1*b*) de la *Déclaration canadienne des droits*, elle prend une autre dimension en ce qu'elle traite inégalement les juges qui sont censés administrer la justice d'une manière équitable. En outre, elle émane du même Parlement qui est le gardien de l'indépendance des juges. Bien que la mesure législative contestée ne soit pas suffisamment grave pour nuire à l'indépendance des juges, il n'en demeure

the rest of their term of office. Judges may be expected to rise above such considerations but it is difficult to see how it could be conducive to the better administration of justice that they should be put to the test.

I now turn to the "valid federal objective" argument retained by the majority of the Federal Court of Appeal and advanced by the appellant in support of the impugned enactment.

Relying on the authority of *Burnshine*, *supra*, at pp. 707 and 708, and of *Bliss*, *supra*, at p. 194, the appellant submits that the onus lies with the respondent to demonstrate that a valid federal objective was not being sought by Parliament. The extent to which this onus is of an evidentiary or of a persuasive nature, and whether this onus, whatever its weight, can be discharged by inferences drawn from the impugned legislation, are questions which may ultimately require clarification. I should have thought that where a challenged provision *prima facie* offends against the principle of equality before the law and does so for reasons which neither appear on its face nor can be inferred from its nature, then it would be incumbent upon the Attorney General, who is in a much better position to do so, to demonstrate what valid objective was being sought by the legislation.

Be that as it may, the question of onus does not really arise in the case at bar since I am quite prepared to accept that s. 29.1 of the *Judges Act* was enacted by Parliament in the pursuit of a valid federal objective, as was held by the Federal Court of Appeal and as is submitted by the appellant.

Paraphrasing the above-quoted reasons of Thurlow C.J. and the submissions of the appellant, I would describe the valid federal objective in question as follows: the policy decision reflected in s. 29.1 of the *Judges Act* is that judges' pension plans should be on a contributory basis in order to reduce the financial burden on future taxpayers;

pas moins qu'elle tend à avoir un effet sur la sérénité de ceux qui sont visés pour le reste de la durée de leurs fonctions. On peut s'attendre à ce que les juges soient au-dessus de telles considérations, mais il est difficile de voir comment le fait de les confronter à une telle situation pourrait entraîner une meilleure administration de la justice.

J'examine maintenant l'argument de l'«objectif fédéral valable» retenu par la Cour d'appel fédérale à la majorité et présenté par l'appelante à l'appui de la mesure législative contestée.

En se fondant sur les arrêts *Burnshine*, précité, aux pp. 707 et 708, et *Bliss*, précité, à la p. 194, l'appelante soutient qu'il incombe à l'intimé de démontrer que le Parlement ne cherchait pas à atteindre un objectif fédéral valable ou régulier. La mesure dans laquelle ce fardeau en est un de preuve ou de persuasion et la question de savoir si on peut s'en acquitter, peu importe son poids, au moyen de déductions tirées de la mesure législative contestée, constituent des questions qu'il peut finalement être nécessaire de clarifier. J'aurais pensé que lorsqu'une disposition attaquée contrevient à première vue au principe de l'égalité devant la loi et qu'elle le fait pour des raisons qui ne sont pas manifestes à sa lecture même ou qui ne peuvent être déduites de sa nature, il incomberait alors au procureur général, qui est dans une bien meilleure position pour le faire, de montrer quel objectif valable ou régulier la mesure législative visait à atteindre.

Quoi qu'il en soit, la question du fardeau ne se pose pas vraiment en l'espèce étant donné que je suis tout à fait prêt à admettre que l'art. 29.1 de la *Loi sur les juges* a été adopté par le Parlement en vue d'atteindre un objectif fédéral valable, comme l'a conclu la Cour d'appel fédérale et comme le soutient l'appelante.

Pour paraphraser les motifs précités du juge en chef Thurlow et les arguments de l'appelante, je décrirais ainsi l'objectif fédéral valable en question: la décision de principe qui ressort de l'art. 29.1 de la *Loi sur les juges* porte que les régimes de retraite des juges devraient être des régimes avec participation des intéressés de manière à

Parliament chose to phase in the contributory requirement, by requiring contributions at the higher rate only from newly appointed judges so that, through the attrition of senior appointees as a result of death and resignations, the whole body of the judiciary would eventually participate in the contributory scheme.

To repeat, I am prepared to accept that the above-mentioned federal objective is a valid one.

What I am not prepared to agree with, on the other hand, with great respect for those who hold a contrary view, is that the manner or means chosen to achieve this valid federal objective, which manner or means themselves establish a new classification and discriminate between incumbent judges, should be immunized from the principle of universal application of the law. So to dispense altogether such manner or means from the equality provision of the *Canadian Bill of Rights* would have the effect of emasculating this provision; in my view, it is in part to guard against this danger that McIntyre J., writing for himself and for Dickson J., as he then was, wrote his concurring reasons in the *MacKay* case, *supra*. I find it appropriate to quote a substantial portion of those reasons. The main issue in that case was set out in these words at p. 401:

> Whether the provisions of the *National Defence Act* which authorize the trial by a service tribunal of military personnel charged with criminal offences committed in Canada contrary to the *Narcotic Control Act* or the *Criminal Code* are inoperable by reason of the *Canadian Bill of Rights*.

At page 402, McIntyre J. dealt with the historical background of military law and, at pp. 403 to 405, with the application of s. 2(*f*) of the *Canadian Bill of Rights* to the facts of that case. Then, at pp. 405 and following, McIntyre J. dealt with the application of s. 1(*b*) of the *Canadian Bill of Rights*:

> The appellant's second point raises the question of whether the trial of servicemen by court martial under military law for an offence under the criminal law of

réduire le fardeau financier des futurs contribuables; le Parlement a choisi d'introduire progressivement l'exigence de la participation en demandant seulement aux juges nouvellement nommés de contribuer au taux plus élevé de manière que, par suite du décès et de la démission des juges exempts, l'ensemble de la magistrature participe éventuellement au régime de retraite avec participation.

Encore une fois, je suis prêt à admettre que l'objectif fédéral susmentionné est valable ou régulier.

Par ailleurs, ce que je ne suis pas prêt à admettre, avec beaucoup d'égards pour les tenants du point de vue contraire, c'est que la manière ou les moyens choisis pour atteindre cet objectif fédéral valable, lesquels établissent eux-mêmes une nouvelle classification et une distinction injuste entre les juges en fonction, devraient être soustraits au principe de l'application universelle de la loi. Le fait de soustraire cette manière ou ces moyens à l'application de la disposition en matière d'égalité de la *Déclaration canadienne des droits* aurait pour effet d'affaiblir cette disposition; à mon avis, c'est en partie pour prévenir ce danger que le juge McIntyre a rédigé, en son propre nom et en celui du juge Dickson, alors juge puîné, ses motifs concordants dans l'arrêt *MacKay*, précité. J'estime qu'il est approprié de citer une partie importante de ces motifs. La question principale dans cet arrêt a été énoncée en ces termes à la p. 401:

> Les dispositions de la *Loi sur la défense nationale*, qui autorisent le procès du personnel militaire accusé d'infractions criminelles commises au Canada en violation de la *Loi sur les stupéfiants* ou du *Code criminel* devant des tribunaux militaires, sont-elles inopérantes en raison de la *Déclaration canadienne des droits*?

À la page 402, le juge McIntyre traite du fondement historique du droit militaire et, aux pp. 403 à 405, de l'application de l'al. 2*f*) de la *Déclaration canadienne des droits* aux faits de l'espèce. Ensuite, aux pp. 405 et suiv., le juge McIntyre traite de l'application de l'al. 1*b*) de la *Déclaration canadienne des droits*:

> Le deuxième moyen de l'appelant soulève la question de savoir si le fait que les militaires sont jugés par une cour martiale conformément au droit militaire pour une

Canada or as here under the *Narcotic Control Act* deprives the serviceman of equality before the law contrary to the provisions of s. 1(*b*) and s. 2 of the *Canadian Bill of Rights*.

This Court decided in *Regina v. Drybones*, [1970] S.C.R. 282, that the *Canadian Bill of Rights* was effective to render inoperative validly enacted federal legislation where such legislation infringed the right of a subject to equality before the law. Judicial construction of the words "equality before the law" found in such cases as *The Queen v. Burnshine*, [1975] 1 S.C.R. 693, *Prata v. The Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376, and *Bliss v. A.G. Canada*, [1979] 1 S.C.R. 183, has advanced the proposition that legislation passed by Parliament does not offend against the principle of equality before the law if passed in pursuance of a "valid federal objective". The significance of these words must be examined.

Prior to the passing of the *Canadian Bill of Rights*, Parliament could have passed in the exercise of its power under s. 91(7) of the *British North America Act* without restriction such legislation in respect of the governance and control of the armed forces as it wished. The *Canadian Bill of Rights*, however, has introduced another dimension and federal legislation must now be construed according to its precepts. Certainly the creation and maintenance of the armed forces of the land constitute a valid federal objective within the legislative competence of the federal Parliament. A valid federal objective, however, must mean something more than an objective which simply falls within the federal legislative competence under the *British North America Act*. Even in the absence of the *Canadian Bill of Rights*, a federal enactment could not be supported constitutionally if it did not embody such an objective. The word "valid" in this context must import a concept of validity not only within the field of constitutional legislative competence but also valid in the sense that it does not offend the *Canadian Bill of Rights*. Our task then is to determine whether in pursuit of an admittedly constitutional federal objective Parliament has, contrary to the provisions of the *Canadian Bill of Rights*, created for those subject to military law a condition of inequality before the law.

It seems to me that it is incontestable that Parliament has the power to legislate in such a way as to affect one group or class in society as distinct from another without any necessary offence to the *Canadian Bill of Rights*. The problem arises however when we attempt to determine

infraction au droit criminel canadien ou, comme en l'espèce, à la *Loi sur les stupéfiants*, les prive de l'égalité devant la loi en violation de l'al. 1*b*) et de l'art. 2 de la *Déclaration canadienne des droits*.

Dans l'arrêt *La Reine c. Drybones*, [1970] R.C.S. 282, cette Cour a décidé que la *Déclaration canadienne des droits* rendait inopérante une loi fédérale validement adoptée lorsque celle-ci violait le droit d'un citoyen à l'égalité devant la loi. L'interprétation prétorienne de l'expression «égalité devant la loi» que l'on trouve dans des arrêts comme *La Reine c. Burnshine*, [1975] 1 R.C.S. 693; *Prata c. Le ministre de la Main-d'oeuvre et de l'Immigration*, [1976] 1 R.C.S. 376; et *Bliss c. Le Procureur général du Canada*, [1979] 1 R.C.S. 183, a avancé la proposition qu'une loi adoptée par le Parlement ne contrevient pas au principe de l'égalité devant la loi si elle est adoptée en cherchant l'accomplissement d'un «objectif fédéral régulier». Il faut examiner le sens de cette expression.

Avant l'adoption de la *Déclaration canadienne des droits*, le Parlement aurait pu, dans l'exercice du pouvoir que lui confère le par. 91(7) de l'*Acte de l'Amérique du Nord britannique*, adopter sans restriction toute loi relative à l'administration et à la réglementation des forces armées. Cependant, la *Déclaration canadienne des droits* a introduit une autre dimension et il faut maintenant interpréter les lois fédérales conformément à ses préceptes. La création et le maintien des forces armées du pays constituent sans aucun doute un objectif fédéral régulier relevant de la compétence du Parlement fédéral. Un objectif fédéral régulier doit cependant signifier plus qu'un objectif qui relève simplement de la compétence législative fédérale en vertu de l'*Acte de l'Amérique du Nord britannique*. Même en l'absence de la *Déclaration canadienne des droits*, une loi fédérale serait inconstitutionnelle si elle ne visait pas pareil objectif. Le terme «régulier» dans ce contexte doit introduire un concept de validité non seulement dans le champ de compétence législative constitutionnelle mais aussi de validité dans le sens de respect de la *Déclaration canadienne des droits*. Notre tâche consiste donc à déterminer si, dans la poursuite d'un objectif fédéral dont on ne conteste pas la constitutionnalité, le Parlement a, contrairement aux dispositions de la *Déclaration canadienne des droits*, créé pour les personnes assujetties au droit militaire une situation d'inégalité devant la loi.

Il me paraît incontestable que le Parlement a le pouvoir de légiférer de façon à viser un groupe ou une catégorie de la société plutôt qu'un autre sans nécessairement enfreindre pour autant la *Déclaration canadienne des droits*. Le problème se soulève cependant

mine an acceptable basis for the definition of such a separate class, and the nature of the special legislation involved. Equality in this context must not be synonymous with mere universality of application. There are many differing circumstances and conditions affecting different groups which will dictate different treatment. The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class—here the military—is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.

There are many such acceptable distinctions recognized in the law. If we are to have safety on the highways, the blind or those with deficient sight must be forbidden to drive. If young people and children are to be protected and their welfare fostered in youth, we have long recognized that special legislative provisions must be made for them imposing restrictions and limitations upon their freedom more stringent than upon adults. In matters of criminology, differences which have been considered conductive to the welfare of society and to young offenders have been considered permissible (see *Regina v. Burnshine*, *supra*). There are many such cases where the needs of society and the welfare of its members dictate inequality for the achievement of socially desirable purposes. It would be difficult, if not impossible, to propound an all-embracing test to determine what departures from the general principle of the equal application of law would be acceptable to meet a desirable social purpose without offence to the *Canadian Bill of Rights*. I would be of the opinion, however, that as a minimum it would be necessary to inquire whether any inequality has been created for a valid federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the *Canadian Bill of Rights*, and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective. Inequalities created for such purposes may well be acceptable under the *Canadian Bill of Rights*.

Applying this test, it seems to me that the creation of a body of military law and the tribunals necessary for its administration, involving as a necessary incident thereto different treatment at law for servicemen in certain cases from that afforded to civilians, does not by itself

lorsque l'on tente d'établir un fondement acceptable à la définition de ces catégories distinctes, et la nature de la loi particulière en cause. Dans ce contexte, égalité ne doit pas être synonyme de simple application universelle. Bien des circonstances et conditions différentes touchent des groupes différents ce qui dicte des traitements différents. La question à résoudre dans chaque cas est celle de savoir si l'inégalité qui peut être créée par la loi vis-à-vis d'une catégorie particulière—ici les militaires—est arbitraire, fantaisiste ou superflue, ou si elle a un fondement rationnel et acceptable en tant que dérogation nécessaire au principe général de l'application universelle de la loi pour faire face à des conditions particulières et atteindre un objectif social nécessaire et souhaitable.

Le droit reconnaît de nombreuses distinctions acceptables de cette sorte. Pour la sécurité sur les routes, il faut interdire aux aveugles ou aux personnes dont la vue est insuffisante de conduire. Pour protéger les adolescents et les enfants et favoriser leur bien-être, il est depuis longtemps reconnu qu'il faut adopter à leur égard des dispositions législatives particulières qui imposent à leur liberté des restrictions et des limites plus sévères que celles imposées aux adultes. En criminologie, on a décidé que des distinctions considérées comme favorables au bien-être de la société et des jeunes délinquants sont jugées admissibles (voir *La Reine c. Burnshine*, précité). Les cas sont légions où les besoins de la société et le bien-être de ses membres exigent une inégalité pour l'accomplissement d'objectifs socialement souhaitables. Il serait difficile, sinon impossible, d'énoncer un critère exhaustif qui déterminerait quelles dérogations au principe général de l'application égale de la loi seraient acceptables pour satisfaire un objectif social souhaitable sans contrevenir à la *Déclaration canadienne des droits*. Je suis d'avis, cependant, qu'au minimum, il faudrait se demander si l'on a créé l'inégalité en cherchant l'accomplissement d'un objectif fédéral constitutionnel et régulier, si elle a été créée rationnellement en ce sens qu'elle n'est ni arbitraire ni fantaisiste et ne tire son origine d'aucun motif inavoué ou contraire aux dispositions de la *Déclaration canadienne des droits*, et s'il s'agit d'une dérogation nécessaire au principe général de l'application universelle de la loi dans la recherche d'un objectif social nécessaire et souhaitable. Il se peut bien que les inégalités créées à ces fins soient acceptables aux termes de la *Déclaration canadienne des droits*.

Si l'on applique ce critère, il me semble que la création d'un droit militaire et des tribunaux que requiert son application, ce qui implique nécessairement que, dans certains cas, le traitement juridique des militaires sera différent de celui des civils, ne constitue pas en soi

constitute a denial of equality before the law contrary to the provisions of the *Canadian Bill of Rights*. It is apparent that the creation of military law and its courts was undertaken in pursuit of a constitutional federal objective. It has been done in my view rationally, not arbitrarily or capriciously, and no ulterior motive has been shown which could be construed as an assault upon any of the rights, liberties and freedoms protected by the *Canadian Bill of Rights*. It seems abundantly clear to me that the emergence of a body of military law with its judicial tribunals has been made necessary because of the peculiar problems which face the military in the performance of its varied tasks. In my opinion, the recognition of the military as a class within society in respect of which special legislation exists dealing with legal rights and remedies, including special courts and methods of trial, fulfilling as it does a socially desirable objective, does not offend the *Canadian Bill of Rights*.

It must not however be forgotten that, since the principle of equality before the law is to be maintained, departures should be countenanced only where necessary for the attainment of desirable social objectives, and then only to the extent necessary in the circumstances to make possible the attainment of such objectives. The needs of the military must be met but the departure from the concept of equality before the law must not be greater than is necessary for those needs. The principle which should be maintained is that the rights of the serviceman at civil law should be affected as little as possible considering the requirements of military discipline and the efficiency of the service. With this concept in mind, I turn to the situation presented in this case.

Section 2 of the *National Defence Act* defines a service offence as "an offence under this Act, the *Criminal Code*, or any other Act of the Parliament of Canada, committed by a person while subject to the Code of Service Discipline". The Act also provides that such offences will be triable and punishable under military law. If we are to apply the definition of service offence literally, then all prosecutions of servicemen for any offences under any penal statute of Canada could be conducted in military courts. In a country with a well-established judicial system serving all parts of the country in which the prosecution of criminal offences and the constitution of courts of criminal jurisdiction is the responsibility of the provincial governments, I find it impossible to accept the proposition that the legitimate needs of the military extend so far. It is not necessary for the attainment of any socially desirable objective connected with the military service to extend the reach of the military courts to that extent. It may well be said that the military courts will not, as a matter of practice,

un déni d'égalité devant la loi contraire aux dispositions de la *Déclaration canadienne des droits*. Il est clair que la création d'un droit militaire et de tribunaux s'est faite dans le cadre de l'accomplissement d'un objectif fédéral constitutionnel. À mon avis, cela s'est fait rationnellement, sans arbitraire ni caprice, et l'on n'a établi aucun motif inavoué pouvant s'interpréter comme une atteinte à un droit ou à une liberté protégés par la *Déclaration canadienne des droits*. Il me paraît très clair que l'apparition du droit et des tribunaux militaires est la suite logique des problèmes particuliers que rencontrent les militaires dans l'accomplissement de leurs diverses tâches. Il est socialement souhaitable de reconnaître que les militaires forment une catégorie au sein de la société à l'égard de laquelle existent des lois particulières relatives aux droits et recours, y compris des tribunaux et des procédures particuliers, ce qui, à mon avis, ne contrevient pas à la *Déclaration canadienne des droits*.

Il ne faut cependant pas oublier que, puisqu'on doit respecter le principe de l'égalité devant la loi, on ne peut y déroger que lorsque cela est nécessaire pour accomplir des objectifs socialement souhaitables et, dans ce cas, seulement dans la mesure nécessaire pour y parvenir dans les circonstances. Il faut répondre aux besoins des forces armées, mais l'on ne doit pas déroger au principe de l'égalité devant la loi plus que cela n'est nécessaire. Le principe à respecter est celui de l'intervention la plus minime possible dans les droits d'un soldat en vertu du droit commun compte tenu des exigences de la discipline militaire et de l'efficacité des forces armées. Avec ce concept à l'esprit, je passe maintenant à la situation présente.

L'article 2 de la *Loi sur la défense nationale* définit une infraction militaire comme «une infraction visée par la présente loi, par le *Code criminel* ou par toute autre loi du Parlement du Canada, et commise par une personne pendant son assujettissement au Code de discipline militaire». La Loi porte également que ces infractions pourront faire l'objet de poursuites et de sanctions conformément au droit militaire. Si nous appliquons littéralement la définition d'infraction militaire, toutes poursuites contre des militaires pour toute infraction à toute loi pénale canadienne pourraient être menées devant des tribunaux militaires. Dans un pays doté d'un système judiciaire bien établi desservant toutes les régions du pays et où la poursuite des infractions criminelles et la constitution des tribunaux de juridiction criminelle incombent aux gouvernements provinciaux, il m'est impossible d'accepter la thèse que les besoins légitimes des forces armées aillent aussi loin. Pour atteindre un objectif socialement souhaitable relié à la vie militaire, il n'est pas nécessaire d'étendre autant la

seek to extend their jurisdiction over the whole field of criminal law as it affects the members of the armed services. This may well be so, but we are not concerned here with the actual conduct of military courts. Our problem is one of defining the limits of their jurisdiction and in my view it would offend against the principle of equality before the law to construe the provisions of the *National Defence Act* so as to give this literal meaning to the definition of a service offence. The all-embracing reach of the questioned provisions of the *National Defence Act* goes far beyond any reasonable or required limit.

. . .

It is of course evident that there are many matters peculiar to the military which require a special code and special courts. I refer to what I would describe as specifically military offences, such as absence without leave, desertion, insubordination, failure to observe and comply with military regulations regarding care and handling and use of military store and equipment, failure to obey lawful commands of officers and a host of other matters dealt with in the *National Defence Act* which relate to service matters and concerns and which require special military rules and procedures. These form part of the proper field of military law and military courts. There are, in addition, other offences which, while offences under the civil law, are also, when committed by servicemen in relation to military service, properly to be considered within the scope of the military courts. Theft is a criminal offence punishable in the civil courts but it would, I suggest, be impossible to say that theft by one soldier from another in barracks is not as well an offence which could be categorized as a military offence and come within the purview of military law. The same is true of trafficking or possession of forbidden narcotics in barracks, the same is true of many other matters and the military courts must have power to deal with them in addition to those offences which could be categorized as military offences pure and simple.

The question then arises: how is a line to be drawn separating the service-related or military offence from the offence which has no necessary connection with the service? In my view, an offence which would be an offence at civil law, when committed by a civilian, is as well an offence falling within the jurisdiction of the courts martial and within the purview of military law when committed by a serviceman if such offence is so

compétence des tribunaux militaires. On peut bien dire qu'en pratique, les tribunaux militaires ne chercheront pas à étendre leur compétence au champ entier du droit pénal applicable aux membres des forces armées. C'est peut-être bien le cas, mais nous n'avons pas à examiner la conduite des tribunaux militaires dans les faits. Notre problème consiste à définir les limites de leur compétence et, à mon avis, ce serait contrevenir au principe de l'égalité devant la loi que d'interpréter les dispositions de la *Loi sur la défense nationale* de façon à donner ce sens littéral à la définition d'infraction militaire. La portée exhaustive des dispositions en cause de la *Loi sur la défense nationale* dépasse toute limite raisonnable ou nécessaire.

. . .

Certes, il est évident qu'il y a plusieurs questions particulières aux forces armées qui exigent un code particulier et des tribunaux particuliers. Je pense aux infractions que je qualifierais de proprement militaires, comme l'absence sans permission, la désertion, l'insubordination, le non-respect des règlements militaires relatifs au soin et à la manutention du matériel et de l'équipement militaires, le défaut d'obéir aux ordres licites des officiers et de nombreuses autres questions visées par la *Loi sur la défense nationale*, qui sont reliées aux problèmes et préoccupations des forces armées et qui exigent des règles et des procédures militaires particulières. Il s'agit là de questions qui relèvent à bon droit de la compétence du droit militaire et des tribunaux militaires. Il y a en outre des infractions qui, bien qu'elles constituent des infractions de droit commun, doivent également relever des tribunaux militaires lorsqu'elles sont commises par des soldats dans le cadre de leur activité militaire. Le vol est une infraction criminelle punissable par les tribunaux civils, mais, à mon avis, il est impossible de dire que lorsqu'un soldat en vole un autre dans une caserne, on ne peut pas également qualifier cette infraction d'infraction militaire relevant du droit militaire. On peut dire la même chose du trafic ou de la possession de stupéfiants prohibés dans une caserne et de nombreuses autres questions; les tribunaux militaires doivent avoir le pouvoir de les juger en plus des infractions que l'on pourrait qualifier d'infractions militaires pures et simples.

La question se pose donc ainsi: comment tracer la ligne de démarcation entre les infractions militaires ou reliées aux forces armées et celles qui n'y sont pas nécessairement reliées. À mon avis, une infraction qui constitue une infraction de droit commun, si elle est commise par un civil, est également une infraction relevant de la compétence des cours martiales et du droit militaire si elle est commise par un soldat, lorsque cette

connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service. I do not consider it wise or possible to catalogue the offences which could fall into this category or try to describe them in their precise nature and detail. The question of jurisdiction to deal with such offences would have to be determined on a case-by-case basis. A serviceman charged in a service court who wished to challenge the jurisdiction of the military court on this basis could do so on a preliminary motion. It seems, by way of illustration, that a case of criminal negligence, causing death resulting from the operation of a military vehicle by a serviceman in the course of his duty, would come within the jurisdiction of the court martial, while the same accident, occurring while the serviceman was driving his own vehicle on leave and away from his military base or any other military establishment, would clearly not. It may be observed that, on an admittedly different constitutional basis, this approach has been taken in American courts where a possible conflict of jurisdiction has arisen between the military tribunals and the civil courts.

I would therefore hold that the provisions of the *National Defence Act*, in so far as they confer jurisdiction upon courts martial to try servicemen in Canada for offences which are offences under the penal statutes of Canada for which civilians might also be tried, and where the commission and nature of such offences has no necessary connection with the service, in the sense that their commission does not tend to affect the standards of efficiency and discipline of the service, are inoperative as being contrary to the *Canadian Bill of Rights* in that they create inequality before the law for the serviceman involved.

Turning to the case at bar, I have no difficulty in holding that the offences here under consideration are sufficiently connected with the service to come within the jurisdiction of the military courts. Trafficking and possession of narcotics, in a military establishment, can have no other tendency than to attack the standards of discipline and effeciency of the service and must clearly come within the jurisdiction of the military courts and I would , therefore, dismiss the appeal.

I adopt the above-quoted reasons in *MacKay*, *supra*.

The test which is emphasized throughout those reasons is that of the necessity of a specific discrimination with respect to the attainment of a desirable social objective:

infraction est, par sa nature et par les circonstances de sa perpétration, à ce point reliée à la vie militaire qu'elle serait susceptible d'influer sur le niveau général de discipline et d'efficacité des forces armées. Je ne crois pas qu'il soit sage, ni possible, d'énumérer les infractions qui entrent dans cette catégorie ou d'essayer de les décrire en détail. Il faut décider dans chaque cas s'il y a compétence sur ces infractions. Un soldat inculpé devant un tribunal militaire et qui désire en contester la compétence pour ce motif pourra le faire par une requête préliminaire. À titre d'exemple, si par la mise en service d'un véhicule militaire, un soldat dans l'exercice de ses fonctions tue quelqu'un, ce cas de négligence criminelle relèvera de la compétence de la cour martiale, alors que si le même accident se produit quand le soldat conduit son propre véhicule pendant une permission et hors de sa base militaire ou de toute autre installation militaire, il en sera clairement exclu. On peut faire remarquer que, bien que sur un fondement constitutionnel différent, les tribunaux américains ont adopté cette façon de voir dans le cas de conflit de juridiction possible entre les tribunaux militaires et les tribunaux civils.

Je suis donc d'avis que lorsque les dispositions de la *Loi sur la défense nationale* confèrent aux cours martiales compétence pour juger des soldats au Canada pour des infractions qui constituent des infractions aux lois pénales canadiennes pour lesquelles des civils pourraient également être poursuivis, et lorsque ni la perpétration ni la nature de ces infractions ne sont nécessairement reliées aux forces armées, en ce sens qu'elles ne tendent pas à influer sur les niveaux d'efficacité et de discipline des forces armées, elles sont inopérantes parce que contraires à la *Déclaration canadienne des droits*, puisqu'elles créent pour le militaire en cause une inégalité devant la loi.

En l'espèce, je n'ai aucune difficulté à conclure que les infractions en cause sont suffisamment reliées à la vie militaire pour relever de la compétence des tribunaux militaires. Le trafic et la possession de stupéfiants, sur une base militaire, ne peuvent avoir d'autre effet que de porter atteinte aux niveaux de discipline et d'efficacité des forces armées et doivent de toute évidence relever de la compétence des tribunaux militaires et, par conséquent, je suis d'avis de rejeter le pourvoi.

Je fais miens les motifs de l'arrêt *MacKay*, précité, que je viens de reproduire.

Le critère qui ressort de ces motifs veut que la nécessité d'établir une distinction précise soit en vue d'atteindre un objectif social souhaitable:

The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class ... is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.

(Emphasis added.)

Furthermore, the test is all the more exacting in that it includes an essential element of proportionality; even where variation from the principle of universal application of the law is justified, the principle cannot be tampered with to a degree or to an extent which goes beyond what is necessary to reach a desirable social objective:

... since the principle of equality before the law is to be maintained, departures should be countenanced only where necessary for the attainment of desirable social objectives, and then only to the extent necessary in the circumstances to make possible the attainment of such objectives. The needs of the military must be met but the departure from the concept of equality before the law must not be greater than is necessary for those needs.

(Emphasis added.)

To the extent that a specific discrimination is unnecessary to achieve a valid social objective, it is arbitrary or capricious and in violation of the principle of equality.

It seems to me that this test, including its element of proportionality, clearly extends to the manner or means chosen to achieve a valid federal objective, particularly where this manner or these means introduce the very inequality complained of. This manner or these means must then be carefully scrutinized by the courts and they must be struck down whenever they do not meet the test.

Applying this test to the facts of the case at bar, it evidently cannot be said that the distinction made by s. 29.1 of the *Judges Act* between incumbent judges was necessary to achieve the abovementioned federal objective. This distinction was effected by the selection of the date of first reading of the bill as a cut-off point to implement the

La question à résoudre dans chaque cas est celle de savoir si l'inégalité qui peut être créée par la loi vis-à-vis d'une catégorie particulière [...] est arbitraire, fantaisiste ou superflue, ou si elle a un fondement rationnel et acceptable en tant que dérogation nécessaire au principe général de l'application universelle de la loi pour faire face à des conditions particulières et atteindre un objectif social nécessaire et souhaitable.

(C'est moi qui souligne.)

En outre, le critère est d'autant plus exigeant qu'il comprend un élément essentiel de proportionnalité; même lorsque la dérogation au principe de l'application universelle de la loi est justifiée, on ne peut déroger au principe plus que ce qui est nécessaire pour atteindre un objectif social souhaitable:

... puisqu'on doit respecter le principe de l'égalité devant la loi, on ne peut y déroger que lorsque cela est nécessaire pour accomplir des objectifs socialement souhaitables et, dans ce cas, seulement dans la mesure nécessaire pour y parvenir dans les circonstances. Il faut répondre aux besoins des forces armées, mais l'on ne doit pas déroger au principe de l'égalité devant la loi plus que cela n'est nécessaire.

(C'est moi qui souligne.)

Dans la mesure où une distinction précise n'est pas nécessaire pour atteindre un objectif social valable ou régulier, elle est arbitraire ou fantaisiste et déroge au principe de l'égalité.

Il me semble que ce critère, y compris son élément de proportionnalité, vise clairement la manière ou les moyens choisis pour atteindre un objectif fédéral valable, particulièrement lorsque cette manière ou ces moyens introduisent l'inégalité même dont on se plaint. Cette manière ou ces moyens doivent alors être examinés soigneusement par les tribunaux, et ils doivent être écartés lorsqu'ils ne satisfont pas au critère.

Si l'on applique ce critère aux faits de l'espèce, on ne peut évidemment pas dire que la distinction établie par l'art. 29.1 de la *Loi sur les juges* entre les juges en fonction était nécessaire pour atteindre l'objectif fédéral susmentionné. Cette distinction a été établie par le choix de la date de la première lecture du projet de loi comme date limite pour

phasing-in feature of the federal enactment and there was clearly no necessity to select this date.

In order to prevent hoarding and other type of speculation, budgetary measures are sometimes enforced from the time they are announced in the House of Commons and there might be similar rational motives to make a law retroactive to the time it was introduced in Parliament. But no such rational motives have been advanced or appear to exist in the case at bar where the selection of the cut-off point, with its discriminatory effect, is entirely arbitrary and capricious. The selection of a cut-off point reaching back two or three years earlier for instance would appear even more glaringly arbitrary and in my view, in the circumstances of the case at bar, there is no difference in the date of first reading that makes its selection any less arbitrary and capricious than the selection of an earlier date.

It may well be that if Parliament wanted to phase-in the implementation of the new measure and to abide by s. 1(*b*) of the *Canadian Bill of Rights*, its only choice as to the cut-off date was the date of enactment. The selection of the latter date would admittedly have put all incumbent judges and judges appointed after the date of enactment on a different footing. But that is what "grandfather" clauses are about and it is accepted in the case at bar that "grandfathering" was an essential feature of the valid federal objective pursued by Parliament. The only alternative would be to hold that Parliament could not "grandfather" incumbent judges at all without offending the principle of equality before the law. Nobody has made such a far-reaching submission which would run contrary to a seemingly ancient and constant usage, as was indicated by Addy J. at p. 557 of the Federal Court Reports:

> ... the numerous Canadian statutes effecting judges' salaries enacted since 1846 until 1932 quoted by the defendant ... clearly establish various categories of compensation for judges of equal rank from time to time, without the slightest objection being raised even indirectly on the grounds that the legislation was dis-

procéder à l'introduction progressive de la mesure législative fédérale et il n'était nettement pas nécessaire de choisir cette date.

Pour empêcher que la thésaurisation ou d'autre genre de spéculation, les mesures budgétaires entrent parfois en vigueur au moment où elles sont annoncées à la Chambre des communes et il pourrait y avoir des motifs rationnels semblables pour qu'une loi s'applique rétroactivement au moment où elle a été présentée devant le Parlement. Toutefois, aucun motif rationnel de cette nature n'a été présenté ou ne semble exister dans le présent cas où le choix de la date, avec son effet discriminatoire, est entièrement arbitraire et fantaisiste. Le choix d'une date limite remontant à deux ou trois années plus tôt par exemple, paraîtrait arbitraire de manière encore plus flagrante et, à mon avis, dans les circonstances de l'espèce, il n'y a aucune différence dans la date de la première lecture qui rende ce choix moins arbitraire et fantaisiste que le choix d'une date antérieure.

Il se peut bien que si le Parlement avait voulu introduire progressivement la nouvelle mesure et respecter l'al. 1*b*) de la *Déclaration canadienne des droits*, il n'aurait pu choisir comme date limite que la date de l'adoption. Le choix de cette dernière date aurait certes eu pour effet de classer à des niveaux différents les juges qui étaient déjà en fonction et les juges nommés après la date de l'adoption. C'est ce que visent les clauses d'exclusion fondée sur la protection du statu quo et il est admis en l'espèce qu'une telle exclusion constituait une caractéristique essentielle de l'objectif fédéral valable visé par le Parlement. La seule autre solution serait de conclure que le Parlement ne pouvait pas du tout exclure les juges qui étaient déjà en fonction sans contrevenir au principe de l'égalité devant la loi. Nul n'a présenté un argument allant aussi loin qui serait contraire à un usage apparemment ancien et constant comme l'a indiqué le juge Addy à la p. 557 du Recueil des arrêts de la Cour fédérale:

> ... les nombreuses lois canadiennes citées par la défenderesse concernant le traitement des juges, adoptées depuis 1846 jusqu'en 1932 [...] établissent clairement diverses catégories de traitement pour des juges de rang égal, sans que la moindre objection ait été soulevée, même indirectement, au motif que la loi ait été discrimi-

criminatory. It is important to note also, however, that in this legislation whenever required to protect the compensation being paid to incumbents, "grandfather" clauses were inserted in the legislation and that, in the one or two cases where that precaution was not taken at the time of the passing of the legislation, an amending statute was subsequently enacted to rectify the situation. (V.g.: S.C. 1927, c. 33 which reduced the retirement annuity of certain judges to two-thirds of salary was amended by S.C. 1930, c. 27 where retirement at full salary of those judges was restored).

Furthermore, judges appointed after the date of enactment know or are presumed to know the law when they freely accept the appointment, and none of them has ever been treated on the same footing as judges who have been "grandfathered": they are members of a new class the creation of which was necessary to attain a valid federal objective.

Assuming that Parliament is under no constitutional obligation to "grandfather" any incumbent judge, it may appear anomalous, at first, that it should be blamed for not "grandfathering" all incumbent judges, but only some of them, albeit the majority in this case. The apparent anomaly is explained however when it is remembered that the principle of equality is capable of being offended against by the uneven granting of favourable treatment within a class, as well as by the uneven imposition of unfavourable treatment.

In the above-quoted passage of their factum, counsel for the appellant write that the

> ... progressive implementation of full contributions protected the legitimate expectations of the judges appointed prior to April [*sic*] 17, 1975 ...

(Emphasis added.)

And I note that in his reasons for judgment, the Chief Justice characterizes the same concept as "the settled expectations" of earlier appointees. With the greatest of respect, I fail to see why the respondent's expectations were any less settled or legitimate than those of his fellow judges appointed before the date of first reading of the bill.

natoire. Il est important de noter également toutefois que, dans cette législation, lorsqu'il était nécessaire de protéger la rémunération versée aux titulaires, les diverses lois comprenaient des clauses [préservant le statu quo] et que, dans un ou deux cas où cette précaution n'avait pas été prise à l'époque de l'adoption de la loi, une loi modificatrice a subséquemment été adoptée pour corriger la situation. (Voir par exemple: S.C 1927, c. 33 qui réduisait la pension de retraite de certains juges à deux tiers de leur traitement fut modifié par S.C. 1930, c. 27 qui rétablissait pour ces juges la pension à plein traitement.)

En outre, les juges nommés après la date de l'adoption connaissent ou sont présumés connaître la loi lorsqu'ils acceptent librement leur nomination, et aucun d'entre eux n'a jamais été traité sur le même pied que les juges exclus pour préserver le statu quo: ils font partie d'une nouvelle classe dont la création était nécessaire pour atteindre un objectif fédéral valable ou régulier.

Si l'on présume que le Parlement n'est pas obligé en vertu de la Constitution d'exclure un juge en fonction afin de préserver le statu quo, il peut sembler anormal au départ qu'on lui reproche d'exclure non pas tous les juges qui étaient en fonction, mais seulement certains d'entre eux quoique ce soit la majorité en l'espèce. Toutefois, cette anomalie apparente s'explique lorsqu'on se rappelle que le principe de l'égalité peut être violé par l'octroi inégal d'un traitement favorable au sein d'une catégorie, de même que par l'imposition inégale d'un traitement défavorable.

Dans le passage précité de leur mémoire, les avocats de l'appelante affirment que

> ... [l']introduction graduelle de la pleine participation protégeait les attentes légitimes des juges nommés avant le 17 avril (*sic*) 1975 ...

(C'est moi qui souligne.)

De plus, je remarque que, dans ses motifs de jugement, le Juge en chef caractérise le même concept comme les «attentes fondées» des juges qui étaient en fonction. Avec les plus grands égards, je ne vois pas pourquoi les attentes de l'intimé étaient moins fondées ou légitimes que celles de ses collègues nommés avant la date de la première lecture du projet de loi.

Implicit in the position of the appellant is the following proposition: if the respondent, unlike judges appointed before February 17, 1975 could have no expectations susceptible to be protected, it must be because he was put on notice that the *Judges Act* was likely to be amended by the mere fact of first reading of the bill, and he should have been alerted to the risk of changing his position. It is the only rational explanation that comes to mind for the selection of the cut-off date and it is the only one that is inferentially suggested in appellant's factum. It is also an explanation which must have crossed the mind of the trial judge who, at p. 548 of the Federal Court Reports wrote as follows, and correctly so in my view:

> Although one is deemed to know the law of the land, there is no such presumption in the case of Bills not yet enacted. No one is bound by their contents. Having regard to the substantive and progressive emasculation of certain Bills in their stormy passage through Parliament, such Bills as are finally passed into law frequently bear little resemblance either in substance or in form to the original proposal. It would be grossly unjust to impute to anyone, other than perhaps a Member of Parliament, constructive knowledge of the business of Parliament.

The suggestion that the respondent may have been put on notice by the mere fact of first reading is not only factually erroneous in this case where it is conceded that he was unaware of that fact: it is also founded on a dangerous and far-reaching error in law in that it presumes knowledge of and reliance upon a bill as opposed to knowledge of and reliance upon the law.

On January 27, 1976, the Minister of Justice and Attorney General of Canada responded in writing to a letter written to him by the respondent. After stating that the impugned enactment had received Royal Assent on December 20, 1975, with its provisions unchanged, the Minister's letter continues as follows:

> Prior to this event I had raised your concerns with several of my colleagues and indeed, an attempt was

La proposition suivante découle implicitement de la position de l'appelante: à supposer que l'intimé, contrairement aux juges nommés avant le 17 février 1975, ne pouvait avoir aucune attente susceptible d'être protégée, ce doit être parce qu'on l'a avisé que la *Loi sur les juges* serait probablement modifiée par le simple fait de la première lecture du projet de loi et il aurait dû être prévenu du risque qu'il courait s'il changeait sa position. C'est la seule explication rationnelle qui vient à l'esprit pour expliquer le choix de la date limite et c'est la seule qu'on peut déduire du mémoire de l'appelante. C'est également une explication qui doit avoir traversé l'esprit du juge de première instance qui, à la p. 548 du Recueil des arrêts de la Cour fédérale a écrit ce qui suit et à mon avis à bon droit:

> Si nul n'est censé ignorer la loi, il n'existe pas de présomption semblable dans le cas de projets de loi qui ne sont pas encore adoptés. Nul n'est lié par leur contenu. Si l'on tient compte des modifications importantes et de l'émasculation progressive de certains projets de loi au cours des débats au Parlement, les projets de loi qui sont finalement adoptés ressemblent souvent très peu, tant sur le plan du fond que de la forme, au projet original. Il serait tout à fait injuste que quiconque, sauf peut-être un membre du Parlement, soit, par présomption, tenu de connaître les travaux du Parlement.

La proposition selon laquelle l'intimé peut avoir été avisé par le simple fait de la première lecture n'est pas seulement erronée en ce qui a trait aux faits de l'espèce où l'on reconnaît qu'il n'était pas au courant de ce fait: elle est également fondée sur une erreur de droit dangereuse et d'une grande portée en ce sens qu'elle présume la connaissance de l'existence d'un projet de loi et le fait de se fonder sur celui-ci par opposition à la connaissance de la loi et au fait de se fonder sur celle-ci.

Le 27 janvier 1976, le ministre de la Justice et Procureur général du Canada a répondu par écrit à une lettre que lui avait fait parvenir l'intimé. Après avoir déclaré dans sa lettre que la mesure législative contestée avait reçu sans modification la sanction royale le 20 décembre 1975, le Ministre poursuit de la manière suivante:

> [TRADUCTION] Avant cet événement, j'avais fait part de vos inquiétudes à plusieurs de mes collègues et, en fait,

made while the Bill was before the joint House of Commons-Senate Committee to amend the clause so that the higher rate of contributions would apply only to judges appointed to office after the Royal Assent date. Unfortunately, the amendment that would have had this result was ruled out of order on procedural grounds.

In my opinion, this late and unsuccessful attempt to have the bill amended along the lines indicated by the Minister, and the Minister's letter constitute an admission that the bill in question was flawed in that it unnecessarily discriminated against certain incumbent judges.

I have reached the conclusion that s. 29.1(2) of the *Judges Act* is inconsistent with s. 1(*b*) of the *Canadian Bill of Rights* and that the respondent is entitled to a declaration that this subsection is inoperative in so far as the respondent is concerned.

In addition, the respondent seeks a declaration that the words "before February 17, 1975" in s. 29.1(1) of the *Judges Act* are inoperative in so far as he is concerned. The reason why the respondent is seeking such a declaration, according to his factum, is to avoid being placed on a higher footing than that of his senior colleagues, appointed before February 17, 1975, who at present, have to contribute one and one-half per cent of their salary to the Consolidated Revenue Fund. In other words, the respondent is asking us to remedy one element of inequality with his colleagues, but not at the cost of creating or leaving another element of inequality within the same class of judges.

On the face of it, we could not grant such a declaration at large without creating an insoluble problem: judges appointed after February 16, 1975 would then have to contribute one and one-half per cent of their salary in addition to the seven per cent they have to contribute under s. 29.1(2). However, no problem would arise, so far as I can see, if the effect of the declaration is limited to the respondent.

on a tenté, pendant que le projet de loi était devant le comité conjoint de la Chambre des communes et du Sénat, de modifier la clause de manière à ce que le taux plus élevé de participation ne s'applique qu'aux juges nommés après la date de la sanction royale. Malheureusement, la modification qui aurait eu cet effet a été écartée pour des motifs de procédure.

À mon avis, cette tentative tardive et infructueuse de faire modifier le projet de loi comme l'indique le Ministre et la lettre du Ministre constituent une reconnaissance que le projet de loi en question était vicié en ce qu'il établissait une distinction inutile à l'égard de certains juges qui étaient en fonction.

J'arrive à la conclusion que le par. 29.1(2) de la *Loi sur les juges* est incompatible avec l'al. 1*b*) de la *Déclaration canadienne des droits* et que l'intimé a le droit d'obtenir un jugement déclaratoire portant que ce paragraphe est inopérant dans la mesure où l'intimé est concerné.

De plus, l'intimé cherche à obtenir un jugement déclaratoire portant que les mots «avant le 17 février 1975», que l'on trouve au par. 29.1(1) de la *Loi sur les juges*, sont inopérants dans la mesure où il est concerné. La raison pour laquelle l'intimé cherche à obtenir un tel jugement déclaratoire, selon son mémoire, est qu'il veut éviter d'être placé dans une meilleure situation que ses collègues déjà en fonction et nommés avant le 17 février 1975 qui, jusqu'à maintenant, ont versé au Fonds du revenu consolidé une contribution égale à un et demi pour cent de leur traitement. En d'autres termes, l'intimé nous demande de remédier à un élément d'inégalité vis-à-vis de ses collègues, mais pas au prix de créer ou de laisser subsister un autre élément d'inégalité au sein de la même catégorie de juges.

À première vue, nous ne pourrions pas accorder un tel jugement déclaratoire général sans créer un problème insoluble: les juges nommés après le 16 février 1975 devraient alors verser une contribution égale à un et demi pour cent de leur traitement en plus du sept pour cent qu'ils doivent verser en vertu du par. 29.1(2). Toutefois aucun problème ne se poserait, je pense, si le jugement déclaratoire avait un effet limité à l'intimé.

The respondent is not asking us to redraft the impugned enactment but simply to declare these few words inoperative in so far as he is concerned, in order to restore complete equality within the class to which he belongs. I have reached the conclusion that it is legitimate for him to seek complete redress in a case of this sort and that he is entitled to the full declaration he is requesting.

Before I reach my final conclusion, I should perhaps state that a short time before the respondent's appointment, judges' salaries were increased by 39 per cent, and pensions to widowed spouses and children by 50 per cent: *An Act to amend the Judges Act and certain other Acts for related purposes and in respect of the reconstitution of the Supreme Courts of Newfoundland and Prince Edward Island*, S.C. 1974-75-76, c. 48. These increases together with the subsequent enactment of s. 29.1 of the *Judges Act* were sometimes referred to as a "package" and may be relevant to a discussion of the first constitutional question. In my view however, these increases are entirely irrelevant in so far as the second constitutional question is concerned since all incumbent judges profited by these increases, including those appointed before February 17, 1975.

VI—Conclusion

I would allow the appeal, set aside the judgment of the Federal Court of Appeal and the declaration granted by the trial judge. I would allow the cross-appeal and, to the declaration granted by the trial judge, I would substitute the following declaration:

The words "before February 17, 1975" of s. 29.1(1) and the whole of s. 29.1(2) of the *Judges Act*, as enacted by s. 100 of S.C. 1974-75-76, c. 81, are inoperative in so far as the plaintiff is concerned.

I would answer the first constitutional question in the negative.

L'intimé nous demande non pas de réécrire la disposition législative attaquée, mais simplement de déclarer ces quelques mots inopérants dans la mesure où il est concerné, afin de rétablir une égalité complète au sein de la catégorie dont il fait partie. J'arrive à la conclusion qu'il est en droit de demander un redressement complet dans un cas comme celui dont nous sommes saisis et qu'il a droit à la totalité du jugement déclaratoire qu'il demande.

Avant d'arriver à ma conclusion finale, je devrais sans doute dire que, peu de temps avant la nomination de l'intimé, les salaires des juges ont été augmentés de 39 pour cent et les pensions destinées aux conjoints survivants et aux enfants, de 50 pour cent: *Loi modifiant la Loi sur les juges, et certaines autres lois connexes par suite de la réorganisation de la Cour suprême de Terre-Neuve et de l'Île-du-Prince-Édouard*, S.C. 1974-75-76, chap. 48. Ces augmentations ainsi que l'adoption subséquente de l'art. 29.1 de la *Loi sur les juges* ont parfois été mentionnées comme un «programme» et peuvent être utiles pour analyser la première question constitutionnelle. À mon avis toutefois, ces augmentations sont tout à fait hors de propos en ce qui concerne la deuxième question constitutionnelle puisque tous les juges qui étaient en fonction ont bénéficié de ces augmentations, y compris ceux nommés avant le 17 février 1975.

VI—Conclusion

Je suis d'avis d'accueillir le pourvoi, d'annuler l'arrêt de la Cour d'appel fédérale et le jugement déclaratoire accordé par le juge de première instance. Je suis d'avis d'accueillir le pourvoi incident et de remplacer le jugement déclaratoire accordé par le juge de première instance par le jugement déclaratoire suivant:

Les mots «avant le 17 février 1975» au par. 29.1(1) et la totalité du par. 29.1(2) de la *Loi sur les juges*, tels qu'édictés par l'art. 100 de S.C. 1974-75-76, chap. 81, sont inopérants dans la mesure où le demandeur est concerné.

Je suis d'avis de répondre à la première question constitutionnelle par la négative.

I would answer the second constitutional question as follows:

The words "before February 17, 1975" of s. 29.1(1) and the whole of s. 29.1(2) of the *Judges Act* as amended by s. 100 of the *Statute law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, are inconsistent with s. 1(*b*) of the *Canadian Bill of Rights* and, to the extent of the inconsistency, of no force or effect in so far as the respondent is concerned.

I would allow the respondent his costs throughout.

Appeal allowed, BEETZ *and* MCINTYRE JJ. *dissenting in part.*

Solicitor for the appellant: Roger Tassé, Ottawa.

Solicitor for the respondent: David W. Scott, Ottawa.

Je suis d'avis de répondre à la seconde question constitutionnelle de la manière suivante:

Les mots «avant le 17 février 1975» au par. 29.1(1) et la totalité du par. 29.1(2) de la *Loi sur les juges* telle que modifiée par l'art. 100 de la *Loi de 1975 modifiant le droit statutaire (Pensions de retraite)*, S.C. 1974-75-76, chap. 81, sont incompatibles avec l'al. 1*b*) de la *Déclaration canadienne des droits* et inopérants dans la mesure où l'intimé est concerné.

Je suis d'avis d'accorder à l'intimé ses dépens dans toutes les cours.

Pourvoi accueilli, les juges BEETZ *et* MCINTYRE *sont dissidents en partie.*

Procureur de l'appelante: Roger Tassé, Ottawa.

Procureur de l'intimé: David W. Scott, Ottawa.

Judge Richard Therrien, Q.C.J. *Appellant*

v.

The Minister of Justice *Respondent*

and

The Attorney General of Quebec *Respondent*

and

The Attorney General for Ontario, the Attorney General for New Brunswick, Office des droits des détenus and Association des services de réhabilitation sociale du Québec *Interveners*

INDEXED AS: THERRIEN (RE)

Neutral citation: 2001 SCC 35.

File No.: 27004.

2000: October 2; 2001: June 7.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Binnie and Arbour JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Appeal — Supreme Court of Canada — Jurisdiction — Report of inquiry panel of Quebec Court of Appeal — Judicial ethics — Report of Court of Appeal recommending removal of Judge of Court of Québec — Whether Supreme Court has jurisdiction to hear appeal from report of Court of Appeal — Whether report a "judgment" within meaning of Supreme Court Act — Supreme Court Act, R.S.C. 1985, c. S-26, ss. 2(1), 40(1) — Courts of Justice Act, R.S.Q., c. T-16, s. 95.

Courts — Jurisdiction — Quebec Court of Appeal — Superior Court — Legal ethics — Court of Appeal hearing request by Minister of Justice concerning removal of Judge of Court of Québec — Judge concerned applying to Superior Court to have report of committee of inquiry

Le juge Richard Therrien, j.c.q. *Appelant*

c.

La ministre de la Justice *Intimée*

et

La procureure générale du Québec *Intimée*

et

Le procureur général de l'Ontario, le procureur général du Nouveau-Brunswick, l'Office des droits des détenus et l'Association des services de réhabilitation sociale du Québec *Intervenants*

RÉPERTORIÉ : THERRIEN (RE)

Référence neutre : 2001 CSC 35.

N° du greffe : 27004.

2000 : 2 octobre; 2001 : 7 juin.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Binnie et Arbour.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Appel — Cour suprême du Canada — Compétence — Rapport de la formation d'enquête de la Cour d'appel du Québec — Déontologie judiciaire — Rapport de la Cour d'appel recommandant la destitution d'un juge de la Cour du Québec — La Cour suprême a-t-elle compétence pour se saisir de l'appel du rapport de la Cour d'appel? — Ce rapport constitue-t-il un « jugement » au sens de la Loi sur la Cour suprême? — Loi sur la Cour suprême, L.R.C. 1985, ch. S-26, art. 2(1), 40(1) — Loi sur les tribunaux judiciaires, L.R.Q., ch. T-16, art. 95.

Tribunaux — Compétence — Cour d'appel du Québec — Cour supérieure — Déontologie judiciaire — Cour d'appel saisie d'une requête du ministre de la Justice concernant la destitution d'un juge de la Cour du Québec — Juge concerné présentant en Cour supérieure

of Conseil de la magistrature quashed and challenge constitutionality of provision of provincial statute — Whether Superior Court has jurisdiction to hear application and motion — Whether Court of Appeal has exclusive jurisdiction to decide questions of law and jurisdiction in course of inquiry — Courts of Justice Act, R.S.Q., c. T-16, s. 95.

Courts — Judges — Legal ethics — Conseil de la magistrature — Jurisdiction — Whether Conseil de la magistrature may examine conduct of judge even if breach of ethics occurred prior to appointment.

Constitutional law — Independence of judiciary — Security of tenure of judges — Provincial statute providing for removal of judge of provincial court without address of legislature — Whether provincial statute satisfies requirements of judicial independence — Constitution Act, 1867, preamble — Courts of Justice Act, R.S.Q., c. T-16, s. 95.

Constitutional law — Independence of judiciary — Security of tenure of judges — Provincial statute providing that government may remove judge only on report of Court of Appeal at request of Minister of Justice — Whether judicial office is secure against discretionary interference by Executive — Courts of Justice Act, R.S.Q., c. T-16, s. 95.

Administrative law — Natural justice — Duty to act fairly — Right to be heard — Complaint made to Conseil de la magistrature against Judge of Court of Québec — Committee of inquiry of Conseil recommending judge be removed — Whether judge had sufficient notice of findings that might be made by committee of inquiry — Whether judge had right to separate hearing on question of sanctions.

Administrative law — Natural justice — Duty to act fairly — Right to impartial hearing — Complaint made to Conseil de la magistrature against Judge of Court of Québec — Conseil bound to follow recommendations of committee of inquiry — Committee of inquiry recommending judge be removed — Whether decision-making structure of Conseil and committee of inquiry violates maxim delegatus non potest delegare — Whether presence of persons not members of judiciary at preliminary stage of disciplinary process violates institutional dimension of structural principle of judicial independence — Whether functioning of committee of inquiry,

des requêtes pour faire annuler le rapport du comité d'enquête du Conseil de la magistrature et contester la constitutionnalité d'une disposition d'une loi provinciale — La Cour supérieure a-t-elle compétence pour entendre ces requêtes? — La Cour d'appel a-t-elle compétence exclusive pour décider de questions de droit et de compétence dans le cadre de l'enquête? — Loi sur les tribunaux judiciaires, L.R.Q., ch. T-16, art. 95.

Tribunaux — Juges — Déontologie judiciaire — Conseil de la magistrature — Compétence — Le Conseil de la magistrature peut-il examiner la conduite d'un juge même si le manquement déontologique est antérieur à sa nomination?

Droit constitutionnel – Indépendance judiciaire — Inamovibilité des juges — Loi provinciale prévoyant la destitution d'un juge d'une cour provinciale sans adresse parlementaire — La loi provinciale est-elle conforme aux exigences de l'indépendance judiciaire? — Loi constitutionnelle de 1867, préambule — Loi sur les tribunaux judiciaires, L.R.Q., ch. T-16, art. 95.

Droit constitutionnel — Indépendance judiciaire — Inamovibilité des juges — Loi provinciale prévoyant que le gouvernement ne peut démettre un juge que sur un rapport de la Cour d'appel à la suite d'une requête du ministre de la Justice — La fonction judiciaire est-elle à l'abri de toute intervention discrétionnaire de la part de l'exécutif? — Loi sur les tribunaux judiciaires, L.R.Q., ch. T-16, art. 95.

Droit administratif — Justice naturelle — Obligation d'agir équitablement — Droit d'être entendu — Dépôt d'une plainte contre un juge de la Cour du Québec auprès du Conseil de la magistrature — Comité d'enquête du Conseil recommandant la destitution du juge — Le juge a-t-il bénéficié d'un préavis suffisant quant aux conclusions susceptibles d'être tirées par le comité d'enquête? — Le juge avait-il droit à une audition distincte sur la question des sanctions?

Droit administratif — Justice naturelle — Obligation d'agir équitablement — Droit à une audition impartiale — Dépôt d'une plainte contre un juge de la Cour du Québec auprès du Conseil de la magistrature — Conseil contraint de suivre les recommandations de son comité d'enquête — Comité d'enquête recommandant la destitution du juge — La structure décisionnelle du Conseil et de son comité d'enquête viole-t-elle la maxime delegatus non potest delegare? — La présence de personnes non membres de la magistrature au stade préliminaire du processus disciplinaire porte-t-elle atteinte à la dimension institutionnelle du principe structurel de

in particular role of committee counsel, raises reasonable fear of institutional bias.

Civil rights — Equality rights — Information relating to employment — Criminal record — Candidate for judicial office — Whether selection committee may question candidate regarding criminal record — Whether question infringes Charter of Human Rights and Freedoms — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 10, 18.1, 18.2, 20.

Constitutional law — Equality rights — Information relating to employment — Criminal record — Candidate for judicial office — Whether procedure initiated against judge concerned infringes equality rights guaranteed by Canadian Charter — Canadian Charter of Rights and Freedoms, s. 15.

Courts — Judges — Judicial ethics — Sanctions — Removal of judge of provincial court — Failure by judge to disclose criminal record when candidate for office of judge — Report of Court of Appeal recommending revocation of commission of judge — Whether sanction appropriate.

Criminal law — Effect of granting pardon — Meaning and effect of pardon granted under Criminal Records Act — Whether pardon expunges conviction retroactively — Criminal Records Act, R.S.C. 1970 (1st Supp.), c. 12, s. 5.

In 1970, the appellant was sentenced to imprisonment for one year for unlawfully giving assistance to four members of the Front de libération du Québec. After serving his sentence, he continued his legal studies. From 1976 to 1996, the appellant practised law, and in 1987, on his application, the Governor in Council granted him a pardon under s. 5(*b*) of the *Criminal Records Act*. Between 1989 and 1996, the appellant submitted his candidacy in five selection procedures for judicial appointments. In 1991 and 1993, he revealed his previous convictions and stated that he had been pardoned and his candidacy was rejected because of his criminal record. In the last selection procedures, he did not disclose his criminal record, or even that he had been pardoned. In September 1996, as a result of the favourable recommendation of the selection committee, the Minister of Justice recommended that he be appointed as a Judge of the Court of Québec. In late October, the Associate Chief Judge of the Court of

l'indépendance judiciaire? — Le fonctionnement du comité d'enquête, en particulier le rôle de son procureur, soulève-t-il une crainte raisonnable de partialité institutionnelle?

Libertés publiques — Droits à l'égalité — Renseignements relatifs à l'emploi — Antécédents judiciaires — Candidat à la magistrature — Le comité de sélection peut-il questionner un candidat sur ses antécédents judiciaires? — Cette question porte-t-elle atteinte aux dispositions de la Charte des droits et libertés de la personne? — Charte des droits et libertés de la personne, L.R.Q., ch. C-12, art. 10, 18.1, 18.2, 20.

Droit constitutionnel — Droits à l'égalité — Renseignements relatifs à l'emploi — Antécédents judiciaires — Candidat à la magistrature — La procédure intentée contre le juge concerné porte-t-elle atteinte aux droits à l'égalité garantis par la Charte canadienne? — Charte canadienne des droits et libertés, art. 15.

Tribunaux — Juges — Déontologie judiciaire — Sanctions — Destitution d'un juge d'une cour provinciale — Omission d'un juge de révéler ses antécédents judiciaires alors qu'il était candidat au poste de juge — Rapport de la Cour d'appel recommandant la révocation de la commission d'un juge — Cette sanction est-elle appropriée?

Droit criminel — Effet de l'octroi d'un pardon — Sens et portée du pardon obtenu en vertu de la Loi sur le casier judiciaire — Un pardon anéantit-il rétroactivement une condamnation? — Loi sur le casier judiciaire, S.R.C. 1970 (1er suppl.), ch. 12, art. 5.

En 1970, l'appelant est condamné à un an d'emprisonnement pour avoir illégalement fourni une aide quelconque à quatre membres du Front de libération du Québec. Après avoir purgé sa peine, il poursuit ses études de droit. De 1976 à 1996, l'appelant pratique le droit et, en 1987, à sa demande, le gouverneur général en conseil lui accorde un pardon en vertu de l'al. 5*b*) de la *Loi sur le casier judiciaire*. Entre 1989 et 1996, l'appelant soumet sa candidature à cinq concours pour l'obtention d'un poste de juge. En 1991 et 1993, il révèle ses condamnations antérieures et mentionne qu'il a fait l'objet d'un pardon et sa candidature n'est pas retenue à cause de ses antécédents judiciaires. Lors du dernier concours, il ne révèle pas ses antécédents judiciaires ni même l'existence d'un pardon. En septembre 1996, suivant la recommandation favorable du comité de sélection, le ministre de la Justice recommande la nomination de l'appelant comme juge à la Cour du Québec. À la fin d'octobre, le juge en chef adjoint de la Cour du Québec

Québec and chairman of the selection committee which had recommended the appellant's candidacy learned that he had been in trouble with the law. She advised the Minister of Justice of the situation and stated that the appellant had failed to disclose this information to the committee. The Minister lodged a complaint with the Quebec Conseil de la magistrature. A committee of inquiry of the Conseil found that the complaint was justified and recommended that removal procedures be initiated. The Conseil then recommended that the Minister of Justice initiate the process to remove the appellant by making a request to the Court of Appeal in accordance with s. 95 of the *Courts of Justice Act* ("*C.J.A.*").

Concurrently with that proceeding, the appellant challenged the removal process and filed an application for judicial review in the Superior Court seeking to have the committee's inquiry report, the recommendation and the order of the Conseil de la magistrature suspending him declared void and of no effect, and seeking to have the request to the Court of Appeal dismissed. At the same time, he filed a motion for declaratory judgment challenging the constitutionality of s. 95. In response to the application and motion, the Minister of Justice filed two motions to dismiss in which he claimed that the Court of Appeal had jurisdiction to dispose of the issues in conducting the inquiry referred to it pursuant to s. 95. The Superior Court dismissed the motions to dismiss. The Minister appealed the decisions. The Court of Appeal allowed the two appeals and dismissed the application for judicial review and motion for declaratory judgment filed by the appellant. In 1998, five judges of the Court of Appeal submitted a report to the Minister of Justice following their inquiry, in which they recommended that the Government revoke the appellant's commission.

Held: The appeal should be dismissed.

(1) *Jurisdictional Questions*

Because the requirements of s. 40(1) of the *Supreme Court Act* ("*S.C.A.*") have been met, the appellant can appeal to this Court from a report of the inquiry panel of the Court of Appeal made pursuant to s. 95 *C.J.A.*, recommending to the government that he be removed. Specifically, the report of the Court of Appeal is a final or other judgment within the meaning of ss. 2(1) and 40(1) *S.C.A.* The expressions "judgment" and "final judgment" in s. 2(1) both contrast the concept of a decision with the concept of mere opinion or advice. The jurisdiction of this Court under that provision is therefore

et présidente du comité de sélection ayant recommandé la candidature de l'appelant apprend que celui-ci a eu des démêlés avec la justice. Elle informe le ministre de la Justice de la situation et indique que l'appelant a omis de révéler ces informations au comité. Le ministre dépose une plainte auprès du Conseil de la magistrature du Québec. Un comité d'enquête du Conseil conclut au bien-fondé de la plainte et recommande d'engager des procédures de destitution. Le Conseil recommande alors au ministre de la Justice d'engager des procédures de destitution à l'endroit de l'appelant en présentant une requête en ce sens à la Cour d'appel, conformément à l'art. 95 de la *Loi sur les tribunaux judiciaires* (« *L.T.J.* »).

Parallèlement, l'appelant conteste la procédure de destitution et présente en Cour supérieure une requête en révision judiciaire demandant de déclarer nuls et sans effet le rapport d'enquête du comité, la recommandation et l'ordonnance de suspension prononcées par le Conseil de la magistrature et demandant de déclarer irrecevable la requête présentée à la Cour d'appel. À la même occasion, il dépose une requête en jugement déclaratoire contestant la constitutionnalité de l'art. 95. Le ministre de la Justice présente à l'encontre de ces deux requêtes des requêtes en irrecevabilité alléguant que la Cour d'appel est compétente pour trancher ces questions dans le cadre de l'enquête dont elle est saisie en vertu de l'art. 95. La Cour supérieure rejette les requêtes en irrecevabilité. Le ministre en appelle des décisions. La Cour d'appel accueille les deux pourvois et déclare irrecevables les requêtes en révision judiciaire et en jugement déclaratoire présentées par l'appelant. En 1998, cinq juges de la Cour d'appel remettent un rapport fait après enquête au ministre de la Justice dans lequel ils recommandent au gouvernement de révoquer la commission de l'appelant.

Arrêt : Le pourvoi est rejeté.

(1) *Les questions de compétence*

Puisque les conditions prévues au par. 40(1) de la *Loi sur la Cour suprême* (« *L.C.S.* ») sont remplies, l'appelant peut interjeter appel devant notre Cour d'un rapport de la formation d'enquête de la Cour d'appel, fait en vertu de l'art. 95 *L.T.J.*, qui recommande au gouvernement sa destitution. En particulier, le rapport de la Cour d'appel constitue un jugement, définitif ou autre, au sens des par. 2(1) et 40(1) *L.C.S.* Les termes « jugement » et « jugement définitif » au par. 2(1) opposent tous deux la notion de décision à celle de la simple opinion ou consultation. La compétence de notre Cour en

connected to the fact that the subject matter of the appeal is in the nature of a decision. In these circumstances, it depends on the nature and effect of the jurisdiction exercised by the Court of Appeal in respect of judicial ethics when it conducts the proceeding set out in s. 95 *C.J.A.* A careful study of the law and its context and purpose leads to the conclusion that the report of the Court of Appeal is in the nature of a decision. Section 95 does not require that the Court of Appeal make a report of an inquiry, but a report made after inquiry. The report is a judicial report and, moreover, one made by the highest court in the province. Its purpose is not simply to assist the Minister in making a decision; rather, it is an essential condition of the proceeding that may lead to the removal of a provincially appointed judge. The aim of the report is legally to determine a situation, and the wording of s. 95 does not restrict the Court of Appeal to making recommendations. The fact that the report is judicial and in the nature of a decision is fundamental to the constitutionality of the proceeding as a whole. Having regard to the fact that the report of the Court of Appeal is substantially in the nature of a decision, this is sufficient to satisfy the definitions of "judgment" or "final judgment" in s. 40(1) *S.C.A.* and to enable this Court to review it.

The Superior Court did not have jurisdiction to consider the application for judicial review and motion for declaratory judgment made by the appellant. Under art. 31 of the *Code of Civil Procedure*, the Superior Court hears in first instance every suit not assigned to another court by a specific provision of law. Where a request is properly made to the Court of Appeal under s. 95 *C.J.A.*, it is precisely the intent of the legislature that it determine the matter to the exclusion of any other court. This interpretation is consistent with the legislature's intention of complying with the constitutional requirements regarding tenure of provincial court judges by assigning responsibility to the Court of Appeal, exclusively and in the first instance, for conducting an inquiry and making a report on the conduct of a judge. Any other conclusion would be inimical to the proper administration of justice, since it would encourage a multiplicity of proceedings before various tribunals. In the case at bar, because the Court of Appeal had before it the request made by the Minister under s. 95 *C.J.A.* before the appellant filed his application and motion in the Superior Court, the appellant's case had been properly referred to the Court of Appeal to the exclusion of any other court. The Superior Court therefore had no jurisdiction to act in the circumstances.

vertu de cette disposition est donc liée au caractère décisionnel de ce qui fait l'objet de l'appel. Dans le présent contexte, elle dépend de la nature et de la portée de la compétence exercée par la Cour d'appel en matière de déontologie judiciaire dans le cadre de la procédure prévue à l'art. 95 *L.T.J.* Une étude attentive de la loi, du cadre dans lequel elle s'inscrit et de la finalité qu'elle poursuit amène à la conclusion que le rapport de la Cour d'appel a un caractère décisionnel. L'article 95 n'exige pas que la Cour d'appel remette un rapport d'enquête, mais un rapport fait après enquête. Le rapport relève du domaine judiciaire, et de surcroît, du plus haut tribunal de la province. Il n'existe pas simplement pour assister le ministre dans sa prise de décision, mais constitue une condition essentielle de la procédure pouvant mener à la destitution d'un juge de nomination provinciale. Le rapport vise la détermination juridique d'une situation et le texte de l'art. 95 ne restreint pas la Cour d'appel à la formulation de recommandations. Le caractère décisionnel et judiciaire du rapport est un élément fondamental de la constitutionnalité de l'ensemble de la procédure. Vu le caractère décisionnel important du rapport de la Cour d'appel, cela suffit pour répondre aux définitions de « jugement » ou de « jugement définitif » prévues au par. 40(1) *L.C.S.* et pour permettre à notre Cour de siéger en révision.

La Cour supérieure n'avait pas compétence pour examiner les requêtes en révision judiciaire et en jugement déclaratoire présentées par l'appelant. En vertu de l'art. 31 du *Code de procédure civile*, la Cour supérieure connaît en première instance de toute demande qu'une disposition formelle de la loi n'a pas attribuée exclusivement à un autre tribunal. Or, lorsque la Cour d'appel est régulièrement saisie d'une requête en vertu de l'art. 95 *L.T.J.*, il est précisément de l'intention du législateur qu'elle le soit à l'exclusion de tout autre tribunal. Cette interprétation est conforme à la volonté du législateur de respecter les exigences constitutionnelles en matière d'inamovibilité des juges de cours provinciales en confiant à la Cour d'appel, exclusivement et en première instance, la responsabilité de faire enquête et d'émettre un rapport sur la conduite d'un juge. Conclure autrement irait à l'encontre d'une saine administration de la justice, puisque cela favoriserait la multiplication des recours devant différentes instances. En l'espèce, puisque la Cour d'appel a été saisie de la requête déposée par le ministre conformément à l'art. 95 *L.T.J.* avant que l'appelant ne dépose ses deux requêtes en Cour supérieure, la Cour d'appel était régulièrement saisie du dossier de l'appelant à l'exclusion de tout autre tribunal. La Cour supérieure était donc incompétente pour agir dans ces circonstances.

The Conseil de la magistrature had jurisdiction to review the appellant's conduct even though the ethical breach occurred before he was appointed. The Conseil had jurisdiction over the person who was the subject of the complaint and over the subject matter of the complaint. Whether or not the appellant's actions were prior to his appointment is not relevant under the *C.J.A.* In the interests of judicial independence, it is also important that discipline be dealt with in the first place by peers. The committee of inquiry of the Conseil is responsible for preserving the integrity of the whole of the judiciary. Accordingly, it must be able to examine the past conduct of a judge if, as in this case, it is relevant to the assessment of his candidacy, having regard to his capacity to carry out his judicial functions, and to determine, based on that, whether it may reasonably undermine public confidence in the incumbent of the office. In conclusion on this point, the process of selecting persons for appointment as judges is so closely related to the exercise of the judicial function that it cannot be dissociated from it.

Le Conseil de la magistrature avait compétence pour examiner la conduite de l'appelant même si le manquement déontologique est survenu avant sa nomination. Le Conseil avait compétence sur la personne visée par la plainte et sur l'objet de la plainte. Que les gestes de l'appelant soient antérieurs à sa nomination n'est pas un critère pertinent au sens de la *L.T.J.* Au nom de l'indépendance judiciaire, il importe aussi que la discipline relève au premier chef des pairs. Le comité d'enquête du Conseil a la responsabilité de veiller à l'intégrité de l'ensemble de la magistrature. En ce sens, il doit pouvoir examiner la conduite passée d'un juge si, comme en l'espèce, celle-ci est pertinente à l'appréciation de sa candidature eu égard à sa capacité d'exercer ses fonctions judiciaires et pour décider si, en conséquence, elle peut raisonnablement porter atteinte à la confiance du public envers le titulaire de la charge. Enfin, le processus de sélection des personnes aptes à être nommées juges est si intimement lié à l'exercice même de la fonction judiciaire qu'il ne saurait en être dissocié.

(2) *Constitutional Questions*

Section 95 *C.J.A.* is constitutional. The removal of a judge of a provincial court without an address of the legislature is not contrary to the principle of judicial independence embodied in the preamble to the *Constitution Act, 1867*. Regarding security of tenure, it does not afford greater protection to judges of the Provincial Court than s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* in criminal matters. The functions of the judge are essentially the same whether or not the judge is hearing criminal matters. Requiring that the removal of a provincial court judge follow the procedure of an address of the legislature, as provided by s. 99 of the *Constitution Act, 1867* for superior court judges, may indeed be an ideal, but that procedure is not necessary in order to comply with the Constitution. Furthermore, the jurisdiction of provincial legislatures over provincial courts derives expressly from s. 92(14) and (4) of the *Constitution Act, 1867*. In exercising their jurisdiction, and within the limitations of the constitutional requirements, provincial legislatures are authorized to establish separate rules for the functioning of the various judicial councils they establish. Lastly, although the government makes the final decision regarding removal, it "may remove a judge only upon a report of the Court of Appeal" (s. 95 *C.J.A.*). The use of that wording indicates a real intention on the part of the legislature that the Executive be bound by a finding of the Court of Appeal exonerating a judge. Because the Executive is bound by a finding exonerating a judge, the judges of

(2) *Les questions constitutionnelles*

L'article 95 *L.T.J.* est constitutionnel. La destitution d'un juge d'une cour provinciale sans adresse parlementaire n'est pas contraire au principe de l'indépendance judiciaire enchâssé dans le préambule de la *Loi constitutionnelle de 1867*. En matière d'inamovibilité dans un contexte autre que pénal, le préambule n'offre pas une protection supérieure aux juges de la Cour provinciale que l'al. 11*d*) de la *Charte canadienne des droits et libertés* en matière pénale. Les fonctions du juge sont essentiellement les mêmes qu'il siège en matière pénale ou non. L'assujettissement de la destitution d'un juge d'une cour provinciale à la procédure d'une adresse parlementaire, comme le prévoit l'art. 99 de la *Loi constitutionnelle de 1867* pour les juges des cours supérieures, peut certes constituer un idéal, mais cette procédure n'est pas nécessaire pour se conformer à la Constitution. Par ailleurs, la compétence des législatures provinciales sur les cours provinciales découle expressément des par. 92(14) et (4) de la *Loi constitutionnelle de 1867*. Dans l'exercice de leurs compétences et dans les limites des exigences constitutionnelles, les législatures provinciales sont autorisées à établir des règles de fonctionnement distinctes pour les différents conseils de la magistrature qu'elles mettent sur pied. Enfin, bien que le gouvernement soit le titulaire de la décision finale en matière de destitution, il « ne peut démettre un juge que sur un rapport de la Cour d'appel » (art. 95 *L.T.J.*). L'emploi d'une telle formulation indique une volonté réelle du législateur que le pouvoir exécutif soit lié par

the Provincial Court are secure against any discretionary interference by the Executive. Section 95 is consistent with the requirements of judicial independence.

une conclusion d'exonération prononcée par la Cour d'appel. Puisque le pouvoir exécutif est lié par une conclusion d'exonération, les juges de la Cour provinciale sont à l'abri de toute intervention discrétionnaire de la part de l'exécutif. L'article 95 est conforme aux exigences de l'indépendance judiciaire.

(3) *Substantive Issues*

The Conseil de la magistrature and its committee of inquiry are subject to the rules of procedural fairness. Essentially, the duty to act fairly has two components: the right to be heard and the right to an impartial hearing. The nature and extent of the duty may vary with the specific context and the various fact situations dealt with by the administrative body, as well as the nature of the disputes it must resolve. In this case, the right to be heard was respected. First, the appellant had sufficient notice. The committee of inquiry of the Conseil de la magistrature did not hold a general inquiry; it examined a specific complaint made against a particular judge. That judge was therefore a party to the proceedings from the outset and was informed of the allegations made against him. In this case, the appellant received a copy of the complaint in accordance with s. 266 *C.J.A.* and the respondents filed a further pleading in which they detailed the subject matter of the complaint. In the circumstances, the appellant was well aware of all of the findings of misconduct that might be made against him in the final report. Second, having regard to s. 275 *C.J.A.*, which authorizes the committee of inquiry of the Conseil de la magistrature to make rules of procedure or practice that are necessary for the carrying out of its duties, the committee was fully justified, out of concern for efficiency, in refusing to hold a separate hearing on the question of sanctions. The committee made a genuine effort to allow the appellant to make representations by twice giving him an opportunity to be heard on the question of the various applicable sanctions.

(3) *Les questions de fond*

Le Conseil de la magistrature et son comité d'enquête sont assujettis aux règles de l'équité procédurale. L'obligation d'agir équitablement comporte essentiellement deux volets, soit le droit d'être entendu et le droit à une audition impartiale. La nature et la portée de cette obligation peuvent varier en fonction du contexte particulier et des différentes réalités auxquelles l'organisme administratif est confronté, ainsi que de la nature des litiges qu'il est appelé à trancher. En l'espèce, le droit d'être entendu a été respecté. Premièrement, l'appelant a bénéficié d'un préavis suffisant. Le comité d'enquête du Conseil de la magistrature ne tient pas une enquête en général, mais il étudie une plainte précise portée à l'encontre d'un juge en particulier. Ce juge est donc partie prenante dès le début des procédures et est informé de ce qui lui est reproché. Dans la présente affaire, l'appelant a reçu une copie de la plainte conformément à l'art. 266 *L.T.J.* et les intimées ont déposé une procédure supplémentaire qui en précisait l'objet. Dans ce contexte, l'appelant connaissait très bien l'ensemble des conclusions d'inconduite susceptibles d'être tirées contre lui dans le rapport final. Deuxièmement, vu l'art. 275 *L.T.J.*, qui permet au comité d'enquête du Conseil de la magistrature d'adopter les règles de procédure ou de pratique qu'il juge convenir aux circonstances de son enquête, le comité était pleinement justifié, dans un souci d'efficacité, de refuser la tenue d'une audience supplémentaire et distincte pour les sanctions. Le comité a fait un effort réel pour permettre à l'appelant de présenter son point de vue en lui fournissant, et ce, à deux reprises, l'occasion de se faire entendre sur les différentes sanctions applicables.

The right to an impartial hearing was also respected. Although the Conseil de la magistrature does not exercise its decision-making authority itself since it is bound by the conclusions drawn by the committee, decision-making structures of the Conseil and its committee do not violate the maxim *delegatus non potest delegare*. The terms used in the *C.J.A.* are mandatory and reflect a clear intent on the part of the legislature to authorize delegation of the powers of inquiry and decision regarding the justification for a complaint to a committee consisting of five persons chosen from among the members

Le droit à une audition impartiale a également été respecté. Bien que le Conseil de la magistrature n'exerce pas lui-même son pouvoir décisionnel puisqu'il est lié par les conclusions tirées par le comité, la structure décisionnelle du Conseil et de son comité ne viole pas la maxime *delegatus non potest delegare*. Les termes utilisés par la *L.T.J.* sont impératifs et reflètent une intention claire du législateur d'autoriser la délégation des pouvoirs d'enquête et de décision sur le bien-fondé d'une plainte à un comité formé de cinq personnes choisies parmi les membres du Conseil (art. 268, 278 et 279).

of the Conseil (ss. 268, 278 and 279). Even though 4 of the 15 members of the Conseil de la magistrature are not judges, the presence of persons who are not members of the judiciary at a preliminary stage of the disciplinary process does not violate the collective or institutional dimension of the structural principle of judicial independence in that only a body composed of judges may recommend the removal of a judge. The report and recommendations made by a committee of inquiry of the Conseil are merely the first stage of the process put in place by the *C.J.A.* The final recommendation to remove a provincial court judge is within the exclusive jurisdiction of the highest court in the province. In these circumstances, the composition of the committee of inquiry of the Conseil de la magistrature complies with the structural principle of judicial independence and the rules of procedural fairness. Lastly, the functioning of the committee of inquiry does not raise a reasonable apprehension of institutional bias. Counsel for the committee does not play the role of judge and party. The committee's purpose is to gather the facts and evidence in order, ultimately, to make a recommendation to the Conseil de la magistrature. When he examined and cross-examined witnesses, counsel was not acting as a prosecutor, but rather was providing the committee with assistance in carrying out the mandate assigned to it by the statute. Where there are no judge or parties, counsel for the committee cannot be in a conflict of interest. Because the committee's recommendation is not final with respect to the outcome of the disciplinary process, the role played by the independent counsel neither violates procedural fairness nor raises a reasonable apprehension of bias in a large number of cases in the mind of an informed person viewing the matter realistically and practically and having thought the matter through.

Même si 4 des 15 membres du Conseil de la magistrature ne sont pas des juges, la présence de personnes non membres de la magistrature au stade préliminaire du processus disciplinaire ne porte pas atteinte à la dimension collective ou institutionnelle du principe structurel de l'indépendance judiciaire en ce que seul un organisme composé de juges peut recommander la révocation d'un juge. Le rapport ainsi que les recommandations formulées par le comité d'enquête du Conseil ne constituent que la première étape du processus mis en place par la *L.T.J.* La recommandation définitive de destitution d'un juge d'une cour provinciale est exclusivement réservée au plus haut tribunal de la province. Dans ce contexte, la composition du comité d'enquête du Conseil de la magistrature est conforme au principe structurel de l'indépendance judiciaire et aux règles de l'équité procédurale. Enfin, le fonctionnement du comité d'enquête ne soulève pas une crainte raisonnable de partialité institutionnelle. Le procureur du comité ne joue pas le rôle de juge et partie. Le but recherché par le comité est de recueillir les faits et les éléments de preuve afin de formuler ultimement une recommandation au Conseil de la magistrature. En interrogeant et contre-interrogeant les témoins, le procureur n'agit pas comme un poursuivant, mais fournit une aide au comité dans l'accomplissement du mandat qui lui est confié par la loi. En l'absence de juge et de parties, le procureur du comité ne peut être en conflit d'intérêts. Puisque la recommandation du comité n'est pas définitive quant à l'issue du processus disciplinaire, le rôle joué par le procureur indépendant ne saurait porter atteinte à l'équité procédurale, ni soulever une crainte raisonnable de partialité dans un grand nombre de cas chez une personne bien renseignée qui étudierait la question en profondeur de façon réaliste et pratique.

The pardon granted to the appellant under the *Criminal Records Act* did not mean that he could deny his criminal record and answer "no" to the question regarding his "trouble with the law", which the selection committee asks people qualified for appointment as judges. An objective analysis of the Act does not support the argument that the pardon retroactively wipes out his conviction. While a pardon does not make the past go away, it expunges consequences for the future. The integrity of the pardoned person is restored and he or she need not suffer the effects associated with the conviction in an arbitrary or discriminatory manner. Even if the opinion subjectively formed by the appellant had to be considered, the Court of Appeal held that the appellant's record contained sufficient evidence tending to

Le pardon obtenu par l'appelant conformément à la *Loi sur le casier judiciaire* ne l'autorisait pas à nier son dossier judiciaire et à répondre négativement à la question portant sur ses « démêlés avec la justice » posée par le comité de sélection des personnes aptes à être nommées juges. Une analyse objective de cette loi ne permet pas de soutenir que le pardon anéantit rétroactivement sa condamnation. Sans faire disparaître le passé, le pardon en efface les conséquences pour l'avenir. L'intégrité de la personne réhabilitée est rétablie et elle ne doit pas subir les effets liés à sa condamnation de façon arbitraire ou discriminatoire. Même si l'on devait considérer l'opinion que s'est subjectivement formée l'appelant, la Cour d'appel a jugé que le dossier de l'appelant contenait suffisamment d'éléments de preuve tendant à démontrer

establish that he was aware of the meaning and effect of the Act and that he deliberately subjectively ignored them.

The decision by the Minister of Justice to lodge an ethics complaint against the appellant was based primarily, perhaps exclusively, on the appellant's failure to disclose to the members of the selection committee that he had been in trouble with the law. Even though that decision was based in part on the existence of a criminal record, it did not infringe the appellant's equality rights under s. 15(1) of the *Canadian Charter*. Although there was differential treatment between the appellant and others who did not have a criminal history, and assuming, but without deciding the issue, that a criminal record is an analogous ground of discrimination for the purposes of s. 15(1), the Minister's decision cannot be regarded as discriminatory when we consider the relevant contextual factors. The Minister took into account the appellant's situation as a whole, as well as the situation of people who come before the court and are entitled to the highest degree of integrity, impartiality and independence on the part of the members of the judiciary in whom they place their confidence.

The appellant could have been asked the question about being in trouble with the law by the members of the selection committee without infringing the provisions of the *Quebec Charter*. Section 18.1 provides that no one may, in an employment interview, require a person to give information regarding any ground mentioned in s. 10 unless the information is useful for the application of s. 20. It is uncertain whether judicial office is included in the expression "employment" in s. 18.1 and a criminal record, even one for which a pardon has been granted, is not included in the grounds listed in s. 10. Even if the information related to one of the grounds listed in s. 10, the question would still be permitted in the selection process for persons qualified for appointment as judges since the distinction is based on the aptitudes or qualifications required for judicial office, which is deemed non-discriminatory by s. 20 of the *Quebec Charter*. The existence of a police file containing information relating to the appellant's criminal record is a supplementary source of information, but it cannot replace the selection committee and did not justify the appellant in not answering the question asked by the committee.

qu'il connaissait le sens et la portée de la loi et qu'il les a subjectivement ignorés.

La décision du ministre de la Justice de déposer une plainte déontologique contre l'appelant repose principalement, voire exclusivement, sur son omission de révéler l'existence de ses démêlés avec la justice aux membres du comité de sélection. Même si cette décision était fondée en partie sur la présence d'antécédents judiciaires, elle ne porterait pas atteinte au droit à l'égalité de l'appelant garanti par le par. 15(1) de la *Charte canadienne*. Bien qu'il ait subi une différence de traitement par rapport à d'autres personnes qui n'ont pas de passé pénal, et en tenant pour acquis, sans toutefois en décider, que les antécédents judiciaires constituent un motif de discrimination analogue au sens du par. 15(1), la décision du ministre ne peut être considérée discriminatoire à la lumière des facteurs contextuels pertinents. Le ministre a pris en considération l'ensemble de la situation de l'appelant ainsi que celle des justiciables qui sont en droit d'obtenir la plus grande intégrité, impartialité et indépendance de la part des membres de la magistrature envers lesquels ils accordent leur confiance.

La question des démêlés avec la justice pouvait être posée à l'appelant par les membres du comité de sélection et ce, sans porter atteinte aux dispositions de la *Charte québécoise*. L'article 18.1 prévoit que nul ne peut, lors d'une entrevue relative à un emploi, requérir d'une personne des renseignements sur les motifs visés dans l'art. 10, sauf si ces renseignements sont utiles à l'application de l'art. 20. Il n'est pas certain que la fonction judiciaire soit visée par le terme « emploi » prévu à l'art. 18.1 et les antécédents judiciaires, même pardonnés, ne font pas partie des motifs énumérés à l'art. 10. Même si l'information portait sur l'un des motifs prévus à l'art. 10, la question serait toujours permise dans le cadre d'un processus de sélection des personnes aptes à être nommées juges puisqu'il s'agit d'une distinction fondée sur les aptitudes ou les qualités requises par la fonction judiciaire laquelle est réputée non discriminatoire en vertu de l'art. 20 de la *Charte québécoise*. L'existence d'un dossier des forces policières contenant des renseignements relatifs aux antécédents judiciaires de l'appelant constitue un moyen d'information complémentaire, mais il ne saurait remplacer le comité de sélection et ne permettait pas à l'appelant de ne pas répondre à la question posée par le comité.

Section 18.2 of the *Quebec Charter*, which provides that no one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence, cannot prevent the appellant from being removed. A careful examination of the conditions that must be met if that section is to apply clearly indicates that this provision does not apply to members of the judiciary. Judicial office is not an employment within the meaning of s. 18.2, by reason of the history of the judiciary and the nature, characteristics and requirements of the office. As well, the recommendations made by the Conseil de la magistrature and the Court of Appeal were not made owing to the mere fact that the appellant had been convicted of a criminal offence; rather, they were made solely because he had failed to disclose his criminal record to the selection committee. Lastly, the legislature, which was concerned about preserving the independence, impartiality and integrity of the judiciary, cannot have intended to deprive the government of its discretion to refuse to vest judicial authority in candidates whose past would be likely to undermine public confidence in its justice system.

Revocation of the appellant's commission is the appropriate sanction. The public's confidence in its justice system, which every judge must strive to preserve, is at the very heart of this case. The Court of Appeal made a thorough study and a balanced assessment of the appellant's situation and focused its decision on upholding the integrity of the judicial office. In the circumstances, and since it is the judicial forum appointed by the legislature to make determinations concerning the conduct of a judge, and a recommendation for removal in this case would not amount to arbitrary interference by the Executive in the exercise of the judicial function, the sanction that the Court of Appeal chose to impose should not be reviewed. The appellant's failure to be candid and to disclose relevant information when he was a candidate for the office of judge sufficiently undermined public confidence that he was incapable of performing the duties of his office.

Cases Cited

Applied: *Valente v. The Queen*, [1985] 2 S.C.R. 673; **distinguished:** *Thomson v. Canada (Deputy Minister of*

Quant à l'art. 18.2 de la *Charte québécoise* qui prévoit que nul ne peut congédier, refuser d'embaucher ou autrement pénaliser dans le cadre de son emploi une personne du seul fait qu'elle a été déclarée coupable d'une infraction pénale ou criminelle, si cette infraction n'a aucun lien avec l'emploi ou si cette personne en a obtenu le pardon, il ne peut empêcher la révocation de l'appelant. Un examen attentif des conditions d'application de cet article indique clairement que cette disposition est inapplicable aux membres de la magistrature. La fonction de juge ne constitue pas un emploi au sens de l'art. 18.2 et ce, en raison de l'histoire de la magistrature, la nature, les caractéristiques et les exigences de la fonction. De plus, les recommandations formulées par le Conseil de la magistrature et la Cour d'appel ne l'ont pas été du seul fait que l'appelant a été déclaré coupable d'une infraction criminelle, mais exclusivement parce que celui-ci a omis de révéler ses antécédents judiciaires au comité de sélection. Enfin, le législateur, ayant le souci de préserver l'indépendance, l'impartialité et l'intégrité des membres de la magistrature, ne peut avoir voulu priver le gouvernement du pouvoir discrétionnaire de refuser de confier des pouvoirs judiciaires à certains candidats dont le passé serait susceptible d'ébranler la confiance que porte le public dans son système de justice.

La révocation de la commission de l'appelant est la sanction appropriée. La confiance que porte le public envers son système de justice et que chaque juge doit s'efforcer de préserver est au cœur du présent litige. La Cour d'appel a fait une étude approfondie et une appréciation nuancée de la situation de l'appelant et elle a centré sa décision sur le maintien de l'intégrité de la fonction judiciaire. Dans ces circonstances, et eu égard aux faits qu'elle constitue le forum judiciaire désigné par le législateur pour se prononcer sur la conduite d'un juge et qu'une recommandation de destitution ne saurait équivaloir à une intervention arbitraire de l'exécutif dans l'exercice de la fonction judiciaire, il n'y a pas lieu de revenir sur le choix de la sanction imposée par la Cour d'appel. Le manque de transparence et l'omission de l'appelant à révéler des informations pertinentes alors qu'il était candidat au poste de juge a suffisamment ébranlé la confiance de la population pour le rendre incapable de s'acquitter des fonctions de sa charge.

Jurisprudence

Arrêt appliqué : *Valente c. La Reine*, [1985] 2 R.C.S. 673; **distinction d'avec les arrêts :** *Thomson c. Canada*

Agriculture), [1992] 1 S.C.R. 385; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. Kelly*, [2001] 1 S.C.R. 741, 2001 SCC 25; *Thomas v. The Queen*, [1980] A.C. 125; **considered:** *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *R. v. Généreux*, [1992] 1 S.C.R. 259; **referred to:** *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536; *Lady Davis v. Royal Trust Co.*, [1932] S.C.R. 203; *Wartime Housing Ltd. v. Madden*, [1945] S.C.R. 169; *R. v. W. (G.)*, [1999] 3 S.C.R. 597; *Luitjens v. Canada (Secretary of State)* (1992), 9 C.R.R. (2d) 149; *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Maurice v. Priel*, [1989] 1 S.C.R. 1023; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879; *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Peralta v. Ontario*, [1988] 2 S.C.R. 1045, aff'g (1985), 49 O.R. (2d) 705; *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy upon Deportation Proceedings*, [1933] S.C.R. 269; *Reference re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753; *Dubois v. The Queen*, [1985] 2 S.C.R. 350; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Commission des droits de la personne du Québec v. Cie Price Ltée*, J.E. 81-866; *Commission des droits de la personne du Québec v. Ville de Beauport*, [1981] C.P. 292.

(Sous-ministre de l'Agriculture), [1992] 1 R.C.S. 385; *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391; *R. c. Kelly*, [2001] 1 R.C.S. 741, 2001 CSC 25; *Thomas c. The Queen*, [1980] A.C. 125; **arrêts examinés :** *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3; *Ruffo c. Conseil de la magistrature*, [1995] 4 R.C.S. 267; *Beauregard c. Canada*, [1986] 2 R.C.S. 56; *R. c. Généreux*, [1992] 1 R.C.S. 259; **arrêts mentionnés :** *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *A. (L.L.) c. B. (A.)*, [1995] 4 R.C.S. 536; *Lady Davis c. Royal Trust Co.*, [1932] R.C.S. 203; *Wartime Housing Ltd. c. Madden*, [1945] R.C.S. 169; *R. c. W. (G.)*, [1999] 3 R.C.S. 597; *Luitjens c. Canada (Secrétaire d'État)* (1992), 9 C.R.R. (2d) 149; *St. Anne Nackawic Pulp & Paper Co. c. Syndicat canadien des travailleurs du papier, section locale 219*, [1986] 1 R.C.S. 704; *Weber c. Ontario Hydro*, [1995] 2 R.C.S. 929; *Maurice c. Priel*, [1989] 1 R.C.S. 1023; *R. c. Lippé*, [1991] 2 R.C.S. 114; *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311; *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *Syndicat des employés de production du Québec et de l'Acadie c. Canada (Commission canadienne des droits de la personne)*, [1989] 2 R.C.S. 879; *2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 R.C.S. 919; *Canada (Procureur général) c. Canada (Commission d'enquête sur le système d'approvisionnement en sang au Canada)*, [1997] 3 R.C.S. 440; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Peralta c. Ontario*, [1988] 2 R.C.S. 1045, conf. (1985), 49 O.R. (2d) 705; *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy upon Deportation Proceedings*, [1933] R.C.S. 269; *Renvoi: Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753; *Dubois c. La Reine*, [1985] 2 R.C.S. 350; *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497; *Commission des droits de la personne du Québec c. Cie Price Ltée*, J.E. 81-866; *Commission des droits de la personne du Québec c. Ville de Beauport*, [1981] C.P. 292.

Statutes and Regulations Cited

Act of Settlement, 12 & 13 Will. 3, c. 2.
An Act to amend the Courts of Justice Act, S.Q. 1941, c. 50, s. 2.
An Act to amend the Criminal Records Act and to amend another Act in consequence, S.C. 2000, c. 1, s. 4.

Lois et règlements cités

Act of Settlement, 12 & 13 Will. 3, ch. 2.
Charte canadienne des droits et libertés, art. 7, 11, 15.
Charte des droits et libertés de la personne, L.R.Q., ch. C-12, art. 4, 5, 10 [mod. 1982, ch. 61, art. 3], 18.1 [*idem*, art. 5], 18.2 [*idem*; mod. 1990, ch. 4, art. 133],

Canadian Charter of Rights and Freedoms, ss. 7, 11,15.
Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 4, 5, 10 [am. 1982, c. 61, s. 3], 18.1 [*idem*, s. 5], 18.2 [*idem*; am. 1990, c. 4, s. 133], 20 [am. 1982, c. 61, s. 6; am. 1996, c. 10, s. 1].
Code of Civil Procedure, R.S.Q., c. C-25, ss. 25, 31, 33 [am. 1992, c. 57, s. 179], 46.
Constitution Act, 1867, preamble, ss. 92(4), (14), 96 to 100, 99.
Courts of Justice Act, R.S.O. 1990, c. C.43, s. 51.8.
Courts of Justice Act, R.S.Q., c. T-16, ss. 9 [am. 1988, c. 21, s. 12], 10, 86, 95 [am. 1988, c. 21, s. 30], 96, 248, 256 [am. 1988, c. 21, s. 56], 260, 262 [am. 1980, c. 11, s. 99; am. 1988, c. 21, s. 57; am. 1988, c. 74, s. 8; am. 1989, c. 52, s. 138], 263 [am. 1988, c. 21, s. 58], 266, 268 [*idem*, s. 60; am. 1990, c. 44, s. 24], 269, 272, 275, 277, 278, 279 [am. 1980, c. 11, s. 101; am. 1988, c. 21, s. 62; c. 74, s. 9], 281.
Criminal Code, R.S.C. 1985, c. C-46, ss. 690, 748, 748.1, 749.
Criminal Records Act, R.S.C. 1970, c. 12 (1st Supp.), s. 5.
Criminal Records Act, R.S.C. 1985, c. C-47, ss. 5, 6, 7, 8.
Inquiries Act, R.S.C. 1985, c. I-11, s. 6.
Interpretation Act, R.S.Q., c. I-16, s. 57.
Judges of the Provincial Court Act, R.S.N.S. 1989, c. 238, s. 6(4).
Judicature Act, R.S.A. 1980, c. J-1, ss. 32.6(2)(*h*), 32.7(2), 32.91.
Judicial Code of Ethics, R.R.Q. 1981, c. T-16, r. 4.1, ss. 2, 4, 5, 10.
Professional Code, R.S.Q., c. C-26, ss. 45 [am. 1994, c. 40, s. 40], 116 [*idem*, s. 103].
Provincial Court Act, R.S.B.C. 1996, c. 379, ss. 28(1), 29.
Provincial Court Act, R.S.M. 1987, c. C275, ss. 39.1(1)(*h*), 39.4.
Provincial Court Act, R.S.N.B. 1973, c. P-21, ss. 6.11(4)(*d*), 6.11(8).
Provincial Court Act, R.S.P.E.I. 1988, c. P-25, s. 10(7).
Provincial Court Act, 1991, S.N. 1991, c. 15, ss. 22, 23.
Provincial Court Act, 1998, S.S. 1998, c. P-30.11, ss. 62(2)(*a*), 62(7).
Public Order Regulations, 1970, SOR/70-444, ss. 3, 4(*c*), 5.
Regulation respecting the procedure for the selection of persons apt for appointment as judges, R.R.Q. 1981, c. T-16, r. 5, ss. 7, 18.
Supreme Court Act, R.S.C. 1985, c. S-26, ss. 2(1) "judgment", "final judgment", 40(1) [am. 1990, c. 8, s. 37], 53.
Territorial Court Act, R.S.N.W.T. 1988, c. T-2, s. 31.8. 20 [mod. 1982, ch. 61, art. 6; mod. 1996, ch. 10, art. 1].
Code criminel, L.R.C. 1985, ch. C-46, art. 690, 748, 748.1, 749.
Code de déontologie de la magistrature, R.R.Q. 1981, ch. T-16, r. 4.1, art. 2, 4, 5, 10.
Code de procédure civile, L.R.Q., ch. C-25, art. 25, 31, 33 [mod. 1992, ch. 57, art. 179], 46 [*idem*, art. 422].
Code des professions, L.R.Q., ch. C-26, art. 45 [mod. 1994, ch. 40, art. 40], 116 [*idem*, art. 103].
Judges of the Provincial Court Act, R.S.N.S. 1989, ch. 238, art. 6(4).
Judicature Act, R.S.A. 1980, ch. J-1, art. 32.6(2)*h*), 32.7(2), 32.91.
Loi constitutionnelle de 1867, préambule, art. 92(4), (14), 96 à 100, 99.
Loi d'interprétation, L.R.Q., ch. I-16, art. 57.
Loi modifiant la Loi des tribunaux judiciaires, S.Q. 1941, ch. 50, art. 2.
Loi modifiant la Loi sur le casier judiciaire et une autre loi en conséquence, L.C. 2000, ch. 1, art. 4.
Loi sur la Cour provinciale, L.R.M. 1987, ch. C275, art. 39.1(1)*h*), 39.4.
Loi sur la Cour provinciale, L.R.N.-B. 1973, ch. P-21, art. 6.11(4)*d*), 6.11(8).
Loi sur la Cour suprême, L.R.C. 1985, ch. S-26, art. 2(1) « jugement », « jugement définitif », 40(1) [mod. 1990, ch. 8, art. 37], 53.
Loi sur la Cour territoriale, L.R.T.N.-O. 1988, ch. T-2, art. 31.8.
Loi sur la Cour territoriale, L.Y. 1998, ch. 26, art. 49(3)*d*), 50(2).
Loi sur le casier judiciaire, L.R.C. 1985, ch. C-47, art. 5, 6, 7, 8.
Loi sur le casier judiciaire, S.R.C. 1970, ch. 12 (1er suppl.), art. 5.
Loi sur les enquêtes, L.R.C. 1985, ch. I-11, art. 6.
Loi sur les jeunes contrevenants, L.R.C. 1985, ch. Y-1, art. 36(1).
Loi sur les mesures de guerre, S.R.C. 1952, ch. 288.
Loi sur les tribunaux judiciaires, L.R.O. 1990, ch. C.43, art. 51.8.
Loi sur les tribunaux judiciaires, L.R.Q., ch. T-16 art. 9 [mod. 1988, ch. 21, art. 12; mod. 1995, ch. 42, art. 3, 46], 10 [mod. 1995, ch. 42, art. 4], 86, 95 [mod. 1988, ch. 21, art. 30], 96, 248, 256 [mod. 1988, ch. 21, art. 56], 260, 262 [mod. 1980, ch. 11, art. 99; mod. 1988, ch. 21, art. 57; mod. 1988, ch. 74, art. 8; mod. 1989, ch. 52, art. 138], 263 [mod. 1988, ch. 21, art. 58], 266, 268 [*idem*, art. 60; mod. 1990, ch. 44, art. 24], 269, 272, 275, 277, 278, 279 [mod. 1980, ch. 11, art. 101; mod. 1988, ch. 21, art. 62; ch. 74, art. 9], 281.

Territorial Court Act, S.Y. 1998, c. 26, ss. 49(3)(*d*), 50(2).
War Measures Act, R.S.C. 1952, c. 288.
Young Offenders Act, R.S.C. 1985, c. Y-1, s. 36(1).

Provincial Court Act, R.S.B.C. 1996, ch. 379, art. 28(1), 29.
Provincial Court Act, R.S.P.E.I. 1988, ch. P-25, art. 10(7).
Provincial Court Act, 1991, S.N. 1991, ch. 15, art. 22, 23.
Provincial Court Act, 1998, S.S. 1998, ch. P-30.11, art. 62(2)*a*), 62(7).
Règlement de 1970 concernant l'ordre public, DORS/70-444, art. 3, 4*c*), 5.
Règlement sur la procédure de sélection des personnes aptes à être nommées juges, R.R.Q. 1981, ch. T-16, r. 5, art. 7, 18.

Authors Cited

Beetz, Jean. Présentation du premier conférencier de la Conférence du 10e anniversaire de l'Institut canadien d'administration de la justice, propos recueillis dans *Mélanges Jean Beetz*. Montréal: Thémis, 1995.

Brunelle, Christian. "La Charte québécoise et les sanctions de l'employeur contre les auteurs d'actes criminels œuvrant en milieu éducatif" (1995), 29 *R.J.T.* 313.

Canada. *Proposal for Reform of the Criminal Records Act* — Explanatory document by the Solicitor General of Canada, Recommendation No. 7. Ottawa: Solicitor General of Canada, July 20, 1991.

Canadian Judicial Council. *Ethical Principles for Judges*. Ottawa: Canadian Judicial Council, 1998.

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 2000.

Dumont, Hélène. "Le casier judiciaire: criminel un jour, criminel toujours?", in Les Journées Maximilien-Caron 1995, *Le respect de la vie privée dans l'entreprise: de l'affirmation à l'exercice d'un droit*. Montréal: Université de Montréal, 1996.

Dumont, Hélène. *Pénologie — Le droit canadien relatif aux peines et aux sentences*. Montréal: Thémis, 1993.

Friedland, Martin L. *A Place Apart: Judicial Independence and Accountability in Canada*. Ottawa: Report prepared for the Canadian Judicial Council, 1995.

Gall, Gerald L. *The Canadian Legal System*. Toronto: Carswell, 1977.

Glenn, H. Patrick. "Indépendance et déontologie judiciaires" (1995), 55 *R. du B.* 295.

Morissette, Yves-Marie. "Figure actuelle du juge dans la cité" (1999), 30 *R.D.U.S.* 1.

Nadin-Davis, R. Paul. "Canada's *Criminal Records Act*: Notes on How Not to Expunge Criminal Convictions" (1980-81), 45 *Sask. L. Rev.* 221.

Doctrine citée

Beetz, Jean. Présentation du premier conférencier de la Conférence du 10e anniversaire de l'Institut canadien d'administration de la justice, propos recueillis dans *Mélanges Jean Beetz*. Montréal : Thémis, 1995.

Brunelle, Christian. « La Charte québécoise et les sanctions de l'employeur contre les auteurs d'actes criminels œuvrant en milieu éducatif » (1995), 29 *R.J.T.* 313.

Canada. *Proposition de réforme de la Loi sur le casier judiciaire* — Document explicatif du Solliciteur général du Canada, Recommandation no 7. Ottawa : Solliciteur général du Canada, 20 juillet 1991.

Conseil canadien de la magistrature. *Principes de déontologie judiciaire*. Ottawa : Conseil canadien de la magistrature, 1998.

Côté, Pierre-André. *Interprétation des lois*, 3e éd. Montréal : Thémis, 1999.

Dumont, Hélène. « Le casier judiciaire : criminel un jour, criminel toujours? », dans Les Journées Maximilien-Caron 1995, *Le respect de la vie privée dans l'entreprise : de l'affirmation à l'exercice d'un droit*. Montréal : Université de Montréal, 1996.

Dumont, Hélène. *Pénologie — Le droit canadien relatif aux peines et aux sentences*. Montréal : Thémis, 1993.

Friedland, Martin L. *Une place à part : l'indépendance et la responsabilité de la magistrature au Canada*. Ottawa : Rapport préparé pour le Conseil canadien de la magistrature, 1995.

Gall, Gerald L. *The Canadian Legal System*. Toronto : Carswell, 1977.

Glenn, H. Patrick. « Indépendance et déontologie judiciaires » (1995), 55 *R. du B.* 295.

Morissette, Yves-Marie. « Figure actuelle du juge dans la cité » (1999), 30 *R.D.U.S.* 1.

Ouellette, Yves. *Les tribunaux administratifs au Canada: Procédure et preuve*. Montréal: Thémis, 1997.

Oxford English Dictionary, 2nd ed., vol. XIX. Oxford: Clarendon Press, 1989.

Quebec. Commission des droits de la personne et des droits de la jeunesse. *Lignes directrices pour l'application de l'article 18.2*, 12 mai 1988.

Russell, Peter H. *The Judiciary in Canada: The Third Branch of Government.* Toronto: McGraw-Hill Ryerson, 1987.

Singleton, Thomas J. "La discrimination fondée sur le motif des antécédents judiciaires et les instruments anti-discriminatoires canadiens" (1993), 72 *Can. Bar Rev*. 456.

Nadin-Davis, R. Paul. « Canada's *Criminal Records Act*: Notes on How Not to Expunge Criminal Convictions » (1980-81), 45 *Sask. L. Rev.* 221.

Ouellette, Yves. *Les tribunaux administratifs au Canada : Procédure et preuve*. Montréal : Thémis, 1997.

Oxford English Dictionary, 2nd ed., vol. XIX. Oxford : Clarendon Press, 1989.

Québec. Commission des droits de la personne et des droits de la jeunesse. *Lignes directrices pour l'application de l'article 18.2*, 12 mai 1988.

Russell, Peter H. *The Judiciary in Canada: The Third Branch of Government.* Toronto : McGraw-Hill Ryerson, 1987.

Singleton, Thomas J. « La discrimination fondée sur le motif des antécédents judiciaires et les instruments anti-discriminatoires canadiens » (1993), 72 *R. du B. can*. 456.

APPEAL from a report of the inquiry panel of the Quebec Court of Appeal, [1998] R.J.Q. 2956, 21 C.R. (5th) 296, [1998] Q.J. No. 3105 (QL), recommending the removal of a judge of the Court of Québec, and from a decision of the Quebec Court of Appeal, [1998] R.J.Q. 1392, [1998] Q.J. No. 1666 (QL), setting aside judgments of the Superior Court, [1998] Q.J. No. 180 (QL), J.E. 98-433, dismissing motions to dismiss applications for judicial review and for declaratory judgment. Appeal dismissed.

POURVOI contre un rapport de la formation d'enquête de la Cour d'appel du Québec, [1998] R.J.Q. 2956, 21 C.R. (5th) 296, [1998] A.Q. nº 3105 (QL), recommandant la révocation de la commission d'un juge de la Cour du Québec, et contre un arrêt de la Cour d'appel du Québec, [1998] R.J.Q. 1392, [1998] A.Q. nº 1666 (QL), infirmant les jugements de la Cour supérieure, [1998] A.Q. nº 180 (QL), J.E. 98-433, qui ont rejeté des requêtes en irrecevabilité à l'encontre de requêtes en révision judiciaire et en jugement déclaratoire. Pourvoi rejeté.

Jean-Claude Hébert, *Sophie Bourque* and *Christian Brunelle*, for the appellant.

Jean-Claude Hébert, *Sophie Bourque* et *Christian Brunelle*, pour l'appelant.

Benoît Belleau, *Robert Mongeon* and *Monique Rousseau*, for the respondents.

Benoît Belleau, *Robert Mongeon* et *Monique Rousseau*, pour les intimées.

Lori Sterling and *Sean Hanley*, for the intervener the Attorney General for Ontario.

Lori Sterling et *Sean Hanley*, pour l'intervenant le procureur général de l'Ontario.

Cedric L. Haines, *Q.C.*, for the intervener the Attorney General for New Brunswick.

Cedric L. Haines, *c.r.*, pour l'intervenant le procureur général du Nouveau-Brunswick.

Julius H. Grey and *Elisabeth Goodwin*, for the interveners the Office des droits des détenus and the Association des services de réhabilitation sociale du Québec.

Julius H. Grey et *Elisabeth Goodwin*, pour les intervenants l'Office des droits des détenus et l'Association des services de réhabilitation sociale du Québec.

English version of the judgment of the Court delivered by

GONTHIER J. —

I. Introduction

This appeal raises very important and for the most part novel questions. They are essentially of three types. First, it addresses questions concerning the jurisdiction of this Court and the courts below in relation to the disciplinary procedure for provincially appointed judges put in place by the *Courts of Justice Act*, R.S.Q., c. T-16 ("*C.J.A.*"). Second, it challenges the constitutionality of s. 95 *C.J.A.* as regards the principle of the independence of the judiciary. Finally, it raises three sets of allegations relating to compliance with the rules of procedural fairness by the Conseil de la magistrature of Quebec and its committee of inquiry, the application of certain provisions of the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*") and the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*") that protect a person who has been pardoned, and the fitness of the sanction imposed on the appellant in the present proceedings.

II. Facts

In October 1970, Quebec was shaken by a serious political crisis. Richard Therrien was then a minor and a first-year law student in the Université de Montréal law faculty. He lived close to the faculty in his sister Colette's apartment on Queen Mary Road. Neither the brother nor the sister was at that time formally a member of the Front de libération du Québec ("F.L.Q."), an association declared to be unlawful by s. 3 of the *Public Order Regulations, 1970*, SOR/70-444, enacted under the *War Measures Act*, R.S.C. 1952, c. 288. Richard Therrien's sister was, however, a friend of Jacques Rose. From October 17 to November 6, 1970, Paul Rose, Jacques Rose, Francis Simard and Bernard Lortie, the four F.L.Q. members associated with the kidnapping of the minister Pierre Laporte, hid in that apartment. Richard Therrien's involvement

Le jugement de la Cour a été rendu par

LE JUGE GONTHIER —

I. Introduction

Le présent pourvoi soulève des questions fort importantes et, pour la plupart, inédites. Elles sont essentiellement de trois ordres. D'abord, il pose des questions de compétence de notre Cour et des cours inférieures dans le cadre de la procédure disciplinaire des juges de nomination provinciale, mise en place par la *Loi sur les tribunaux judiciaires*, L.R.Q., ch. T-16 (« *L.T.J.* »). Ensuite, il met à l'épreuve la constitutionnalité de l'art. 95 *L.T.J.* en regard du principe de l'indépendance de la magistrature. Finalement, il soulève trois séries de moyens d'appel concernant le respect des règles de l'équité procédurale par le Conseil de la magistrature du Québec et son comité d'enquête, l'application de certaines dispositions de la *Charte canadienne des droits et libertés* (« *Charte canadienne* ») et de la *Charte des droits et libertés de la personne*, L.R.Q., ch. C-12 (« *Charte québécoise* ») conférant une protection à une personne ayant fait l'objet d'un pardon, et le caractère approprié de la sanction imposée à l'appelant dans le cadre des présentes procédures. 1

II. Les faits

Octobre 1970, le Québec est secoué par une importante crise politique. À cette époque, Richard Therrien est mineur et étudiant en première année de droit à la Faculté de droit de l'Université de Montréal. Il réside à proximité de la Faculté dans l'appartement de sa sœur Colette, rue Queen Mary. Ni l'un ni l'autre n'est alors membre en règle du Front de libération du Québec (« F.L.Q. »), une association déclarée illégale par l'art. 3 du *Règlement de 1970 concernant l'ordre public*, DORS/70-444, adopté sous l'empire de la *Loi sur les mesures de guerre*, S.R.C. 1952, ch. 288. La sœur de Richard Therrien est toutefois une amie de Jacques Rose. Entre le 17 octobre et le 6 novembre 1970, Paul Rose, Jacques Rose, Francis Simard et Bernard Lortie, les quatre membres du F.L.Q. associés à l'enlèvement du ministre Pierre Laporte, 2

If it makes the recommendation provided for in paragraph *b*, the council suspends the judge for a period of thirty days.

Judicial Code of Ethics, R.R.Q. 1981, c. T-16, r. 4.1

2. The judge should perform the duties of his office with integrity, dignity and honour.

4. The judge should avoid any conflict of interest and refrain from placing himself in a position where he cannot faithfully carry out his functions.

5. The judge should be, and be seen to be, impartial and objective.

10. The judge should uphold the integrity and defend the independence of the judiciary, in the best interest of justice and society.

Regulation respecting the procedure for the selection of persons apt for appointment as judges, R.R.Q. 1981, c. T-16, r. 5

7. A candidate is deemed to have accepted that an investigation be carried out with respect to him with the Bar and with police authorities.

18. The committee determines the competence of the candidate for appointment as a judge. For that purpose, it assesses the personal and intellectual qualities of the candidate as well as his experience.

The committee assesses, in particular, the candidate's degree of legal knowledge in the areas of law in which the judge will perform his duties, as well as his capacity for judgment, his insight, his ability for evaluation, his sense of decision and his concept of a judge's duty.

2. Appellant's Arguments

The appellant argues, first, that the pardon he was granted under the *Criminal Records Act*, R.S.C. 1985, c. C-47 ("*C.R.A.*") (formerly R.S.C. 1970, c. 12 (1st Supp.)) retroactively vacated his conviction and allows him to deny its existence when he is asked whether he has "been in trouble with the law". He then claims the protection of the Canadian and Quebec charters. More specifically, he believes that he was discriminated against on the basis of a criminal record, contrary to s. 15 of the *Canadian Charter*, and was dismissed or other-

S'il fait la recommandation prévue par le paragraphe *b*, le conseil suspend le juge pour une période de trente jours.

Code de déontologie de la magistrature, R.R.Q. 1981, ch. T-16, r. 4.1

2. Le juge doit remplir son rôle avec intégrité, dignité et honneur.

4. Le juge doit prévenir tout conflit d'intérêt et éviter de se placer dans une situation telle qu'il ne peut remplir utilement ses fonctions.

5. Le juge doit de façon manifeste être impartial et objectif.

10. Le juge doit préserver l'intégrité et défendre l'indépendance de la magistrature, dans l'intérêt supérieur de la justice et de la société.

Règlement sur la procédure de sélection des personnes aptes à être nommées juges, R.R.Q. 1981, ch. T-16, r. 5

7. Un candidat est réputé accepter qu'une vérification soit faite à son sujet auprès du Barreau et des autorités policières.

18. Le comité détermine l'aptitude du candidat à être nommé juge. À cette fin, il évalue les qualités personnelles et intellectuelles du candidat ainsi que son expérience.

Il évalue notamment le degré de connaissance juridique de cette personne dans les domaines du droit dans lesquels le juge exercera ses fonctions, sa capacité de jugement, sa perspicacité, sa pondération, son esprit de décision et la conception qu'elle se fait de la fonction de juge.

2. Les prétentions de l'appelant

106 L'appelant prétend d'abord que le pardon qu'il a obtenu en vertu de la *Loi sur le casier judiciaire*, L.R.C. 1985, ch. C-47 (« *L.C.J.* ») (auparavant S.R.C. 1970, ch. 12 (1er suppl.)), a annulé rétroactivement sa condamnation et lui permet de nier son existence lorsqu'on lui demande s'il a eu « des démêlés avec la justice ». Il invoque ensuite la protection des chartes canadienne et québécoise. Plus particulièrement, il estime avoir été victime de discrimination fondée sur l'existence d'antécédents judiciaires, contrairement à l'art. 15 de la *Charte*

wise penalized in his employment owing to the mere fact that he was granted a pardon, contrary to s. 18.2 of the *Quebec Charter*. He also submits that his rights to dignity, honour and reputation, and to private life, which are protected by ss. 4 and 5 of the *Quebec Charter*, have been infringed, since the existence of his conviction has been disclosed despite the pardon, and he was defamed by members of the legislature. Finally, the appellant questions the application of the test for removal in his specific case. In his view, his conduct has not been so manifestly and profoundly destructive of the impartiality, integrity and independence of the justice system that the confidence of the public in his capacity to carry out his functions would be undermined.

canadienne et avoir été congédié ou autrement pénalisé dans le cadre de son emploi du seul fait qu'il a obtenu un pardon contrairement à l'art. 18.2 de la *Charte québécoise*. Il soutient également que ses droits à la dignité, à l'honneur et à la réputation, et à la vie privée protégés par les art. 4 et 5 de la *Charte québécoise* ont été brimés puisque l'existence de sa condamnation a été révélée malgré le pardon et qu'il fut l'objet de diffamation de la part des parlementaires. Finalement, l'appelant remet en question l'application du critère de destitution dans son cas particulier. Selon lui, sa conduite ne porte pas si manifestement et si totalement atteinte aux notions d'impartialité, d'intégrité et d'indépendance de la justice au point d'ébranler la confiance du public en sa capacité d'exercer ses fonctions.

107 By making these arguments, the appellant is inviting this Court to examine the very foundations of our justice system. The decision is, first and foremost, closely connected to the role a judge is called upon to play in that system and to the image of impartiality, independence and integrity he or she must project and strive to maintain.

En soulevant de tels arguments, l'appelant demande que notre Cour se penche sur les fondements mêmes de notre système de justice. La décision est, avant toute chose, intimement liée au rôle que le juge est appelé à y jouer et à l'image d'impartialité, d'indépendance et d'intégrité qu'il doit dégager et s'efforcer de préserver.

3. The Role of the Judge: "A Place Apart"

3. Le rôle du juge : « une place à part »

108 The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies: *Beauregard*, *supra*, at p. 70, and *Reference re Remuneration of Judges of the Provincial Court*, *supra*, at para. 123. Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.

La fonction judiciaire est tout à fait unique. Notre société confie d'importants pouvoirs et responsabilités aux membres de sa magistrature. Mis à part l'exercice de ce rôle traditionnel d'arbitre chargé de trancher les litiges et de départager les droits de chacune des parties, le juge est aussi responsable de protéger l'équilibre des compétences constitutionnelles entre les deux paliers de gouvernement, propres à notre État fédéral. En outre, depuis l'adoption de la *Charte canadienne*, il est devenu un défenseur de premier plan des libertés individuelles et des droits de la personne et le gardien des valeurs qui y sont enchâssées : *Beauregard*, précité, p. 70, et *Renvoi sur la rémunération des juges de cours provinciales*, précité, par. 123. En ce sens, aux yeux du justiciable qui se présente devant lui, le juge est d'abord celui qui dit la loi, qui lui reconnaît des droits ou lui impose des obligations.

If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them (Justice Jean Beetz, Introduction of the first speaker at the conference marking the 10th anniversary of the Canadian Institute for the Administration of Justice, observations collected in *Mélanges Jean Beetz* (1995), at pp. 70-71).

109 Puis, au-delà du juriste chargé de résoudre les conflits entre les parties, le juge joue également un rôle fondamental pour l'observateur externe du système judiciaire. Le juge constitue le pilier de l'ensemble du système de justice et des droits et libertés que celui-ci tend à promouvoir et à protéger. Ainsi, pour les citoyens, non seulement le juge promet-il, par son serment, de servir les idéaux de Justice et de Vérité sur lesquels reposent la primauté du droit au Canada et le fondement de notre démocratie, mais il est appelé à les incarner (le juge Jean Beetz, Présentation du premier conférencier de la Conférence du 10e anniversaire de l'Institut canadien d'administration de la justice, propos recueillis dans *Mélanges Jean Beetz* (1995), p. 70-71).

Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains:

110 En ce sens, les qualités personnelles, la conduite et l'image que le juge projette sont tributaires de celles de l'ensemble du système judiciaire et, par le fait même, de la confiance que le public place en celui-ci. Le maintien de cette confiance du public en son système de justice est garant de son efficacité et de son bon fonctionnement. Bien plus, la confiance du public assure le bien-être général et la paix sociale en maintenant un État de droit. Dans un ouvrage destiné à ses membres, le Conseil canadien de la magistrature explique :

> Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.
>
> (Canadian Judicial Council, *Ethical Principles for Judges* (1998), p. 14)

> La confiance et le respect que le public porte à la magistrature sont essentiels à l'efficacité de notre système de justice et, ultimement, à l'existence d'une démocratie fondée sur la primauté du droit. De nombreux facteurs peuvent ébranler la confiance et le respect du public à l'égard de la magistrature, notamment : des critiques injustifiées ou malavisées; de simples malentendus sur le rôle de la magistrature; ou encore toute conduite de juges, en cour ou hors cour, démontrant un manque d'intégrité. Par conséquent, les juges doivent s'efforcer d'avoir une conduite qui leur mérite le respect du public et ils doivent cultiver une image d'intégrité, d'impartialité et de bon jugement.
>
> (Conseil canadien de la magistrature, *Principes de déontologie judiciaire* (1998), p. 14)

The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they

111 La population exigera donc de celui qui exerce une fonction judiciaire une conduite quasi irréprochable. À tout le moins exigera-t-on qu'il paraisse

give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens. This is eloquently expressed by Professor Y.-M. Morissette:

[TRANSLATION] [T]he vulnerability of judges is clearly greater than that of the mass of humanity or of "elites" in general: it is rather as if his or her function, which is to judge others, imposed a requirement that he or she remain beyond the judgment of others.

("Figure actuelle du juge dans la cité" (1999), 30 *R.D.U.S.* 1, at pp. 11-12)

In *The Canadian Legal System* (1977), Professor G. Gall goes even further, at p. 167:

The dictates of tradition require the greatest restraint, the greatest propriety and the greatest decorum from the members of our judiciary. We expect our judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society which must fulfil this standard of public expectation and, at the same time, accept numerous constraints. At any rate, there is no question that a certain loss of freedom accompanies the acceptance of an appointment to the judiciary.

avoir un tel comportement. Il devra être et donner l'apparence d'être un exemple d'impartialité, d'indépendance et d'intégrité. Les exigences à son endroit se situent à un niveau bien supérieur à celui de ses concitoyens. Le professeur Y.-M. Morissette exprime bien ce propos :

[L]a vulnérabilité du juge est nettement plus grande que celle du commun des mortels, ou des «élites» en général : c'est un peu comme si sa fonction, qui consiste à juger autrui, lui imposait de se placer hors de portée du jugement d'autrui.

(« Figure actuelle du juge dans la cité » (1999), 30 *R.D.U.S.* 1, p. 11-12)

Le professeur G. Gall, dans son ouvrage *The Canadian Legal System* (1977), va encore plus loin à la p. 167 :

[TRADUCTION] Les membres de notre magistrature sont, par tradition, astreints aux normes de retenue, de rectitude et de dignité les plus strictes. La population attend des juges qu'ils fassent preuve d'une sagesse, d'une rectitude, d'une dignité et d'une sensibilité quasi-surhumaines. Sans doute aucun autre groupe de la société n'est-il soumis à des attentes aussi élevées, tout en étant tenu d'accepter nombre de contraintes. De toute façon, il est indubitable que la nomination à un poste de juge entraîne une certaine perte de liberté pour la personne qui l'accepte.

112 The reasons that follow therefore cannot disregard two fundamental premises. First, and following from the foregoing, they cannot be dissociated from the very particular context of the judicial function. The judge is in "a place apart" in our society and must conform to the demands of this exceptional status (Friedland, *supra*). On the other hand, we also must not forget that this Court is sitting on appeal from the report of the inquiry panel of the Quebec Court of Appeal, to which a specific function has been assigned by s. 95 *C.J.A.* As I said earlier, the Court of Appeal, when it makes its report under that provision, is called upon to play a fundamental role in terms of both the ethical process itself and the principle of judicial independence. This Court must therefore respect that jurisdiction and show it the proper deference. This is

Les motifs qui suivent ne sauraient donc faire abstraction de deux prémisses fondamentales. D'abord et dans la lignée de ce qui précède, ils ne sauraient être dissociés du contexte très particulier dans lequel la fonction judiciaire s'inscrit. La magistrature occupe une « place à part » dans notre société et elle doit se conformer aux exigences requises par ce statut exceptionnel (Friedland, *op. cit.*). Par ailleurs, nous ne saurions également perdre de vue que notre Cour siège en appel du rapport de la formation d'enquête de la Cour d'appel du Québec, laquelle est dépositaire d'une fonction particulière qui lui est confiée par l'art. 95 *L.T.J.* Comme je le mentionnais précédemment, la Cour d'appel, lorsqu'elle rédige son rapport en vertu de cette disposition, est appelée à jouer un rôle fondamental tant au niveau du processus déontologique lui-même qu'à l'égard de l'application du principe de l'indépendance judiciaire. Notre Cour se doit

Trial Lawyers Association of British Columbia and Canadian Bar Association — British Columbia Branch *Appellants/Respondents on cross-appeal*

v.

Attorney General of British Columbia
Respondent/Appellant on cross-appeal

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Alberta, Advocates' Society, West Coast Women's Legal Education and Action Fund and David Asper Centre for Constitutional Rights *Interveners*

Trial Lawyers Association of British Columbia et Association du Barreau canadien — Division de la Colombie-Britannique *Appelantes/Intimées au pourvoi incident*

c.

Procureur général de la Colombie-Britannique
Intimé/Appelant au pourvoi incident

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Québec, procureur général de l'Alberta, Advocates' Society, West Coast Women's Legal Education and Action Fund et David Asper Centre for Constitutional Rights *Intervenants*

Indexed as: Trial Lawyers Association of British Columbia *v.* British Columbia (Attorney General)

2014 SCC 59

File No.: 35315.

2014: April 14; 2014: October 2.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

Répertorié : Trial Lawyers Association of British Columbia *c.* Colombie-Britannique (Procureur général)

2014 CSC 59

N° du greffe : 35315.

2014 : 14 avril; 2014 : 2 octobre.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Courts — Access to justice — Court hearing fees — Province enacting regulations establishing graduated court hearing fees — Regulations containing exemption provision from fees for persons who are "indigent" or "impoverished" — Whether province can establish hearing fee scheme under its administration of justice power pursuant to s. 92(14) of Constitution Act, 1867 — Whether regulations imposing hearing fees denying some people access to courts infringing core jurisdiction of s. 96 superior courts — Whether provincial hearing fee scheme constitutionally valid — Constitution

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Cours — Accès à la justice — Frais d'audience — Règlement provincial fixant des frais d'audience progressifs — Règlement comportant une disposition dispensant des frais d'audience les personnes « indigentes » ("indigent") ou « démunies » ("impoverished") — La province peut-elle établir un régime de frais d'audience en vertu du pouvoir que lui confère l'art. 92(14) de la Loi constitutionnelle de 1867 en matière d'administration de la justice? — Est-ce qu'un règlement qui impose des frais d'audience niant à certaines personnes l'accès aux tribunaux porte atteinte

Act, 1867, ss. 92(14), 96 — Court Rules Act, R.S.B.C. 1996, c. 80 — Supreme Court Rules, B.C. Reg. 221/90, as amended by B.C. Reg. 10/96 and B.C. Reg. 75/98 — Supreme Court Civil Rules, B.C. Reg. 168/2009, r. 20-5(1).

This case began as a family action. V and D were involved in a custody dispute. V went to court to have these issues resolved. In order to get a trial date, she had to undertake in advance to pay a court hearing fee. At the outset of the trial, V asked the judge to relieve her from paying the hearing fee. The judge reserved his decision on this request until the end of the trial. The parties were not represented by lawyers, and the hearing took 10 days. The hearing fee amounted to some $3,600 — almost the net monthly income of the family. After legal fees had depleted her savings, V could not afford the hearing fee.

Aware that there was some authority for the proposition that hearing fees are unconstitutional, the judge invited submissions and interventions on the subject from outside parties and stayed V's obligation to pay the hearing fee. Ultimately, the B.C. branch of the Canadian Bar Association ("CBA"), the Trial Lawyers Association of British Columbia ("Trial Lawyers") and the Attorney General of British Columbia (the "Province") intervened.

The *Supreme Court Rules*, which were in place at the time this case began, were replaced in 2010 by the *Supreme Court Civil Rules*. The constitutionality of the hearing fees set out in both rules of court is challenged. The current hearing fees escalate from no fee for the first three days of trial, to $500 for days four to ten, to $800 for each day over ten. Rule 20-5(1) of the *Supreme Court Civil Rules* provides for an exemption from hearing fees if the court finds that a person is "impoverished". The exemption in place at the time of the trial provided that a judge could waive all fees for a person who is "indigent".

The trial judge in this case ruled that the hearing fee provision was unconstitutional. The Court of Appeal agreed that the scheme could not stand as it is, but held that if the exemption provision were expanded by reading in the

à la compétence fondamentale des cours supérieures visées à l'art. 96? — Le régime provincial de frais d'audience est-il constitutionnellement valide? — Loi constitutionnelle de 1867, art. 92(14), 96 — Court Rules Act, R.S.B.C. 1996, ch. 80 — Supreme Court Rules, B.C. Reg. 221/90, modifiées par B.C. Reg. 10/96 et B.C. Reg. 75/98 — Supreme Court Civil Rules, B.C. Reg. 168/2009, art. 20-5(1).

Au départ, la présente affaire était un litige de droit de la famille. V et D se disputaient la garde d'un enfant, et la première s'est adressée aux tribunaux pour faire trancher cette question et certaines autres. Pour faire fixer la date du procès, V a dû s'engager d'avance à payer des frais d'audience. Au début du procès, elle a demandé au juge de la dispenser du paiement de ces frais. Le juge a mis cette demande en délibéré jusqu'à la fin du procès. Les parties n'étaient pas représentées par avocat et l'audience a duré 10 jours. Les frais d'audience se sont élevés à quelque 3 600 $, une somme pratiquement égale au revenu mensuel net de la famille. Après avoir épuisé ses économies pour payer les honoraires d'avocat, V n'avait plus les moyens de payer les frais d'audience.

Au fait de certaines sources appuyant la thèse de l'inconstitutionnalité des frais d'audience, le juge a invité des tierces parties à intervenir et à présenter des observations sur le sujet et il a suspendu l'obligation de V de payer les frais d'audience. La Division de la Colombie-Britannique de l'Association du Barreau canadien (« ABC »), la Trial Lawyers Association of British Columbia (« Trial Lawyers ») et le procureur général de la Colombie-Britannique (la « Province ») sont finalement intervenus.

Les *Supreme Court Rules*, qui étaient en vigueur au moment où la présente affaire a pris naissance, ont été remplacées en 2010 par les *Supreme Court Civil Rules*. La présente contestation de la constitutionnalité des frais d'audience vise tant ceux que fixaient les anciennes Règles que ceux établis dans les nouvelles. Les frais d'audience applicables actuellement passent de zéro pour les trois premiers jours d'audience à 500 $ par jour du quatrième au dixième jour, puis à 800 $ pour chaque jour après le dixième. Une dispense des frais d'audience est prévue au par. 20-5(1) des *Supreme Court Civil Rules* si le tribunal conclut qu'une personne est « *impoverished* » (« démunie »). L'exemption en vigueur au moment du procès précisait que le juge pouvait dispenser de tous les frais une personne « *indigent* » (« indigente »).

En l'espèce, le juge du procès a déclaré inconstitutionnelle la disposition relative aux frais d'audience. La Cour d'appel a elle aussi jugé que le régime ne pouvait être maintenu tel quel, mais elle a décidé que, si on élargissait

words "or in need", it would pass constitutional muster. The Trial Lawyers and CBA appeal the remedy to this Court. The Province cross-appeals on the issue of the constitutionality of the hearing fees.

Held (Rothstein J. dissenting): The appeal should be allowed and the cross-appeal dismissed.

Per McLachlin C.J. and LeBel, Abella, Moldaver and Karakatsanis JJ.: Levying hearing fees is a permissible exercise of the Province's jurisdiction under s. 92(14) of the *Constitution Act, 1867*; however, that power is not unlimited. It must be exercised in a manner that is consistent with s. 96 of the *Constitution Act, 1867* and the requirements that flow by necessary implication from s. 96. Section 96 restricts the legislative competence of provincial legislatures and Parliament; neither level of government can enact legislation that removes part of the core or inherent jurisdiction of the superior courts. The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. Therefore, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts and impermissibly impinge on s. 96 of the *Constitution Act, 1867*.

The connection between access to justice and s. 96 is further supported by considerations relating to the rule of law. The s. 96 function and the rule of law are inextricably intertwined. As access to justice is fundamental to the rule of law, it is natural that s. 96 provide some degree of constitutional protection for access to justice. Concerns about the rule of law in this case are not abstract or theoretical. If people cannot bring legitimate issues to court, laws will not be given effect, and the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed.

Section 92(14), read in the context of the Constitution as a whole, does not give the provinces the power to administer justice in a way that denies the right of Canadians to access courts of superior jurisdiction. Any

la portée de la disposition accordant l'exemption en considérant qu'elle comporte les mots « *or in need* » (« ou dans le besoin »), cette disposition résisterait à un contrôle de constitutionnalité. Trial Lawyers et l'ABC se pourvoient devant notre Cour à l'encontre de la réparation accordée par la Cour d'appel. Pour sa part, la Province forme un appel incident sur la question de la constitutionnalité des frais d'audience.

Arrêt (le juge Rothstein est dissident) : Le pourvoi est accueilli et le pourvoi incident est rejeté.

La juge en chef McLachlin et les juges LeBel, Abella, Moldaver et Karakatsanis : La perception de frais d'audience représente un exercice acceptable de la compétence reconnue à la Province par le par. 92(14) de la *Loi constitutionnelle de 1867*. Cependant, ce pouvoir n'est pas illimité. Il doit être exercé conformément à l'art. 96 de cette loi et aux exigences qui découlent de cet article par déduction nécessaire. L'article 96 a pour effet de restreindre le pouvoir de légiférer des législatures et du Parlement; aucun ordre de gouvernement ne peut édicter de lois qui supprimeraient une partie de la compétence fondamentale ou inhérente des cours supérieures. Ces cours ont toujours eu pour tâche de résoudre des différends opposant des particuliers et de trancher des questions de droit privé et de droit public. Des mesures qui empêchent des gens de s'adresser à cette fin aux tribunaux vont à l'encontre de cette fonction fondamentale des cours de justice. Par conséquent, des frais d'audience qui ont pour effet de nier à des gens l'accès aux tribunaux portent atteinte à la compétence fondamentale des cours supérieures et contreviennent de façon inacceptable à l'art. 96 de la *Loi constitutionnelle de 1867*.

Des considérations relatives à la primauté du droit viennent étayer encore davantage l'existence du lien entre l'accès à la justice et l'art. 96. Le rôle que joue l'art. 96 et la primauté du droit sont inextricablement liés. Puisque l'accès à la justice est essentiel à la primauté du droit, il est naturel que l'art. 96 accorde une certaine protection constitutionnelle à l'accès à la justice. Les inquiétudes concernant la primauté du droit en l'espèce n'ont rien d'abstrait ou de théorique. Si les gens ne sont pas en mesure de saisir les tribunaux de questions légitimes, les lois ne seront pas appliquées, ce qui risque d'altérer l'équilibre entre le pouvoir de l'État de faire et d'appliquer des lois et la responsabilité des tribunaux de statuer sur les contestations de ces lois par des citoyens.

Considéré dans le contexte de l'ensemble de la Constitution, le par. 92(14) ne confère pas aux provinces le pouvoir d'administrer la justice d'une manière qui nie aux Canadiennes et aux Canadiens le droit d'avoir accès

attempt to do so will run afoul of the constitutional protection for the superior courts found in s. 96 of the *Constitution Act, 1867*.

Hearing fees are unconstitutional when they deprive litigants of access to the superior courts. That point is reached when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court. A hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum. But providing exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts. It is the role of the provincial legislatures to devise a constitutionally compliant hearing fee scheme. But as a general rule, hearing fees must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court. A hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an amount such that anyone who is not impoverished can afford them. Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims.

The hearing fee scheme at issue in this case places an undue hardship on litigants and impedes the right of British Columbians to bring legitimate cases to court and is unconstitutional. The current exemptions do not provide sufficient discretion to the trial judge to exempt litigants from having to pay hearing fees in appropriate circumstances.

V is excused from paying the hearing fee. The hearing fee scheme prevents access to the courts in a manner inconsistent with s. 96 of the *Constitution Act, 1867* and the

aux cours de juridiction supérieure. Toute tentative en ce sens se heurtera à la protection constitutionnelle dont jouissent les cours supérieures en vertu de l'art. 96 de la *Loi constitutionnelle de 1867*.

Des frais sont inconstitutionnels lorsqu'ils privent des plaideurs de l'accès aux cours supérieures. Cette limite est atteinte dans les cas où les frais d'audience en question causent des difficultés excessives à un plaideur qui souhaite s'adresser à la cour supérieure. Un régime de frais d'audience qui ne dispense pas les personnes démunies de l'obligation de payer ces frais outrepasse clairement les limites minimales autorisées par la Constitution. Mais le fait de n'offrir des exemptions qu'aux personnes véritablement démunies pourrait se traduire par un coût d'accès trop élevé. Des frais si considérables qu'ils obligent des plaideurs non démunis à sacrifier des dépenses raisonnables pour présenter une réclamation peuvent, en l'absence d'exemptions adéquates, être inconstitutionnels parce qu'ils causent aux plaideurs des difficultés excessives et, de ce fait, les empêchent effectivement d'avoir accès aux tribunaux. C'est aux législateurs provinciaux qu'il appartient de concevoir des régimes de frais d'audience conformes à la Constitution. Mais, en règle générale, des frais d'audience doivent être assortis d'une exemption habilitant les juges à les écarter dans le cas des personnes qui, en raison de leur situation financière, ne pourraient soumettre aux tribunaux des litiges qui ne sont ni frivoles ni vexatoires. Un régime de frais d'audience peut comporter une exemption en faveur des personnes véritablement démunies, mais ces frais doivent être fixés à un montant tel que toute personne non démunie ait les moyens de les payer. Un régime exigeant le paiement de frais plus élevés doit conférer aux juges un pouvoir discrétionnaire suffisant pour leur permettre d'en dispenser les plaideurs dans tous les cas où ces frais empêcheraient effectivement ces personnes d'avoir accès aux tribunaux parce qu'ils les obligeraient à renoncer à des dépenses raisonnables afin de pouvoir exercer leurs recours.

Le régime de frais d'audience contesté en l'espèce cause des difficultés excessives aux plaideurs de la Colombie-Britannique et il porte atteinte à leur droit d'intenter des recours légitimes devant les tribunaux. Il est inconstitutionnel. Les exemptions actuelles n'accordent pas au juge du procès un pouvoir discrétionnaire suffisant pour dispenser les plaideurs d'avoir à payer les frais d'audience dans les cas qui s'y prêtent.

V est dispensée de payer les frais d'audience. Le régime de frais d'audience empêche l'accès aux tribunaux d'une manière qui contrevient à l'art. 96 de la *Loi*

underlying principle of the rule of law. It therefore falls outside the Province's jurisdiction under s. 92(14) to administer justice.

The proper remedy is to declare the hearing fee scheme as it stands unconstitutional and leave it to the legislature or the Lieutenant Governor in Council to enact new provisions, should they choose to do so. "Reading in" is a remedy sparingly used, and available only where it is clear the legislature, faced with a ruling of unconstitutionality, would have made the change proposed. This condition is not met here. Further, modifying the exemption as suggested might still not cover all litigants who cannot afford the hearing fee and other provisions might be required in order to avoid the onerous or undignified process of proving that one falls within the exception.

Per Cromwell J.: This case can be resolved on administrative law grounds and it is unnecessary to address the broader constitutional issues. There is a common law right of reasonable access to civil justice. This right of reasonable access may only be abrogated by clear statutory language. This common law right is preserved by the *Court Rules Act*. The common law right of access to civil justice allows court fees, but only if there is an exemption to ensure that no person is prevented from making an arguable claim or defence because he or she lacks the resources to carry on the proceeding. This is a flexible standard: whether a person has the ability to pay the fees depends not only on wealth and income, but also on the amount of their reasonable, necessary expenses and the magnitude of the fees. If the hearing fee exemptions cannot be interpreted to ensure that the common law right of access is not defeated, then the fees are *ultra vires* the *Court Rules Act*.

Here, the trial judge found as a fact that the hearing fees are unaffordable and therefore limit access for litigants who do not fall within the exemptions for the indigent and the impoverished. The plain meaning of the exemption, referring to persons who are "impoverished" and "indigent", cannot be interpreted to cover people of modest means who are prevented from having a trial

constitutionnelle de 1867 et au principe fondamental de la primauté du droit. Le régime outrepasse donc la compétence conférée à la Province en matière d'administration de la justice par le par. 92(14).

La réparation convenable consiste à déclarer que, dans sa forme actuelle, le régime de frais d'audience est inconstitutionnel et à laisser à la législature ou au lieutenant-gouverneur en conseil le soin d'édicter de nouvelles dispositions, s'ils décident de le faire. L'« interprétation extensive » est une réparation qui est rarement utilisée et qui ne peut l'être que dans les cas où il est clair que le législateur aux prises avec une déclaration d'inconstitutionnalité aurait apporté la modification proposée. Cette condition n'est pas remplie en l'espèce. En outre, il est même possible que la modification de l'exemption proposée ne permette pas d'englober tous les plaideurs qui n'ont pas les moyens de payer les frais d'audience, et il pourrait être nécessaire d'édicter d'autres dispositions pour éviter à un plaideur la démarche lourde ou humiliante de prouver que l'exception s'applique à lui.

Le juge Cromwell : La présente affaire peut être tranchée sur la base de principes de droit administratif et il n'est pas nécessaire de répondre aux questions constitutionnelles plus générales soulevées. Il existe en common law un droit d'accès raisonnable à la justice civile. Ce droit d'accès raisonnable ne peut être aboli que par des dispositions législatives claires. Ce droit reconnu par la common law est maintenu par la *Court Rules Act*. Le droit d'accès à la justice civile reconnu en common law autorise les frais d'audience, mais seulement s'il existe une exemption faisant en sorte qu'aucun justiciable ne sera empêché de présenter une demande ou une défense soutenable parce qu'il ne dispose pas des ressources nécessaires pour poursuivre l'instance. Il s'agit d'une norme souple : la question de savoir si une personne est en mesure de payer les frais dépend non seulement des biens qu'elle possède et de son revenu, mais également du montant des dépenses raisonnables et nécessaires qu'elle doit assumer, ainsi que de l'ampleur des frais exigés. Si les exemptions relatives aux frais d'audience ne peuvent être interprétées de manière à ne pas faire échec au droit d'accès reconnu en common law, les frais sont *ultra vires* de la *Court Rules Act*.

En l'espèce, le juge du procès a estimé, à titre de conclusion de fait, que les frais d'audience sont inabordables et qu'ils ont en conséquence pour effet de limiter l'accès aux tribunaux dans le cas des plaideurs qui n'entrent pas dans le champ d'application des exemptions visant les indigents et les démunis. Le sens ordinaire de l'exemption — qui fait état des personnes « *impoverished* »

because of the hearing fees. The hearing fees do not meet the common law standard preserved by the *Court Rules Act*. The exemptions under the *Court Rules Act* cannot be interpreted in a way that is consistent with the common law right of access to civil justice which is preserved by the *Court Rules Act*. Thus, the fees are *ultra vires* the regulation-making authority conferred by the *Court Rules Act*.

Per Rothstein J. (dissenting): The British Columbia hearing fee scheme does not offend any constitutional right. There is no express constitutional right to access the civil courts without hearing fees. Section 92(14) of the *Constitution Act, 1867* entrusts the administration of justice in the provinces to provincial legislatures. It is well established that provinces have the power under s. 92(14) to enact laws that prescribe conditions on access to the courts. Legislatures must balance a number of important values, including providing access to courts and ensuring that those same courts are adequately funded. They are accountable to voters for the choices they make. Absent a violation of the *Charter* and within the bounds of their constitutional jurisdiction, provincial legislatures have leeway to make policy decisions regarding the allocation of funding and the recovery of costs.

The hearing fee scheme in this case cannot be struck down on the basis of a novel reading of s. 96 of the *Constitution Act, 1867*. Section 96 protects the core jurisdiction of superior courts that is integral to their operations; however, it does not follow that legislation that places conditions on access to superior courts removes or infringes upon an aspect of their core jurisdiction. This Court has previously established a three-part test for determining whether legislation impermissibly removes an aspect of the core jurisdiction of superior courts. The majority does not apply this test because no aspect of the core jurisdiction of superior courts is removed by legislation that merely places limits on access to superior courts. In the absence of any demonstrated destruction of the core powers of the superior courts, there is no such removal sufficient to find a violation of s. 96. Instead, the majority significantly expands what is meant by the "core jurisdiction" of the superior courts beyond what is contemplated in the text or this Court's jurisprudence

(« démunies ») et « *indigent* » (« indigentes ») — ne permet pas de considérer que cette exemption s'applique aux personnes qui disposent de moyens modestes et sont empêchées de s'adresser aux tribunaux en raison des frais d'audience. Les frais d'audience ne respectent pas la norme de common law qui est maintenue par la *Court Rules Act*. On ne peut interpréter les exemptions d'une manière compatible avec le droit d'accès à la justice civile que reconnaît la common law et qui est maintenu par la *Court Rules Act*. Par conséquent, ces frais outrepassent le pouvoir de réglementation conféré par la *Court Rules Act*.

Le juge Rothstein (dissident) : Le régime de frais d'audience de la Colombie-Britannique ne viole aucun droit constitutionnel. La Constitution ne garantit pas expressément aux justiciables un droit d'accès aux tribunaux civils sans qu'ils aient à verser des frais d'audience. Le paragraphe 92(14) de la *Loi constitutionnelle de 1867* confie aux assemblées législatives provinciales l'administration de la justice dans la province. Il est bien établi que les provinces possèdent, en vertu du par. 92(14), le pouvoir d'adopter des lois fixant des conditions régissant l'accès aux tribunaux. Les législatures doivent mettre en balance un certain nombre de valeurs importantes, notamment l'accès aux tribunaux et le financement adéquat de ces institutions. Elles doivent rendre compte aux électeurs des choix qu'elles font. Pourvu qu'ils ne violent pas la *Charte* et qu'ils agissent dans les limites de la compétence que leur confère la Constitution, les législateurs provinciaux possèdent la latitude voulue pour prendre des décisions de politique générale concernant l'affectation des deniers publics et la récupération des coûts.

Le régime de frais d'audience contesté en l'espèce ne peut être invalidé sur la base d'une interprétation nouvelle de l'art. 96 de la *Loi constitutionnelle de 1867*. L'article 96 protège la compétence fondamentale des cours supérieures essentielle à leurs activités; toutefois, il ne s'ensuit pas qu'une loi imposant aux justiciables des conditions d'accès aux cours supérieures a pour effet de retirer à ces tribunaux un aspect de leur compétence fondamentale ou encore de porter atteinte à un tel aspect. La Cour a déjà établi un critère à trois volets permettant de décider si un texte de loi prive de façon inacceptable les cours supérieures d'un aspect de leur compétence fondamentale. Les juges majoritaires n'appliquent pas ce critère, car aucun aspect de la compétence fondamentale des cours supérieures n'est retiré par le texte de loi, lequel ne fait qu'imposer des limites à l'accès aux cours supérieures. Vu l'absence de toute démonstration de la destruction des pouvoirs fondamentaux des cours supérieures, nous ne sommes en présence d'aucun retrait de compétence

on the scope of s. 96. The hearing fees are a financing mechanism and do not go to the very existence of the court as a judicial body or limit the types of powers it may exercise.

The unwritten principle of the rule of law does not support the striking down of legislation otherwise properly within provincial jurisdiction. The majority uses the rule of law to support reading a general constitutional right to access the superior courts into s. 96. Section 96 requires that the existence and core jurisdiction of superior courts be preserved, but this does not necessarily imply the general right of access to superior courts described by the majority. So long as the courts maintain their character as judicial bodies and exercise the core functions of courts, the demands of the Constitution are satisfied. In using an unwritten principle to support expanding the ambit of s. 96 to such an extent, the majority subverts the structure of the Constitution and jeopardizes the primacy of the written text. This purported constitutional right to access the courts circumvents the careful checks and balances built into the structure of the *Charter*. Unlike *Charter* rights, rights read into s. 96 are not subject to s. 1 justification or the s. 33 notwithstanding clause.

This Court has clearly and persuasively cautioned against using the rule of law to strike down legislation. To circumvent this caution, the majority characterizes the rule of law as a limitation on the jurisdiction of provinces under s. 92(14). Dressing the rule of law in division-of-powers clothing does not disguise the fact that the rule of law, an unwritten principle, cannot be used to support striking down the hearing fee scheme. Reading the unwritten principle of the rule of law too broadly would also render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers. Provisions such as ss. 11(*d*) and 24(1) of the *Charter* would be unnecessary if the Constitution already contained a more general right to access superior courts. The rule of law is a vague and fundamentally disputed concept. To rely on

suffisant pour permettre de conclure à une violation de l'art. 96. Les juges majoritaires élargissent plutôt le sens de la notion de « compétence fondamentale » des cours supérieures bien au-delà de ce qu'envisage le texte de l'art. 96 ou la jurisprudence de notre Cour sur la portée de cette disposition. Les frais d'audience constituent un mode de financement, et ils ne touchent pas à l'existence même du tribunal en tant qu'organisme judiciaire, ni ne limitent les types de pouvoirs qu'il peut exercer.

Le principe non écrit de la primauté du droit ne peut être invoqué pour invalider un texte de loi qui relève par ailleurs nettement du pouvoir de légiférer des provinces. S'appuyant sur la primauté du droit, les juges majoritaires considèrent, par voie d'interprétation extensive, que l'art. 96 confère un droit général d'accès aux cours supérieures garanti par la Constitution. Cette disposition requiert que l'existence et la compétence fondamentale des cours supérieures soient protégées, mais cela n'implique pas nécessairement l'existence du droit général d'accès aux cours supérieures décrit par les juges majoritaires. Tant que les cours conservent leur caractère d'organismes judiciaires et qu'elles exercent les fonctions fondamentales relevant des tribunaux, les exigences de la Constitution sont respectées. En invoquant un principe non écrit pour étayer un élargissement aussi grand de la portée de l'art. 96, les juges majoritaires bouleversent la structure de la Constitution et compromettent la primauté du texte écrit. Ce prétendu droit constitutionnel d'accès aux tribunaux élude les délicats mécanismes de poids et de contrepoids intégrés à la structure de la *Charte*. Contrairement aux droits garantis par celle-ci, les droits qui sont considérés faire partie de l'art. 96 par voie d'interprétation extensive ne sont assujettis à aucun processus de justification fondé sur l'article premier de la *Charte* ou à la disposition de dérogation de l'art. 33.

La Cour a formulé une mise en garde claire et convaincante contre le recours à la primauté du droit pour invalider une loi. Afin de contourner cette mise en garde, la majorité qualifie la primauté du droit de limite à la compétence conférée aux provinces par le par. 92(14). Intégrer la primauté du droit à une motivation basée sur le partage des compétences ne change toutefois pas le fait que la primauté du droit, un principe non écrit, ne peut être invoquée pour appuyer l'invalidation du régime de frais d'audience. Donner une interprétation trop large du principe non écrit de la primauté du droit aurait également pour effet de rendre superflu un bon nombre de nos droits constitutionnels écrits et, ce faisant, elle compromettrait ainsi la délimitation de ces droits établie par les rédacteurs de notre Constitution. Des dispositions telles l'al. 11*d*) et le par. 24(1) de la *Charte* seraient inutiles si

this nebulous principle to invalidate legislation based on its content introduces uncertainty into constitutional law and undermines our system of positive law.

Even if there were a constitutional basis upon which to challenge the British Columbia hearing fee scheme, it would not be unconstitutional. The majority's approach to determining whether hearing fees prevent litigants from accessing the courts overlooks some important contextual considerations. In particular, the majority does not account for measures that offset the burden of hearing fees or eliminate them altogether. When these measures are taken into consideration, there is no indication that the hearing fees at issue would prevent litigants from bringing meritorious legal claims.

Cases Cited

By McLachlin C.J.

Distinguished: *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, rev'g 2005 BCCA 631, 262 D.L.R. (4th) 51; **applied:** *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; **referred to:** *Pleau v. Nova Scotia (Prothonotary)* (1998), 186 N.S.R. (2d) 1; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, aff'g (1985), 20 D.L.R. (4th) 399; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

By Cromwell J.

Referred to: *Polewsky v. Home Hardware Stores Ltd.* (2003), 66 O.R. (3d) 600; *Fabrikant v. Canada*, 2014 FCA 89, 459 N.R. 163; *Toronto-Dominion Bank v. Beaton*, 2012 ABQB 125, 534 A.R. 132; *R. v. Lord Chancellor, Ex parte Witham*, [1998] Q.B. 575; *R. v. Secretary of State for the Home Department, ex p. Saleem*, [2000] 4 All E.R. 814; *Katz Group Canada Inc.*

la Constitution garantissait déjà un droit général d'accès aux cours supérieures. La primauté du droit est une notion vague et fondamentalement contestée. S'appuyer sur ce principe nébuleux pour invalider un texte de loi en raison de son contenu introduit de l'incertitude dans le droit constitutionnel et mine notre système de droit positif.

Même s'il existait une assise constitutionnelle permettant de contester le régime de frais d'audience de la Colombie-Britannique, ce régime ne serait pas inconstitutionnel. L'analyse qu'appliquent les juges majoritaires afin de déterminer si les frais d'audience empêchent des plaideurs d'avoir accès aux tribunaux néglige certaines considérations contextuelles importantes. En particulier, les juges majoritaires ne tiennent pas compte des mesures qui permettent soit d'atténuer le fardeau créé par les frais d'audience soit d'éliminer complètement ces frais. Lorsque ces mesures sont prises en considération, rien n'indique que les frais d'audience en cause empêcheraient des plaideurs d'intenter des recours légitimes.

Jurisprudence

Citée par la juge en chef McLachlin

Distinction d'avec l'arrêt : *Colombie-Britannique (Procureur général) c. Christie*, 2007 CSC 21, [2007] 1 R.C.S. 873, inf. 2005 BCCA 631, 262 D.L.R. (4th) 51; **arrêts appliqués :** *MacMillan Bloedel Ltd. c. Simpson*, [1995] 4 R.C.S. 725; *Renvoi relatif à la Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714; *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220; **arrêts mentionnés :** *Pleau c. Nova Scotia (Prothonotary)* (1998), 186 N.S.R. (2d) 1; *Colombie-Britannique c. Imperial Tobacco Canada Ltée*, 2005 CSC 49, [2005] 2 R.C.S. 473; *Renvoi relatif à la réforme du Sénat*, 2014 CSC 32, [2014] 1 R.C.S. 704; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3; *B.C.G.E.U. c. Colombie-Britannique (Procureur général)*, [1988] 2 R.C.S. 214, conf. (1985), 20 D.L.R. (4th) 399; *Hryniak c. Mauldin*, 2014 CSC 7, [2014] 1 R.C.S. 87; *Schachter c. Canada*, [1992] 2 R.C.S. 679.

Citée par le juge Cromwell

Arrêts mentionnés : *Polewsky c. Home Hardware Stores Ltd.* (2003), 66 O.R. (3d) 600; *Fabrikant c. Canada*, 2014 CAF 89 (CanLII); *Toronto-Dominion Bank c. Beaton*, 2012 ABQB 125, 534 A.R. 132; *R. c. Lord Chancellor, Ex parte Witham*, [1998] Q.B. 575; *R. c. Secretary of State for the Home Department, ex p. Saleem*, [2000] 4 All E.R. 814; *Katz Group Canada Inc. c.*

v. Ontario (Health and Long-Term Care), 2013 SCC 64, [2013] 3 S.C.R. 810.

By Rothstein J. (dissenting)

OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Singh v. Canada (Attorney General)*, [2000] 3 F.C. 185; *De Fehr v. De Fehr*, 2001 BCCA 485, 156 B.C.A.C. 240; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1.

Statutes and Regulations Cited

A Mean to help and speed poor Persons in their Suits (Eng.), 11 Hen. 7, c. 12 [*Statute of Henry VII*].
Canadian Charter of Rights and Freedoms, ss. 1, 2, 7, 11(*d*), 24(1), 33.
Constitution Act, 1867, ss. 92(14), 96.
Court Rules Act, R.S.B.C. 1996, c. 80.
Employment and Assistance Act, S.B.C. 2002, c. 40.
Employment and Assistance for Persons with Disabilities Act, S.B.C. 2002, c. 41.
Supreme Court Civil Rules, B.C. Reg. 168/2009, rr. 14-1, 20-5(1), (3), App. C, Sch. 1.
Supreme Court Family Rules, B.C. Reg. 169/2009, App. C, Sch. 1.
Supreme Court Rules, B.C. Reg. 221/90 [rep. 168/2009], App. C, Sch. 1 [rep. & sub. 10/96; *idem* 75/98].

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Chiasson and Garson JJ.A.), 2013 BCCA 65, 43 B.C.L.R. (5th) 217, 334 B.C.A.C. 71, 572 W.A.C. 71, 359 D.L.R. (4th) 524, [2013] 7 W.W.R. 478, 286 C.R.R. (2d) 26, [2013] B.C.J. No. 243 (QL), 2013 CarswellBC 354, setting aside a decision of McEwan J., 2012 BCSC 748, 260 C.R.R. (2d) 1,

Ontario (Santé et Soins de longue durée), 2013 CSC 64, [2013] 3 R.C.S. 810.

Citée par le juge Rothstein (dissident)

SEFPO c. Ontario (Procureur général), [1987] 2 R.C.S. 2; *Colombie-Britannique (Procureur général) c. Christie*, 2007 CSC 21, [2007] 1 R.C.S. 873; *Ontario c. Criminal Lawyers' Association of Ontario*, 2013 CSC 43, [2013] 3 R.C.S. 3; *MacMillan Bloedel Ltd. c. Simpson*, [1995] 4 R.C.S. 725; *Renvoi sur la Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714; *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3; *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217; *B.C.G.E.U. c. Colombie-Britannique (Procureur général)*, [1988] 2 R.C.S. 214; *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721; *Colombie-Britannique c. Imperial Tobacco Canada Ltée*, 2005 CSC 49, [2005] 2 R.C.S. 473; *Singh c. Canada (Procureur général)*, [2000] 3 C.F. 185; *De Fehr c. De Fehr*, 2001 BCCA 485, 156 B.C.A.C. 240; *Hryniak c. Mauldin*, 2014 CSC 7, [2014] 1 R.C.S. 87; *Combined Air Mechanical Services Inc. c. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1.

Lois et règlements cités

A Mean to help and speed poor Persons in their Suits (Angl.), 11 Hen. 7, ch. 12 [*Statute of Henry VII*].
Charte canadienne des droits et libertés, art. 1, 2, 7, 11*d*), 24(1), 33.
Court Rules Act, R.S.B.C. 1996, ch. 80.
Employment and Assistance Act, S.B.C. 2002, ch. 40.
Employment and Assistance for Persons with Disabilities Act, S.B.C. 2002, ch. 41.
Loi constitutionnelle de 1867, art. 92(14), 96.
Supreme Court Civil Rules, B.C. Reg. 168/2009, art. 14-1, 20-5(1), (3), app. C, ann. 1.
Supreme Court Family Rules, B.C. Reg. 169/2009, app. C, ann. 1.
Supreme Court Rules, B.C. Reg. 221/90 [abr. 168/2009], app. C, ann. 1 [abr. & rempl. 10/96; *idem* 75/98].

POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Donald, Chiasson et Garson), 2013 BCCA 65, 43 B.C.L.R. (5th) 217, 334 B.C.A.C. 71, 572 W.A.C. 71, 359 D.L.R. (4th) 524, [2013] 7 W.W.R. 478, 286 C.R.R. (2d) 26, [2013] B.C.J. No. 243 (QL), 2013 CarswellBC 354, qui a infirmé une décision du juge McEwan, 2012 BCSC 748, 260

[2012] B.C.J. No. 1016 (QL), 2012 CarswellBC 1485. Appeal allowed and cross-appeal dismissed, Rothstein J. dissenting.

Darrell W. Roberts, *Q.C.*, and *Chantelle M. Rajotte*, for the appellant/respondent on cross-appeal the Trial Lawyers Association of British Columbia.

Sharon D. Matthews, *Q.C.*, *Melina Buckley* and *Michael Sobkin*, for the appellant/respondent on cross-appeal the Canadian Bar Association — British Columbia Branch.

Bryant A. Mackey and *J. Gareth Morley*, for the respondent/appellant on cross-appeal.

Alain Préfontaine, for the intervener the Attorney General of Canada.

Rochelle Fox and *Padraic Ryan*, for the intervener the Attorney General of Ontario.

Alain Gingras and *Dana Pescarus*, for the intervener the Attorney General of Quebec.

Donald Padget, for the intervener the Attorney General of Alberta.

Joseph J. Arvay, *Q.C.*, *Kelly D. Jordan* and *Tim A. Dickson*, for the intervener the Advocates' Society.

Francesca V. Marzari and *Kasari Govender*, for the intervener the West Coast Women's Legal Education and Action Fund.

Paul Schabas and *Cheryl Milne*, for the intervener the David Asper Centre for Constitutional Rights.

C.R.R. (2d) 1, [2012] B.C.J. No. 1016 (QL), 2012 CarswellBC 1485. Pourvoi accueilli et pourvoi incident rejeté, le juge Rothstein est dissident.

Darrell W. Roberts, *c.r.*, et *Chantelle M. Rajotte*, pour l'appelante/intimée au pourvoi incident Trial Lawyers Association of British Columbia.

Sharon D. Matthews, *c.r.*, *Melina Buckley* et *Michael Sobkin*, pour l'appelante/intimée au pourvoi incident l'Association du Barreau canadien — Division de la Colombie-Britannique.

Bryant A. Mackey et *J. Gareth Morley*, pour l'intimé/appelant au pourvoi incident.

Alain Préfontaine, pour l'intervenant le procureur général du Canada.

Rochelle Fox et *Padraic Ryan*, pour l'intervenant le procureur général de l'Ontario.

Alain Gingras et *Dana Pescarus*, pour l'intervenant le procureur général du Québec.

Donald Padget, pour l'intervenant le procureur général de l'Alberta.

Joseph J. Arvay, *c.r.*, *Kelly D. Jordan* et *Tim A. Dickson*, pour l'intervenante Advocates' Society.

Francesca V. Marzari et *Kasari Govender*, pour l'intervenant West Coast Women's Legal Education and Action Fund.

Paul Schabas et *Cheryl Milne*, pour l'intervenant David Asper Centre for Constitutional Rights.

The judgment of McLachlin C.J. and LeBel, Abella, Moldaver and Karakatsanis JJ. was delivered by

THE CHIEF JUSTICE —

I. Overview

[1] The issue in this case is whether court hearing fees imposed by the Province of British Columbia that deny some people access to the courts are constitutional. The trial judge, upheld on appeal, held that the legislation imposing the fees was unconstitutional. I agree.

[2] In my view, the fees at issue here violate s. 96 of the *Constitution Act, 1867*. Although the province can establish hearing fees under its power to administer justice under s. 92(14) of the *Constitution Act, 1867*, the exercise of that power must also comply with s. 96 of the *Constitution Act, 1867*, which constitutionally protects the core jurisdiction of the superior courts. For the reasons discussed below, the fees impermissibly infringe on that jurisdiction by, in effect, denying some people access to the courts.

II. Facts

[3] This case began as a family action (2009 BCSC 434 (CanLII)). Ms. Vilardell and Mr. Dunham began a relationship in England and came to British Columbia, Canada, with their daughter. The relationship foundered, and the question arose — who should have custody of the child? Ms. Vilardell wanted to return with the child to Spain, her country of origin. Mr. Dunham wanted to keep the child in British Columbia. Ms. Vilardell also claimed an interest in Mr. Dunham's house.

[4] Ms. Vilardell went to court to have these issues resolved. In order to get a trial date, she had to undertake in advance to pay a court hearing fee. At the outset of the trial, Ms. Vilardell asked the

Version française du jugement de la juge en chef McLachlin et des juges LeBel, Abella, Moldaver et Karakatsanis rendu par

LA JUGE EN CHEF —

I. Aperçu

[1] En l'espèce, il s'agit de décider de la constitutionnalité des frais d'audience qu'impose la province de la Colombie-Britannique et qui nient à certaines personnes l'accès aux tribunaux. Le juge de première instance, dont la décision a été confirmée en appel, a conclu que le texte de loi établissant les frais était inconstitutionnel. Je partage son avis.

[2] À mon avis, les frais en cause violent l'art. 96 de la *Loi constitutionnelle de 1867*. Bien que la province puisse imposer des frais d'audience en vertu du pouvoir que lui confère le par. 92(14) de cette même loi en matière d'administration de la justice, elle doit exercer ce pouvoir conformément à l'art. 96, lequel accorde la protection de la Constitution à la compétence fondamentale des cours supérieures. Pour les raisons exposées ci-après, les frais litigieux portent atteinte de façon inacceptable à cette compétence pour le motif que, de par leur effet, ils nient à certaines personnes l'accès aux tribunaux.

II. Faits

[3] Au départ, la présente affaire était un litige de droit de la famille (2009 BCSC 434 (CanLII)). Madame Vilardell et Monsieur Dunham ont amorcé leur relation en Angleterre, puis ils sont venus s'installer en Colombie-Britannique avec leur fille. Leur relation a pris fin et la question suivante s'est posée : Qui devrait avoir la garde de l'enfant? Madame Vilardell voulait retourner avec celle-ci en Espagne, son pays d'origine. Quant à M. Dunham, il souhaitait garder leur fille avec lui en Colombie-Britannique. Madame Vilardell revendiquait également un intérêt dans la demeure de M. Dunham.

[4] Madame Vilardell s'est adressée aux tribunaux pour qu'ils tranchent ces questions. Pour faire fixer la date du procès, elle a dû s'engager d'avance à payer des frais d'audience. Au début du procès,

[32] The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.

[33] The jurisprudence under s. 96 supports this conclusion. The cases decided under s. 96 have been concerned either with legislation that purports to transfer an aspect of the core jurisdiction of the superior court to another decision-making body or with privative clauses that would bar judicial review: *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *MacMillan Bloedel*; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220. The thread throughout these cases is that laws may impinge on the core jurisdiction of the superior courts by denying access to the powers traditionally exercised by those courts.

[34] In *Residential Tenancies*, the law at issue unconstitutionally denied access to the superior courts by requiring that a certain class of cases be decided by an administrative tribunal. In *Crevier*, the law at issue unconstitutionally denied access to the superior courts by imposing a privative clause excluding the supervisory jurisdiction of the superior courts. In *MacMillan Bloedel*, the legislation at issue unconstitutionally barred access to the superior courts for a segment of society — young persons — by conferring an exclusive power on youth courts to try youths for contempt in the face of superior courts. This Court, *per* Lamer C.J., relied on *Crevier*,

[32] Les cours supérieures ont toujours eu pour tâche de résoudre des différends opposant des particuliers et de trancher des questions de droit privé et de droit public. Des mesures qui empêchent des gens de s'adresser à cette fin aux tribunaux vont à l'encontre de cette fonction fondamentale des cours de justice. Considérées dans le contexte institutionnel du système de justice canadien, la résolution de ces différends et les décisions qui en résultent en matière de droit privé et de droit public sont des aspects centraux des activités des cours supérieures. De fait, les plaideurs constituent l'« achalandage » de ces tribunaux. Empêcher l'exercice de ces activités attaque le cœur même de la compétence des cours supérieures que protège l'art. 96 de la *Loi constitutionnelle de 1867*. Par conséquent, des frais d'audience qui ont pour effet de nier à des gens l'accès aux tribunaux portent atteinte à la compétence fondamentale des cours supérieures.

[33] La jurisprudence relative à l'art. 96 étaye cette conclusion. Ces décisions portaient soit sur des textes de loi censés confier un aspect de la compétence fondamentale de la cour supérieure à un autre organisme décisionnel, soit sur des clauses privatives visant à empêcher le contrôle judiciaire : *Renvoi relatif à la Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714; *MacMillan Bloedel*; *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220. Le dénominateur commun à toutes ces décisions est la possibilité que des lois portent atteinte à la compétence fondamentale des cours supérieures en empêchant certaines personnes de faire appel à elles et aux pouvoirs qu'elles exercent depuis toujours.

[34] Dans l'arrêt *Location résidentielle*, la loi litigieuse niait de manière inconstitutionnelle l'accès aux cours supérieures en exigeant qu'une certaine catégorie d'affaires soient décidées par un tribunal administratif. Dans *Crevier*, la loi contestée niait, encore une fois inconstitutionnellement, l'accès aux cours supérieures en imposant une clause privative qui écartait le pouvoir de surveillance de ces tribunaux. Dans *MacMillan Bloedel*, le texte de loi litigieux refusait inconstitutionnellement à une partie de la population, les jeunes, l'accès aux cours supérieures en conférant aux tribunaux pour adolescents le pouvoir exclusif de juger les

concluding that "[it] establishes . . . that powers which are 'hallmarks of superior courts' cannot be removed from those courts" (*MacMillan Bloedel*, at para. 35).

[35] Here, the legislation at issue bars access to the superior courts in yet another way — by imposing hearing fees that prevent some individuals from having their private and public law disputes resolved by the courts of superior jurisdiction — the hallmark of what superior courts exist to do. As in *MacMillan Bloedel*, a segment of society is effectively denied the ability to bring their matter before the superior court.

[36] It follows that the province's power to impose hearing fees cannot deny people the right to have their disputes resolved in the superior courts. To do so would be to impermissibly impinge on s. 96 of the *Constitution Act, 1867*. Rather, the province's powers under s. 92(14) must be exercised in a manner that is consistent with the right of individuals to bring their cases to the superior courts and have them resolved there.

[37] This is consistent with the approach adopted by Major J. in *Imperial Tobacco*. The legislation here at issue — the imposition of hearing fees — must conform not only to the express terms of the Constitution, but to the "requirements . . . that flow by necessary implication from those terms" (para. 66). The right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the *Constitution Act, 1867* as we have seen. It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts.

adolescents en cas d'outrage commis au cours des audiences d'une cour supérieure. Notre Cour, sous la plume du juge en chef Lamer, a cité *Crevier* et conclue que « [cet arrêt] établit qu'un pouvoir qui constitue une "marque [. . .] distinctive d'une cour supérieure" ne peut être retiré à ce tribunal » (*MacMillan Bloedel*, par. 35).

[35] En l'espèce, la loi litigieuse nie l'accès aux cours supérieures d'une autre façon — à savoir en établissant des frais d'audience qui empêchent certaines personnes de faire trancher leurs différends de droit privé et de droit public par les cours de juridiction supérieure, activité qui constitue la marque distinctive de la raison d'être de ces tribunaux. Tout comme dans *MacMillan Bloedel*, une partie de la population se voit effectivement nier la faculté de soumettre sa cause devant la cour supérieure.

[36] Par conséquent, le pouvoir de la province d'imposer des frais d'audience ne peut être exercé d'une manière qui nie aux gens le droit de faire trancher leurs différends par les cours supérieures. Leur nier ce droit reviendrait à porter atteinte de façon inacceptable à l'art. 96 de la *Loi constitutionnelle de 1867*. La province doit plutôt exercer les pouvoirs que lui confère le par. 92(14) d'une manière compatible avec le droit des justiciables de soumettre leurs différends aux cours supérieures pour qu'elles les règlent.

[37] Cette conclusion est conforme à la démarche adoptée par le juge Major dans *Imperial Tobacco*. Le texte de loi en litige dans la présente affaire — qui impose des frais d'audience — doit respecter non seulement les termes exprès de la Constitution, mais également les « exigences [. . .] qui découlent [de ceux-ci] par déduction nécessaire » (par. 66). Comme nous l'avons vu, le droit d'accès des Canadiennes et des Canadiens aux cours supérieures découle par déduction nécessaire des termes exprès de l'art. 96 de la *Loi constitutionnelle de 1867*. Il s'ensuit que la province ne dispose pas, en vertu du par. 92(14), du pouvoir d'adopter des lois qui empêchent les gens de s'adresser aux tribunaux.

[38] While this suffices to resolve the fundamental issue of principle in this appeal, the connection between s. 96 and access to justice is further supported by considerations relating to the rule of law. This Court affirmed that access to the courts is essential to the rule of law in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214. As Dickson C.J. put it, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (p. 230). The Court adopted, at p. 230, the B.C. Court of Appeal's statement of the law ((1985), 20 D.L.R. (4th) 399, at p. 406):

> . . . access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. . . . Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have already indicated, interference from whatever source falls into the same category. [Emphasis added.]

As stated more recently in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, *per* Karakatsanis J., "without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined" (para. 26).

[39] The s. 96 judicial function and the rule of law are inextricably intertwined. As Lamer C.J. stated in *MacMillan Bloedel*, "[i]n the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself" (para. 37). The very rationale for the provision is said to be "the maintenance of the rule of law through the protection of the judicial role": *Provincial Judges Reference*, at para. 88. As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is

[38] Bien que cela soit suffisant pour trancher la question de principe que soulève le présent pourvoi, des considérations relatives à la primauté du droit viennent étayer encore davantage l'existence du lien entre l'art. 96 et l'accès à la justice. Dans *B.C.G.E.U. c. Colombie-Britannique (Procureur général)*, [1988] 2 R.C.S. 214, notre Cour a confirmé que l'accès aux tribunaux est essentiel à la primauté du droit. Comme l'a dit le juge en chef Dickson, « [i]l ne peut y avoir de primauté du droit sans accès aux tribunaux, autrement la primauté du droit sera remplacée par la primauté d'hommes et de femmes qui décident qui peut avoir accès à la justice » (p. 230). À la p. 230, la Cour a fait sien l'énoncé du droit formulé par la Cour d'appel de la Colombie-Britannique ((1985), 20 D.L.R. (4th) 399, p. 406) :

> . . . [l]'accès aux tribunaux constitue sous le régime de la primauté du droit, un des piliers de base qui protège les droits et libertés de nos citoyens. [. . .] Du moment qu'une personne ou un groupe fait obstacle à cet accès, le tribunal exercera ses pouvoirs de manière à assurer aux justiciables leur accès au tribunal. En l'occurrence, l'entrave vient du piquetage. Comme nous l'avons déjà souligné, toutes les entraves, peu importe leur origine, tombent dans la même catégorie. [Je souligne.]

Comme l'a souligné tout récemment la juge Karakatsanis dans *Hryniak c. Mauldin*, 2014 CSC 7, [2014] 1 R.C.S. 87, « en l'absence d'un forum public accessible pour faire trancher les litiges, la primauté du droit est compromise et l'évolution de la common law, freinée » (par. 26).

[39] Le rôle de protection des tribunaux que joue l'art. 96 et la primauté du droit sont inextricablement liés. Comme l'a indiqué le juge en chef Lamer dans l'arrêt *MacMillan Bloedel*, « [s]elon les ententes constitutionnelles qui nous ont été transmises par l'Angleterre et qui sont reconnues dans le préambule de la *Loi constitutionnelle de 1867*, les cours supérieures provinciales constituent le fondement de la primauté du droit » (par. 37). La raison d'être même de la disposition est, affirme-t-on, « [le] maintien de la primauté du droit par la protection du rôle des tribunaux » : *Renvoi relatif aux juges de la Cour provinciale*, par. 88. Puisque l'accès

only natural that s. 96 provide some degree of constitutional protection for access to justice.

[40] In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed: *Christie v. British Columbia (Attorney General)*, 2005 BCCA 631, 262 D.L.R. (4th) 51, at paras. 68-69, *per* Newbury J.A.

[41] This Court's decision in *Christie* does not undermine the proposition that access to the courts is fundamental to our constitutional arrangements. The Court in *Christie* — a case concerning a 7 percent surcharge on legal services — proceeded on the premise of a fundamental right to access the courts, but held that not "every limit on access to the courts is automatically unconstitutional" (para. 17). In the present case, the hearing fee requirement has the potential to bar litigants with legitimate claims from the courts. The tax at issue in *Christie*, on the evidence and arguments adduced, was not shown to have a similar impact.

[42] Nor does the argument that legislatures generally have the right to determine the cost of government services undermine the proposition that laws cannot prevent citizens from accessing the superior courts. (Indeed, the Attorney General does not assert such a proposition.) The right of the province

à la justice est essentiel à la primauté du droit, et que celle-ci est favorisée par le maintien des cours visées à l'art. 96, il est naturel que cet article accorde une certaine protection constitutionnelle à l'accès à la justice.

[40] En présence d'un texte de loi qui nie effectivement à des gens le droit de soumettre leurs différends aux tribunaux, les inquiétudes concernant le maintien de la primauté du droit n'ont rien d'abstrait ou de théorique. Si les gens ne sont pas en mesure de contester en justice les mesures prises par l'État, ils ne peuvent obliger celui-ci à rendre des comptes — l'État serait alors au-dessus des lois ou perçu comme tel. Si les gens ne sont pas en mesure de saisir les tribunaux de questions légitimes, cela gênera la création et le maintien de règles de droit positif, car les lois ne seront pas appliquées. Et cela risquera d'altérer l'équilibre entre le pouvoir de l'État de faire et d'appliquer des lois et la responsabilité des tribunaux de statuer sur les contestations de ces lois par des citoyens : *Christie c. British Columbia (Attorney General)*, 2005 BCCA 631, 262 D.L.R. (4th) 51, par. 68-69, la juge Newbury.

[41] L'arrêt *Christie* de notre Cour n'affaiblit pas la proposition voulant que l'accès aux tribunaux constitue un aspect fondamental de nos arrangements constitutionnels. Dans cet arrêt — qui concernait une surtaxe de 7 pour 100 imposée sur les services juridiques — la Cour est partie du principe qu'il existe un droit fondamental à l'accès aux tribunaux, mais elle a conclu que « [les] limite[s] à l'accès aux tribunaux [ne sont pas toutes] automatiquement inconstitutionnelle[s] » (par. 17). En l'espèce, l'obligation de payer les frais d'audience risque d'empêcher des plaideurs dont les réclamations sont légitimes d'avoir accès aux tribunaux. Au vu de la preuve et des arguments présentés dans *Christie*, il n'a pas été démontré que la taxe en cause dans cette affaire produisait le même effet.

[42] L'argument selon lequel les législatures ont généralement le droit de fixer le coût des services offerts par l'État n'affaiblit pas lui non plus la proposition voulant qu'on ne puisse, par des lois, empêcher les citoyens d'avoir accès aux cours supérieures. (D'ailleurs, le procureur général n'affirme

to impose hearing fees is limited by constitutional constraints. In defining those constraints, the Court does not impermissibly venture into territory that is the exclusive turf of the legislature. Rather, the Court is ensuring that the Constitution is respected.

[43] I conclude that s. 92(14), read in the context of the Constitution as a whole, does not give the provinces the power to administer justice in a way that denies the right of Canadians to access courts of superior jurisdiction. Any attempt to do so will run afoul of the constitutional protection for the superior courts found in s. 96.

C. *When Do Hearing Fees Become Unconstitutional?*

[44] The remaining question is how to determine when hearing fees deny access to superior courts.

[45] Litigants with ample resources will not be denied access to the superior courts by hearing fees. Even litigants with modest resources are often capable of arranging their finances so that, with reasonable sacrifices, they may access the courts. However, when hearing fees deprive litigants of access to the superior courts, they infringe the basic right of citizens to bring their cases to court. That point is reached when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court.

[46] A hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum — as tacitly recognized by the exemption in the B.C. scheme at issue here. But providing exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue

rien de tel.) Le droit de la province d'imposer des frais d'audience est limité par des contraintes d'ordre constitutionnel. En définissant ces contraintes, notre Cour ne s'aventure pas de manière inacceptable dans un domaine relevant exclusivement de la législature. Au contraire, elle veille au respect de la Constitution.

[43] Je conclus que, considéré dans le contexte de l'ensemble de la Constitution, le par. 92(14) ne confère pas aux provinces le pouvoir d'administrer la justice d'une manière qui nie aux Canadiennes et aux Canadiens le droit d'avoir accès aux cours de juridiction supérieure. Toute tentative en ce sens se heurtera à la protection constitutionnelle dont jouissent les cours supérieures en vertu de l'art. 96.

C. *Dans quels cas des frais d'audience sont-ils inconstitutionnels?*

[44] Il reste à décider dans quels cas des frais d'audience nient l'accès aux cours supérieures.

[45] Des frais d'audience ne nieront pas aux plaideurs bien nantis l'accès aux cours supérieures. De plus, même des plaideurs disposant de ressources modestes sont souvent capables d'organiser leurs finances de façon à pouvoir, moyennant certains sacrifices raisonnables, avoir accès aux tribunaux. Toutefois, lorsque des frais d'audience privent des plaideurs de l'accès aux cours supérieures, ces frais portent alors atteinte au droit fondamental des citoyens de soumettre leurs différends aux tribunaux. Cette limite est atteinte dans les cas où les frais d'audience en question causent des difficultés excessives à un plaideur qui souhaite s'adresser à la cour supérieure.

[46] Un régime de frais d'audience qui ne dispense pas les personnes démunies de l'obligation de payer ces frais outrepasse clairement les limites minimales autorisées par la Constitution — comme en témoigne tacitement l'exemption prévue par le régime de la Colombie-Britannique contesté en l'espèce. Mais le fait de n'offrir des exemptions qu'aux personnes véritablement démunies pourrait se traduire par un coût d'accès trop élevé. Des frais si considérables qu'ils obligent des plaideurs non

Walter Valente *Appellant*;

and

Her Majesty The Queen *Respondent*;

and

Attorney General of Canada, Attorney General of Quebec, Attorney General for Saskatchewan, Provincial Court Judges Association (Criminal Division) and Ontario Family Court Judges Association *Interveners.*

File No.: 17583.

1984: October 9, 10; 1985: December 19.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Charter of Rights — Independent tribunal — Provincial Court judge declined jurisdiction on ground Provincial Court (Criminal Division) not an independent tribunal — Whether or not judge of Provincial Court (Criminal Division) an independent tribunal.

Constitutional law — Charter of Rights — Courts — Independent tribunal — Jurisdiction declined on ground Provincial Court (Criminal Division) not an independent tribunal — Whether or not judge of Provincial Court (Criminal Division) an independent tribunal — Canadian Charter of Rights and Freedoms, s. 11(d) — Constitution Act, 1982, s. 52(1) — Provincial Courts Act, R.S.O. 1980, c. 398 — Public Service Act, R.S.O. 1980, c. 418 — Public Service Superannuation Act, R.S.O. 1980, c. 419 — Provincial Courts Amendment Act, 1983, 1983 (Ont.), c. 18, s. 1 — Provincial Judges and Masters Statute Law Amendment Act, 1983, 1983 (Ont.), c. 78, s. 2(2) — Courts of Justice Act, 1984, 1984 (Ont.), c. 11.

A judge of the Provincial Court (Criminal Division), sitting on the Crown's appeal against the sentence imposed on the appellant following conviction for careless driving, declined to hear the appeal pending determination by a superior court as to whether the Provincial Court (Criminal Division) was an independent tribunal within the meaning of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*. Among the several reasons advanced by counsel in support of the contention

Walter Valente *Appelant*;

et

Sa Majesté La Reine *Intimée*;

et

Procureur général du Canada, Procureur général du Québec, Procureur général de la Saskatchewan, Association des juges des Cours provinciales (Division criminelle) et Ontario Family Court Judges Association *Intervenants.*

N° du greffe: 17583.

1984: 9, 10 octobre; 1985: 19 décembre.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre, Chouinard, Lamer et Le Dain.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Tribunaux — Charte des droits — Tribunal indépendant — Juge de la Cour provinciale déclinant compétence parce que la Cour provinciale (Division criminelle) n'est pas un tribunal indépendant — Un juge de la Cour provinciale (Division criminelle) est-il un tribunal indépendant?

Droit constitutionnel — Charte des droits — Tribunaux — Tribunal indépendant — Compétence déclinée parce que la Cour provinciale (Division criminelle) n'est pas un tribunal indépendant — Un juge de la Cour provinciale (Division criminelle) est-il un tribunal indépendant? — Charte canadienne des droits et libertés, art. 11d) — Loi constitutionnelle de 1982, art. 52(1) — Loi sur les cours provinciales, L.R.O. 1980, chap. 398 — Loi sur la fonction publique, L.R.O. 1980, chap. 418 — Loi sur le régime de retraite des fonctionnaires, L.R.O. 1980, chap. 419 — Provincial Courts Amendment Act, 1983, 1983 (Ont.), chap. 18, art. 1 — Provincial Judges and Masters Statute Law Amendment Act, 1983, 1983 (Ont.), chap. 78, art. 2(2) — Loi de 1984 sur les tribunaux judiciaires, 1984 (Ont.), chap. 11.

Dans un appel formé par Sa Majesté contre une peine infligée à l'appelant, reconnu coupable de l'infraction de conduite imprudente, un juge de la Cour provinciale (Division criminelle) a décliné compétence pour entendre l'appel tant qu'une cour supérieure n'aurait pas déterminé si la Cour provinciale (Division criminelle) était un tribunal indépendant au sens de l'al. 11*d*) de la *Charte canadienne des droits et libertés*. Parmi les nombreuses raisons soumises par l'avocat à l'appui de la

that the Provincial Court (Criminal Division) was not an independent tribunal were the nature of the tenure of provincial court judges, particularly those holding office under a post-retirement reappointment, the manner in which their salaries and pensions were fixed and provided for, and the extent to which they were dependent for certain advantages and benefits on the discretion of the executive government. The Ontario Court of Appeal proceeded on the basis that the provincial court judge had in effect decided that as a matter of law the Provincial Court (Criminal Division) as an institution was not independent. It allowed the appeal, holding that both the Provincial Court Judge and the Provincial Court (Criminal Division) were independent, and remitted the matter to the Provincial Court Judge to determine whether the sentence imposed was a fit and proper sentence.

Held: The appeal should be dismissed and the constitutional question answered as follows: A judge of the Provincial Court (Criminal Division) of Ontario is an independent tribunal within the meaning of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

The concepts of "independence" and "impartiality" found in s. 11(*d*) of the *Charter*, although obviously related, are separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. "Independence" reflects or embodies the traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others—particularly to the executive branch of government—that rests on objective conditions or guarantees. Judicial independence involves both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government.

The test for independence for purposes of s. 11(*d*) of the *Charter* should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. This perception must be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence and not a perception of how it will in fact act regardless of whether it enjoys such conditions or guarantees.

It would not be feasible to apply the most rigorous and elaborate conditions of judicial independence to the

prétention que la Cour provinciale (Division criminelle) n'est pas un tribunal indépendant, on trouve la nature de la charge des juges de cour provinciale, en particulier ceux qui occupent leur charge en vertu d'une nouvelle nomination après l'âge de la retraite, la manière dont leur traitement et pension sont fixés et versés et la mesure dans laquelle certains de leurs avantages sociaux dépendent du pouvoir discrétionnaire de l'exécutif. La Cour d'appel de l'Ontario a procédé sur le fondement que le juge de la Cour provinciale avait en réalité décidé qu'aux yeux du droit la Cour provinciale (Division criminelle), en tant qu'institution, n'était pas indépendante. Elle a accueilli l'appel, décidant que le juge de la Cour provinciale de même que la Cour provinciale (Division criminelle) étaient indépendants et a renvoyé la question au juge de la Cour provinciale pour qu'il statue sur la régularité et l'à-propos de la peine infligée.

Arrêt: Le pourvoi est rejeté et la question constitutionnelle reçoit la réponse suivante: Un juge de la Cour provinciale (Division criminelle) de l'Ontario est un tribunal indépendant au sens de l'al. 11*d*) de la *Charte canadienne des droits et libertés*.

Même s'il existe de toute évidence un rapport étroit entre les notions d'«indépendance» et d'«impartialité» que l'on trouve à l'al. 11*d*) de la *Charte*, ce sont néanmoins des valeurs ou exigences séparées et distinctes. L'impartialité désigne un état d'esprit ou une attitude du tribunal vis-à-vis des points en litige et des parties dans une affaire donnée. Le terme «indépendance» reflète ou consacre la valeur constitutionnelle traditionnelle qu'est l'indépendance judiciaire et connote non seulement un état d'esprit, mais aussi un statut ou une relation avec autrui, particulièrement avec l'organe exécutif du gouvernement, qui repose sur des conditions ou garanties objectives. L'indépendance judiciaire fait intervenir des rapports tant individuels qu'institutionnels: l'indépendance individuelle d'un juge, qui se manifeste dans certains de ses attributs, telle l'inamovibilité, et l'indépendance institutionnelle du tribunal qui ressort de ses rapports institutionnels ou administratifs avec les organes exécutif et législatif du gouvernement.

Le critère de l'indépendance aux fins de l'al. 11*d*) de la *Charte* doit être, comme dans le cas de l'impartialité, de savoir si le tribunal peut raisonnablement être perçu comme indépendant. Cette perception doit être celle d'un tribunal jouissant des conditions ou garanties objectives essentielles d'indépendance judiciaire, et non pas une perception de la manière dont il agira en fait, indépendamment de la question de savoir s'il jouit de ces conditions ou garanties.

Il ne serait pas possible d'appliquer les conditions les plus rigoureuses et les plus élaborées de l'indépendance

constitutional requirement of independence in s. 11(*d*) of the *Charter*, which may have to be applied to a variety of tribunals. The essential conditions of judicial independence for purposes of s. 11(*d*) must bear some reasonable relationship to the variety of legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence. It is the essence of the security afforded by the essential conditions of judicial independence that is appropriate for application under s. 11(*d*) of the *Charter* and not any particular legislative or constitutional formula by which it may be provided or guaranteed. Section 11(*d*) cannot be construed and applied so as to accord provincial court judges the same constitutional guarantees of security of tenure and security of salary and pension as superior court judges for that construction would, in effect, amend the judicature provisions of the Constitution. The standard of judicial independence cannot be a standard of uniform provisions but rather must reflect what is common to the various approaches to the essential conditions of judicial independence in Canada.

Security of tenure, because of the importance traditionally attached to it, is the first of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*. The essentials of such security are that a judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s. 11(*d*) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.

Notwithstanding the importance of tradition as an objective condition tending to ensure the independence in fact of a tribunal, a provincial court judge who held office during pleasure under a post-retirement reappointment prior to the amendment in 1983 to s. 5(4) of the *Provincial Courts Act* was not an independent tribunal. The reasonable perception was that by providing for two classes of tenure the Legislature had deliberately, in the case of one category of judges, reserved to the Executive the right to terminate the holding of office without the necessity of any particular jurisdiction and without any inhibition or restraint arising from perceived tradition.

judiciaire à l'exigence constitutionnelle d'indépendance qu'énonce l'al. 11*d*) de la *Charte*, qui peut devoir s'appliquer à différents tribunaux. Les conditions essentielles de l'indépendance judiciaire, pour les fins de l'al. 11*d*), doivent avoir un lien raisonnable avec cet éventail de dispositions législatives et constitutionnelles qui au Canada régissent les questions touchant à l'indépendance judiciaire des tribunaux qui jugent les personnes accusées d'une infraction. C'est l'essence de la garantie fournie par les conditions essentielles de l'indépendance judiciaire qu'il convient d'appliquer en vertu de l'al. 11*d*) de la *Charte*, et non pas quelque formule législative ou constitutionnelle particulière qui peut l'offrir ou l'assurer. L'alinéa 11*d*) ne peut pas être interprété et appliqué de manière à conférer aux juges de cour provinciale les mêmes garanties constitutionnelles d'inamovibilité et de sécurité de traitement et de pension que les juges des cours supérieures, parce qu'une telle interprétation aurait pour effet de modifier les dispositions de la Constitution relatives à la magistrature. La norme de l'indépendance judiciaire ne peut être l'uniformité des dispositions, mais doit plutôt refléter ce qui est commun aux diverses conceptions des conditions essentielles de l'indépendance judiciaire au Canada.

L'inamovibilité, de par son importance traditionnelle, est la première des conditions essentielles de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*. Les conditions essentielles de l'inamovibilité sont que le juge ne puisse être révoqué que pour un motif déterminé, et que ce motif fasse l'objet d'un examen indépendant et d'une décision selon une procédure qui offre au juge visé la possibilité pleine et entière de se faire entendre. L'essence de l'inamovibilité pour les fins de l'al. 11*d*), que ce soit jusqu'à l'âge de la retraite, pour une durée fixe, ou pour une charge *ad hoc*, est que la charge soit à l'abri de toute intervention discrétionnaire ou arbitraire de la part de l'exécutif ou de l'autorité responsable des nominations.

Nonobstant l'importance de la tradition comme condition objective tendant à assurer l'indépendance de fait d'un tribunal, un juge de cour provinciale qui a occupé sa charge à titre amovible en vertu d'une nouvelle nomination après l'âge de la retraite, avant la modification apportée en 1983 au par. 5(4) de la *Loi sur les cours provinciales*, ne constituait pas un tribunal indépendant. Il est raisonnable de croire qu'en prévoyant deux genres de charge le corps législatif a délibérément, dans le cas d'une catégorie de juges, réservé à l'exécutif le droit de mettre fin à une charge, sans qu'aucune justification particulière ne soit nécessaire et sans aucune inhibition ou restriction imposée par une certaine perception de la tradition.

The Provincial Court Judge who declined jurisdiction did not hold office under a post-retirement reappointment. The fact that certain judges may have held office during pleasure at that time could not impair or destroy the independence of the Provincial Court (Criminal Division) as a whole. The objection would have to be taken to the status of the particular judge constituting the tribunal.

The second essential condition of judicial independence for purposes of s. 11(*d*) of the *Charter* is financial security—security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to pension and a pension that depends on the grace or favour of the Executive. Although it may be theoretically preferable that judicial salaries should be fixed by the legislature rather than the executive government and should be made a charge on the consolidated revenue fund rather than requiring annual appropriation, neither of these features should be regarded as essential to the financial security that may be reasonably perceived as sufficient for independence under s. 11(*d*) of the *Charter*. The right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge. It is impossible that the legislature would refuse to vote the annual appropriation in order to attempt to exercise some control or influence over a class of judges as a whole. The fact that the provisions respecting the pensions and other benefits of civil servants were made applicable to provincial court judges did not impair the independence of the latter. The provisions established a right to pension and other benefits which could not be interfered with by the Executive on a discretionary or arbitrary basis.

The third essential condition of judicial independence is the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function. Judicial control over such matters as assignment of judges, sittings of the court and court lists has been considered the essential or minimum requirement for institutional independence. Although an increased measure of administrative autonomy or independence for the courts may be desir-

Le juge de la cour provinciale qui s'est récusé n'occupait pas sa charge en vertu d'une nouvelle nomination postérieure à sa retraite. Le fait qu'à l'époque certains juges aient pu occuper leur charge à titre amovible ne saurait altérer ni détruire l'indépendance de la Cour provinciale (Division criminelle) dans son ensemble. L'objection aurait dû viser le statut du juge particulier qui constituait le tribunal saisi.

La deuxième condition essentielle de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte* est la sécurité financière, c'est-à-dire un traitement ou autre rémunération assurés et, le cas échéant, une pension assurée. Cette sécurité consiste essentiellement en ce que le droit au traitement et à la pension soit prévu par la loi et ne soit pas sujet aux ingérences arbitraires de l'exécutif, d'une manière qui pourrait affecter l'indépendance judiciaire. Dans le cas de la pension, la distinction essentielle est entre un droit à une pension et une pension qui dépend du bon vouloir ou des bonnes grâces de l'exécutif. Bien qu'il puisse être théoriquement préférable que les traitements des juges soient fixés par le corps législatif, plutôt que par le pouvoir exécutif, et qu'ils grèvent le fonds du revenu consolidé, plutôt que d'exiger une affectation de crédit annuelle, ni l'une ni l'autre de ces caractéristiques ne doit être considérée comme essentielle à la sécurité financière qui peut être raisonnablement perçue comme suffisante pour assurer l'indépendance aux termes de l'al. 11*d*) de la *Charte*. Le droit d'un juge de cour provinciale à un traitement est prévu par la loi et l'exécutif ne peut d'aucune manière empiéter sur ce droit de façon à affecter l'indépendance du juge pris individuellement. Il est impossible que le corps législatif refuse de voter l'affectation de crédit annuelle dans le but de tenter d'exercer un contrôle ou d'influer sur une catégorie de juges dans son ensemble. Le fait que les dispositions relatives aux pensions et aux autres avantages offerts aux fonctionnaires ont été rendues applicables aux juges de cour provinciale ne porte pas atteinte à l'indépendance de ces derniers. Ces dispositions créent un droit à une pension et à d'autres avantages qui ne peut faire l'objet d'une atteinte discrétionnaire ou arbitraire de l'exécutif.

La troisième condition essentielle de l'indépendance judiciaire est l'indépendance institutionnelle du tribunal relativement aux questions administratives qui ont directement un effet sur l'exercice de ses fonctions judiciaires. Le contrôle des juges sur des questions comme l'assignation des juges aux causes, les séances de la cour et le rôle de la cour est considéré comme essentiel ou comme une exigence minimale de l'indépendance institutionnelle. Même si une plus grande autonomie ou

able it cannot be regarded as essential for purposes of s. 11(*d*) of the *Charter*.

While it may be desirable that discretionary benefits or advantages such as leave of absence with pay and permission to engage in extra-judicial employment, to the extent they should exist at all, should be under the control of the judiciary rather than the Executive, their control by the Executive does not touch one of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*. It would not, moreover, be reasonable to apprehend that a provincial court judge would be influenced by the possible desire for one of these benefits or advantages to be less than independent in his or her adjudication.

Cases Cited

MacKay v. The Queen, [1980] 2 S.C.R. 370, considered; *Re Evans and Milton* (1979), 46 C.C.C. (2d) 129; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, referred to.

Statutes and Regulations Cited

Act of Settlement, 12 & 13 Will. 3, c. 2.
Canadian Bill of Rights, R.S.C. 1970, App. III, s. 2(*f*).
Canadian Charter of Rights and Freedoms, s. 11(*d*).
Constitution Act, 1867, ss. 99(1), (2), 100.
Constitution Act, 1982, s. 52(1).
Courts of Justice Act, 1984, 1984 (Ont.), c. 11, ss. 53(1), (2), 54(4), 56(1), 87(1), 88.
European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6.
Highway Traffic Act, R.S.O. 1970, c. 202, s. 83.
Judges Act, R.S.C. 1970, c. J-1, ss. 33(1), 40, 41.
Provincial Courts Act, R.S.O. 1980, c. 398, ss. 2, 5(4), 12(1), (2), 34(1).
Provincial Courts Amendment Act, 1983, 1983 (Ont.), c. 18, s. 1.
Provincial Judges and Masters Statute Law Amendment Act, 1983, 1983 (Ont.), c. 78, s. 2(2).
Provincial Offences Act, R.S.O. 1980, c. 400, ss. 99, 114.
Public Service Act, R.S.O. 1980, c. 418.
Public Service Superannuation Act, R.S.O. 1980, c. 419, s. 26.
O. Reg. 332/84, s. 32(3).
R.R.O. 1980, Reg. 811, ss. 2, 4, 5, 7.
R.R.O. 1980, Reg. 881, ss. 7, 75, 76.

Authors Cited

Canadian Bar Association. Special Committee on the Independence of the Judiciary in Canada. Report.

indépendance administrative des tribunaux peut être souhaitable, elle ne saurait être considérée comme essentielle pour les fins de l'al. 11*d*) de la *Charte*.

Il est peut-être souhaitable que des bénéfices ou avantages discrétionnaires comme les congés payés et l'autorisation de s'adonner à des activités extrajudiciaires, dans la mesure où il devrait y en avoir, soient contrôlés par le pouvoir judiciaire plutôt que par l'exécutif. Toutefois, leur contrôle par l'exécutif ne touche pas à l'une des conditions essentielles de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*. De plus, il ne serait pas raisonnable de craindre qu'un juge de cour provinciale, influencé par l'éventuel désir d'obtenir l'un de ces bénéfices ou avantages soit loin d'être indépendant au moment de rendre jugement.

Jurisprudence

Arrêt examiné: *MacKay c. La Reine*, [1980] 2 R.C.S. 370; arrêts mentionnés: *Re Evans and Milton* (1979), 46 C.C.C. (2d) 129; *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369.

Lois et règlements cités

Acte d'établissement, 12 & 13 Will. 3, chap. 2.
Charte canadienne des droits et libertés, art. 11*d*).
Code de la route, S.R.O. 1970, chap. 202, art. 83.
Convention de sauvegarde des droits de l'homme et des libertés fondamentales, art. 6.
Déclaration canadienne des droits, S.R.C. 1970, app. III, art. 2*f*).
Loi constitutionnelle de 1867, art. 99(1), (2), 100.
Loi constitutionnelle de 1982, art. 52(1).
Loi de 1983 modifiant la Loi sur les cours provinciales, 1983 (Ont.), chap. 18, art. 1.
Loi de 1984 sur les tribunaux judiciaires, 1984 (Ont.), chap. 11, art. 53(1), (2), 54(4), 56(1), 87(1), 88.
Loi sur la fonction publique, L.R.O. 1980, chap. 418.
Loi sur le régime de retraite des fonctionnaires, L.R.O. 1980, chap. 419, art. 26.
Loi sur les cours provinciales, L.R.O. 1980, chap. 398, art. 2, 5(4), 12(1), (2), 34(1).
Loi sur les infractions provinciales, L.R.O. 1980, chap. 400, art. 99, 114.
Loi sur les juges, S.R.C. 1970, chap. J-1, art. 33(1), 40, 41.
Provincial Judges and Masters Statute Law Amendment Act, 1983, 1983 (Ont.), chap. 78, art. 2(2).
O. Reg. 332/84, art. 32(3).
R.R.O. 1980, Reg. 811, art. 2, 4, 5, 7.
R.R.O. 1980, Reg. 881, art. 7, 75, 76.

Doctrine citée

Association du Barreau canadien. Comité spécial sur l'indépendance de la magistrature au Canada. Rap-

The Independence of the Judiciary in Canada, Ottawa, Canadian Bar Foundation, 1985.
Denning, Sir Alfred. *The Road to Justice*, London, Stevens & Sons Ltd., 1955.
Deschênes, Jules, in collaboration with Carl Baar. *Masters in their own house*, Ottawa, Canadian Judicial Council, 1981.
Dickson, Brian. "The Rule of Law: Judicial Independence and the Separation of Powers," Address to the Canadian Bar Association, Halifax, August 21, 1985, unpublished manuscript, The Library, Supreme Court of Canada, Ottawa.
Fawcett, J. E. S. *The Application of the European Convention on Human Rights*, Oxford, Clarendon Press, 1969.
Green, Sir Guy. "The Rationale and Some Aspects of Judicial Independence" (1985), 59 *A.L.J.* 135, 135-150.
Laskin, Bora. "Some Observations on Judicial Independence," Address to the Canadian Association of Provincial Court Judges, New Judges Programme, Ottawa, November 1, 1980, unpublished manuscript, The Library, Supreme Court of Canada, Ottawa.
Lederman, W. R. "The Independence of the Judiciary" (1956), 34 *Can. Bar Rev.* 769, 769-809, 1139-1179.
Lederman, W. R. "The Independence of the Judiciary" in *The Canadian Judiciary*, ed. A. M. Linden, Toronto, Osgoode Hall Law School, York University, 1976.
Shetreet, S. *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary*, Amsterdam, North-Holland Publishing Co., 1976.
Shetreet, S. "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges" in *Judicial Independence: The Contemporary Debate*, eds. S. Shetreet and J. Deschênes, Dordrecht, The Netherlands, Martinus Nijhoff Publishers, 1985.
Shetreet, S. and J. Deschênes, eds. *Judicial Independence: The Contemporary Debate*, Dordrecht, The Netherlands, Martinus Nijhoff Publishers, 1985.
Universal Declaration on the Independence of Justice, adopted by the First World Conference on the Independence of Justice, Montreal, June 1983, in S. Shetreet and J. Deschênes, eds., *Judicial Independence: The Contemporary Debate*, Dordrecht, The Netherlands, Martinus Nijhoff Publishers, 1985.

APPEAL from a judgment of the Ontario Court of Appeal (1983), 2 C.C.C. (3d) 417, allowing an appeal from a judgment of Sharpe Prov. Ct. J. declining jurisdiction to hear the Crown's appeal as to sentence on appellant's conviction. Appeal dismissed.

port. *L'Indépendance de la magistrature au Canada*, Ottawa, Fondation du Barreau canadien, 1985.
Denning, Sir Alfred. *The Road to Justice*, London Stevens & Sons Ltd., 1955.
Déclaration universelle sur l'Indépendance de la Justice, adoptée par la Conférence mondiale sur l'Indépendance de la Justice, Montréal, juin 1983, dans S. Shetreet et J. Deschênes, eds., *Judicial Independence: The Contemporary Debate*, Dordrecht, The Netherlands, Martinus Nijhoff Publishers, 1985.
Deschênes, Jules, en collaboration avec Carl Baar. *Maîtres chez eux*, Ottawa, Conseil canadien de la magistrature, 1981.
Dickson, Brian. «The Rule of Law: Judicial Independence and the Separation of Powers,» Address to the Canadian Bar Association, Halifax, August 21, 1985, unpublished manuscript, The Library, Supreme Court of Canada, Ottawa.
Fawcett, J. E. S. *The Application of the European Convention on Human Rights*, Oxford, Clarendon Press, 1969.
Green, Sir Guy. «The Rationale and Some Aspects of Judicial Independence» (1985), 59 *A.L.J.* 135, 135-150.
Laskin, Bora. «Some Observations on Judicial Independence,» Address to the Canadian Association of Provincial Court Judges, New Judges Programme, Ottawa, November 1, 1980, unpublished manuscript, The Library, Supreme Court of Canada, Ottawa.
Lederman, W. R. «The Independence of the Judiciary» (1956), 34 *R. du B. can.* 769, 769-809, 1139-1179.
Lederman, W. R. «The Independence of the Judiciary» in *The Canadian Judiciary*, ed. A. M. Linden, Toronto, Osgoode Hall Law School, York University, 1976.
Shetreet, S. *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary*, Amsterdam, North-Holland Publishing Co., 1976.
Shetreet, S. «Judicial Independence: New Conceptual Dimensions and Contemporary Challenges,» in *Judicial Independence: The Contemporary Debate*, eds. S. Shetreet and J. Deschênes, Dordrecht, The Netherlands, Martinus Nijhoff Publishers, 1985.
Shetreet, S. and J. Deschênes, eds. *Judicial Independence: The Contemporary Debate*, Dordrecht, The Netherlands, Martinus Nijhoff Publishers, 1985.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1983), 2 C.C.C. (3d) 417, qui a accueilli un appel contre un jugement du juge Sharpe de la Cour provinciale qui avait décliné compétence pour entendre un appel de Sa Majesté relativement à la peine infligée à l'appelant suite à sa déclaration de culpabilité. Pourvoi rejeté.

B. A. Crane, Q.C., and *R. Noel Bates*, for the appellant.

W. G. Blacklock, for the respondent.

Derek Aylen, Q.C., and *Graham Garton*, for the intervener the Attorney General of Canada.

Réal A. Forest and *Angeline Thibault*, for the intervener the Attorney General of Quebec.

James C. MacPherson, for the intervener the Attorney General for Saskatchewan.

Morris Manning, Q.C., for the interveners the Provincial Court Judges Association (Criminal Division) and Ontario Family Court Judges Association.

The judgment of the Court was delivered by

LE DAIN J.—The general question raised by this appeal is what is meant by an independent tribunal in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, which provides:

11. Any person charged with an offence has the right

. . .

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

The specific issue in the appeal is whether a provincial judge sitting as the Provincial Court (Criminal Division) in Ontario in December 1982 was an independent tribunal within the meaning of s. 11(*d*).

I

The appeal is by leave of this Court from the judgment of the Ontario Court of Appeal on February 15, 1983, allowing an appeal from the judgment on December 16, 1982 of Sharpe J. of the Provincial Court (Criminal Division) for the Judicial District of Halton, who, sitting on the Crown's appeal, pursuant to s. 99 of the *Provincial Offences Act*, R.S.O. 1980, c. 400, against the sentence imposed on the appellant following his conviction of the offence of careless driving contrary to s. 83 of *The Highway Traffic Act*, R.S.O. 1970, c. 202, declined jurisdiction to hear the

B. A. Crane, c.r., et *R. Noel Bates*, pour l'appelant.

W. G. Blacklock, pour l'intimée.

Derek Aylen, c.r., et *Graham Garton*, pour l'intervenant le procureur général du Canada.

Réal A. Forest et *Angeline Thibault*, pour l'intervenant le procureur général du Québec.

James C. MacPherson, pour l'intervenant le procureur général de la Saskatchewan.

Morris Manning, c.r., pour les intervenants l'Association des juges des Cours provinciales (Division criminelle) et Ontario Family Court Judges Association.

Version française du jugement de la Cour rendu par

LE JUGE LE DAIN — La question générale que soulève ce pourvoi est de savoir ce qu'on entend par tribunal indépendant à l'al. 11*d*) de la *Charte canadienne des droits et libertés*, lequel porte:

11. Tout inculpé a le droit:

. . .

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

Le point précis en litige dans ce pourvoi est de savoir si un juge siégeant en Cour provinciale (Division criminelle) de l'Ontario, en décembre 1982, constituait un tribunal indépendant au sens de l'al. 11*d*).

I

On se pourvoit, avec l'autorisation de cette Cour, contre l'arrêt rendu le 15 février 1983 par la Cour d'appel de l'Ontario, qui a accueilli l'appel du jugement rendu le 16 décembre 1982 par le juge Sharpe de la Cour provinciale (Division criminelle) du district judiciaire de Halton qui, dans l'appel formé par Sa Majesté conformément à l'art. 99 de la *Loi sur les infractions provinciales*, L.R.O. 1980, chap. 400, contre la peine infligée à l'appelant, reconnu coupable de l'infraction de conduite imprudente décrite à l'art. 83 du *Code de la route*, S.R.O. 1970, chap. 202, a décliné compé-

appeal pending determination by a superior court whether the Provincial Court (Criminal Division) was an independent tribunal.

On the challenge before Sharpe J. to the independence of the Provincial Court (Criminal Division) counsel for the appellant advanced a number of reasons why in his submission the Court, because of the status of its judges as reflected in the provisions of the *Provincial Courts Act*, R.S.O. 1980, c. 398, the *Public Service Act*, R.S.O. 1980, c. 418, and the *Public Service Superannuation Act*, R.S.O. 1980, c. 419, as well as regulations made thereunder, was not one which satisfied the requirement of s. 11(*d*) of the *Charter*. These reasons, as summarized by Sharpe J. under the heading "Perceptions of Dependence" and set out in the reasons for judgment of the Ontario Court of Appeal, are as follows:

1. In that the salaries of the provincial judges are determined by the executive branch of the government without the benefit of the scrutiny of the legislature.

2. The judicial salaries are *not a charge* on the consolidated revenue fund, but are subject to annual appropriation.

3. Neither is there a pension charged on the consolidated revenue fund.

4. Nor is there any judicial pension other than one provided for under the *Public Service Superannuation Act*, and this notwithstanding s. 34 of the *Provincial Courts Act*.

5. Both the Act and the regulations provide for control of the judge and could be used to influence a judge or to apply real or perceived pressure to judges generally. Some of the sections that are capable of destroying the appearance of independence are as follows:

6. A judge may be appointed to sit during pleasure — s. 5(4) of the *Provincial Courts Act*. Moreover, any provincial court judge appointed after attaining the age of fifty-five years cannot receive any pension under the *Public Service Superannuation Act* unless the Cabinet reappoints him during pleasure after he reaches retirement age for a sufficient duration that he attains his minimum years of service to qualify for pension. Under the *Judges Act*, it is the *Judge* who chooses whether to retire. Can a provincial court judge under such a disabil-

tence pour entendre l'appel, tant qu'une cour supérieure n'aurait pas déterminé si la Cour provinciale (Division criminelle) était un tribunal indépendant.

Contestant devant le juge Sharpe l'indépendance de la Cour provinciale (Division criminelle), l'avocat de l'appelant a soumis un certain nombre de raisons pour lesquelles, selon lui, la cour, de par le statut de ses juges qui ressort des dispositions de la *Loi sur les cours provinciales*, L.R.O. 1980, chap. 398, la *Loi sur la fonction publique*, L.R.O. 1980, chap. 418, et la *Loi sur le régime de retraite des fonctionnaires*, L.R.O. 1980, chap. 419, ainsi que de leurs règlements d'application, ne satisferait pas à l'exigence de l'al. 11*d*) de la *Charte*. Voici ces raisons, résumées par le juge Sharpe, sous le titre [TRADUCTION] «Perceptions de dépendance», et exposées dans les motifs de l'arrêt de la Cour d'appel de l'Ontario:

[TRADUCTION] 1. En ce que les traitements des juges de cour provinciale sont fixés par l'organe exécutif du gouvernement, sans droit de regard de l'assemblée législative.

2. Les traitements des juges *ne sont pas une charge* grevant le fonds du revenu consolidé, mais dépendent d'une affectation annuelle de crédit.

3. Aucune pension ne grève non plus le fonds du revenu consolidé.

4. Il n'existe d'ailleurs aucune autre pension pour les juges que celle que prévoit la *Loi sur le régime de retraite des fonctionnaires*, et ce, malgré l'art. 34 de la *Loi sur les cours provinciales*.

5. Tant la Loi que la réglementation prévoient le contrôle du juge et pourraient être utilisées pour influencer un juge ou pour faire pression sur les juges en général, ou être perçues comme telles. Voici certains articles susceptibles de détruire toute apparence d'indépendance:

6. Un juge peut être nommé à titre amovible — par. 5(4) de la *Loi sur les cours provinciales*. De plus, tout juge de cour provinciale nommé après qu'il a atteint l'âge de cinquante-cinq ans ne peut toucher une pension en vertu de la *Loi sur le régime de retraite des fonctionnaires*, à moins que le Cabinet ne le nomme à nouveau, à titre amovible, lorsqu'il atteint l'âge de la retraite, pour une période suffisamment longue pour lui permettre de cumuler le nombre minimum d'années de service requis pour avoir droit à une pension. Aux termes de la *Loi sur*

ity be seen to be independent in a cause involving the Attorney General?

7. The Attorney General can appoint senior judges at greater pay than ordinary judges.

8. The executive branch can authorize judges to engage in any business, trade or occupation.

9. The Attorney General may authorize certain judges to do arbitrations, be conciliators, be a member of a police commission for which additional remuneration is received.

10. The executive branch purports to be able to appoint a rules committee composed of persons not necessarily judges for rules under the *Criminal Code*.

11. The executive branch has the power to make regulations for the inspection and destruction of judges' books, documents and papers (s. 34(1)(b) of the *Provincial Courts Act*).

12. In the regulations, the Attorney General can grant leave of absence for up to three years and the executive branch can grant it with pay.

13. This last mentioned regulation incorporates regulation 881 wherein judges are referred to as civil servants.

14. The judge has the same sick leave as a civil servant and his salary is reduced in the same manner as a civil servant when sick.

15. The Deputy Attorney General can require the judge to attend for medical examinations and to supply doctors' certificates.

16. A Deputy Attorney General can grant a judge a leave of absence for up to a year for employment with the Government of Canada or other public agency. A provincial judge in Ontario has been made a Deputy Minister while retaining his position as a judge, a matter deplored by Chief Justice Bora Laskin of the Supreme Court of Canada.

17. The judge receives the same financial benefits as the other civil servants as set out in s. 77, namely: (a) a basic life insurance plan, (b) a dependent's life insurance plan, (c) a long-term income protection plan, (d) a supplementary insurance plan, (e) a dental insurance plan. Some of these plans are paid for by the Government and all affect the financial status of the judge.

les juges, c'est *le juge* qui choisit ou non de prendre sa retraite. Un juge de cour provinciale assujetti à une telle incapacité peut-il être perçu comme indépendant dans une affaire impliquant le procureur général?

7. Le procureur général peut nommer des juges principaux dont le traitement est supérieur à celui des juges ordinaires.

8. Le pouvoir exécutif peut autoriser les juges à exercer tout commerce, métier ou occupation.

9. Le procureur général peut autoriser certains juges à agir à titre d'arbitres, de conciliateurs ou de membres d'une commission de police, auxquels cas ils reçoivent une rémunération supplémentaire.

10. Le pouvoir exécutif est apparemment en mesure de nommer un comité des règles de pratique, auquel ne siègent pas uniquement des juges, pour l'adoption de règles de pratique en vertu du *Code criminel*.

11. Le pouvoir exécutif peut établir des règlements portant sur l'inspection et la destruction des livres, documents et écrits des juges (al. 34(1)b) de la *Loi sur les cours provinciales*).

12. Suivant le règlement, le procureur général peut accorder un congé, pouvant aller jusqu'à trois ans, et le pouvoir exécutif peut l'accorder avec traitement.

13. Le dernier règlement mentionné incorpore le règlement 881 où l'on parle des juges comme étant des fonctionnaires.

14. Le juge a droit aux mêmes congés de maladie qu'un fonctionnaire et son traitement est réduit de la même manière qu'un fonctionnaire en cas de maladie.

15. Le sous-procureur général peut exiger d'un juge qu'il subisse des examens médicaux et fournisse des certificats médicaux.

16. Un sous-procureur général peut accorder à un juge un congé, pouvant aller jusqu'à un an, pour lui permettre de travailler pour le gouvernement du Canada ou un autre organisme public. Un juge de cour provinciale en Ontario a été nommé sous-ministre tout en conservant sa charge de juge, ce qu'a déploré le juge en chef Bora Laskin de la Cour suprême du Canada.

17. Le juge reçoit les mêmes bénéfices d'ordre financier que les autres fonctionnaires, comme l'indique l'art. 77, savoir: a) un plan d'assurance-vie de base, b) un plan d'assurance-vie pour les personnes à charge, c) un plan de protection de revenu garanti, d) un plan d'assurance supplémentaire, e) un plan d'assurance dentaire. Certains de ces plans sont payés par le gouvernement et tous influent sur la situation financière du juge.

18. The *Provincial Courts Act* provides for a procedure to remove a judge after an inquiry but it does not require a vote in the legislature as there is with a supreme court judge. The *Public Service Act* has a regulation under section [*sic*] 12 and 13 which includes a provincial court judge. The significance of this is that a provincial judge can be classified as a Crown employee and therefore under some direction by the executive branch of the government and there may be other Acts which have regulations that affect the provincial judges.

18. La *Loi sur les cours provinciales* établit une procédure de révocation d'un juge, après enquête, mais elle n'exige pas un vote de l'assemblée législative comme c'est le cas pour un juge de cour suprême. Un règlement d'application des art. 12 et 13 de la *Loi sur la fonction publique* inclut le juge de cour provinciale. Ce qui signifie qu'un juge de cour provinciale peut être classé comme employé de l'État et donc être assujetti jusqu'à un certain point aux directives de l'organe exécutif du gouvernement; il se peut qu'il y ait d'autres lois dont les règlements d'application touchent les juges de cour provinciale.

Counsel for the appellant submitted before Sharpe J. that since the Provincial Court (Criminal Division) was not an independent tribunal within the meaning of s. 11(*d*) of the *Charter*, s. 99 of the *Provincial Offences Act*, which conferred the right of appeal to the Court from the sentence imposed on the appellant, was of no force or effect by operation of s. 52(1) of the *Constitution Act, 1982*, which provides:

52. (1) The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

L'avocat de l'appelant a fait valoir devant le juge Sharpe que, puisque la Cour provinciale (Division criminelle) n'était pas un tribunal indépendant au sens de l'al. 11*d*) de la *Charte*, l'art. 99 de la *Loi sur les infractions provinciales*, qui confère le droit d'en appeler à la cour de la sentence imposée à l'appelant, était inopérant en vertu du par. 52(1) de la *Loi constitutionnelle de 1982* qui porte:

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

After consideration of the submissions in support of the contention that the Provincial Court (Criminal Division) was not an independent tribunal, Sharpe J. took the position that he was disqualified by interest from determining the question of independence, and he declined jurisdiction in order that the question be determined by a superior court.

Après examen des arguments soumis à l'appui de la prétention que la Cour provinciale (Division criminelle) n'était pas un tribunal indépendant, le juge Sharpe s'est récusé, s'estimant partie intéressée pour ce qui était de statuer sur la question d'indépendance, et il a décliné compétence afin de laisser une cour supérieure trancher cette question.

Leave to appeal to the Ontario Court of Appeal was granted on the basis that Sharpe J.'s decision that he was disqualified from determining the question of jurisdiction was a judgment from which an appeal lay under s. 114 of the *Provincial Offences Act*. At the hearing of the appeal the Court of Appeal ruled that the appeal should proceed on the basis that Sharpe J. had in effect decided that as a matter of law the Provincial Court (Criminal Division) as an institution was not independent.

L'autorisation d'interjeter appel à la Cour d'appel de l'Ontario a été accordée pour le motif que la décision du juge Sharpe, qu'il ne pouvait statuer sur la question de compétence, constituait un jugement dont appel pouvait être interjeté en vertu de l'art. 114 de la *Loi sur les infractions provinciales*. À l'audition de l'appel, la Cour d'appel a décidé que l'appel devait être fondé sur le fait que le juge Sharpe avait en réalité décidé qu'aux yeux du droit la Cour provinciale (Division criminelle), en tant qu'institution, n'était pas indépendante.

The unanimous judgment of the five-member Court of Appeal (Howland C.J.O., MacKinnon A.C.J.O., Dubin, Martin and Weatherston JJ.A.),

L'arrêt unanime de la formation de cinq membres de la Cour d'appel de l'Ontario (le juge en chef Howland, le juge en chef adjoint MacKinnon

reported at *R. v. Valente (No. 2)* (1983), 2 C.C.C. (3d) 417, was delivered by Howland C.J.O., who, after a comprehensive consideration of the issues, concluded at p. 444 as follows:

I have reached the conclusion that the concerns raised by the counsel for the respondent neither singly nor collectively would result in a reasonable apprehension that they would impair the ability of Judge Sharpe to make an independent and impartial adjudication. In my opinion, the provincial court in this province is as a matter of law an independent tribunal. Judge Sharpe sitting as a member of the court was independent, and as has been noted earlier, he was impartial. Therefore, the respondent appeared before an independent and impartial tribunal within the Charter.

Accordingly, the appeal is allowed. The purported judgment of Judge Sharpe that the provincial court (criminal division) as an institution is not an independent tribunal is set aside and the matter is remitted to Judge Sharpe to determine whether the sentence imposed was a fit and proper sentence.

On the appeal to this Court the constitutional question was framed as follows:

Is a judge of the Provincial Court (Criminal Division) of Ontario, appointed pursuant to the provisions of the *Provincial Courts Act*, R.S.O. 1980, c. 398, an independent and impartial tribunal within the meaning of the *Constitution Act, 1982*?

Although the decision of Sharpe J. was treated as a judgment that the Provincial Court (Criminal Division) as an institution was not an independent tribunal and it was that judgment that was found by the Court of Appeal to be in error and was set aside, the Court of Appeal, as the conclusions in its reasons for judgment indicate, necessarily had to consider the independence of Sharpe J. The tribunal, for purposes of s. 11(*d*) of the *Charter*, was Sharpe J. sitting as the Provincial Court (Criminal Division) for the Judicial District of Halton. The independence of Sharpe J. for purposes of the issue in the appeal is to be determined with reference to the relevant statutory provisions and regulations that were in force at the time he declined jurisdiction on December 16, 1982. Subsequent changes in the law governing the Provincial Court (Criminal Division) and its judges are relevant to the question of the continuing inde-

et les juges Dubin, Martin et Weatherston), publié à *R. v. Valente (No. 2)* (1983), 2 C.C.C. (3d) 417, a été rendu par le juge en chef Howland qui, après un examen approfondi des points litigieux, conclut ceci à la p. 444:

[TRADUCTION] Je suis arrivé à la conclusion que les préoccupations des avocats de l'intimé, ni individuellement ni collectivement, ne permettent pas raisonnablement de craindre qu'il y ait atteinte à la capacité du juge Sharpe de statuer en toute indépendance et impartialité. À mon avis, la Cour provinciale de notre province est, aux yeux du droit, un tribunal indépendant. Le juge Sharpe, siégeant comme membre de la cour, était indépendant et, comme on l'a déjà dit, impartial. Donc l'intimé a comparu devant un tribunal indépendant et impartial au sens de la Charte.

En conséquence, l'appel est accueilli. Le prétendu jugement du juge Sharpe, portant que la Cour provinciale (Division criminelle), en tant qu'institution, n'est pas un tribunal indépendant, est annulé et l'affaire lui est renvoyée pour qu'il statue sur la régularité et l'à-propos de la peine infligée.

Dans le pourvoi devant cette Cour, la question constitutionnelle a été formulée ainsi:

Un juge de la Cour provinciale (Division criminelle) de l'Ontario, nommé conformément aux dispositions de la *Loi sur les cours provinciales* L.R.O. 1980, chap. 398, constitue-t-il un tribunal indépendant et impartial au sens de la *Loi constitutionnelle de 1982*?

Bien que la décision du juge Sharpe ait été considérée comme un jugement portant que la Cour provinciale (Division criminelle), en tant qu'institution, n'était pas un tribunal indépendant et que ce soit ce jugement que la Cour d'appel a jugé erroné et a annulé, la Cour d'appel, comme l'indiquent les conclusions de ses motifs de jugement, devait nécessairement examiner si le juge Sharpe lui-même était indépendant. Le tribunal, pour les fins de l'al. 11*d*) de la *Charte*, était le juge Sharpe siégeant en Cour provinciale (Division criminelle) du district judiciaire de Halton. L'indépendance du juge Sharpe pour les fins du pourvoi doit être établie en fonction des dispositions législatives et réglementaires pertinentes en vigueur au moment où il a décliné compétence, le 16 décembre 1982. Les changements subséquents apportés au droit régissant la Cour provinciale (Division criminelle) et ses juges sont pertinents en ce qui

pendence of the tribunal to which the matter must be remitted for determination of this Court agrees with the Court of Appeal that Sharpe J. sitting as the Provincial Court (Criminal Division) was an independent tribunal when he declined jurisdiction.

II

The first question in the appeal is whether the Court of Appeal adopted the proper test for determining whether a tribunal is independent within the meaning of s. 11(*d*) of the *Charter*. The test applied was the one for reasonable apprehension of bias, adapted to the requirement of independence. Noting that in *Re Evans and Milton* (1979), 46 C.C.C. (2d) 129, a case involving a question of bias, the Ontario Court of Appeal has adopted the test for reasonable apprehension of bias expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, Howland C.J.O. held that this was the proper test to be applied in determining whether a tribunal is an independent tribunal.

The test for reasonable apprehension of bias was put by de Grandpré J. at p. 394 as follows:

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

As adapted to the requirement of an independent tribunal and to the issues in the appeal the test was stated by Howland C.J.O., at pp. 439-40 as follows:

> The question that now has to be determined is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically would conclude that a provincial court judge sitting as Judge Sharpe was to hear the appeal in this case was a tribunal which could make an independent and impartial adjudication. In answering

concerne la question de l'indépendance permanente du tribunal auquel l'affaire doit être renvoyée si cette Cour est d'accord avec la Cour d'appel pour dire que le juge Sharpe, siégeant en Cour provinciale (Division criminelle), constituait un tribunal indépendant lorsqu'il a décliné compétence.

II

La première question qui se pose dans ce pourvoi est de savoir si la Cour d'appel a adopté le bon critère pour déterminer si un tribunal est indépendant au sens de l'al. 11*d*) de la *Charte*. Le critère appliqué a été celui de la crainte raisonnable de partialité, adapté à l'exigence d'indépendance. Faisant remarquer que dans l'affaire *Re Evans and Milton* (1979), 46 C.C.C. (2d) 129, où il était question de partialité, la Cour d'appel d'Ontario a adopté le critère de la crainte raisonnable de partialité formulé par le juge de Grandpré dans l'arrêt *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369, le juge en chef Howland de l'Ontario a jugé que c'était là le critère qu'il fallait appliquer pour décider si un tribunal est un tribunal indépendant.

Le critère de la crainte raisonnable de partialité est énoncé ainsi par le juge de Grandpré, à la p. 394:

> ... la crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. Selon les termes de la Cour d'appel, ce critère consiste à se demander «à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique. . .»

L'adaptant à l'exigence d'un tribunal indépendant et aux questions en litige dans cet appel, le juge en chef Howland énonce ainsi le critère aux pp. 439 et 440:

> [TRADUCTION] La question qui doit maintenant être tranchée est de savoir si une personne raisonnable, informée des dispositions législatives pertinentes, de leur historique et des traditions les entourant, après avoir envisagé la question de façon réaliste et pratique, conclurait qu'un juge de cour provinciale, chargé comme le juge Sharpe d'instruire l'appel en l'espèce, était un tribunal en mesure de statuer en toute indépendance et

this question it is necessary to review once again the specific concerns which were raised before Judge Sharpe and then conclude whether singly or collectively they would raise a reasonable apprehension that the tribunal was not independent and impartial so far as its adjudication was concerned.

In his reasons for judgment, Howland C.J.O. generally referred, as does the constitutional question, to the double requirement of an "independent and impartial tribunal". He made it clear, however, at one point in his reasons that there was no question of Sharpe J.'s impartiality, and that the sole issue was whether he, as a judge of the Provincial Court (Criminal Division), was an independent tribunal within the meaning of s. 11(*d*) of the *Charter*. On this point he said at p. 423:

> It will be noted that both the Charter and the *Bill of Rights* refer to an "independent and impartial tribunal". In this appeal the Court is only concerned with the independence of the tribunal and not with its impartiality or freedom from bias except in so far as it affects that independence. There was no suggestion that Judge Sharpe was in any way biased, and therefore not impartial. A judge may be impartial in the sense that he has no preconceived ideas or bias, actual or perceived, without necessarily being independent.

The issue is whether the test applied by the Court of Appeal, clearly appropriate, because of its derivation, to the requirement of impartiality, is an appropriate and sufficient test for the requirement of independence. Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" as Howland C.J.O. noted, connotes absence of bias, actual or perceived. The word "independent" in s. 11(*d*) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

impartialité. Pour répondre à cette question, il est nécessaire d'examiner une fois de plus les préoccupations spécifiques exprimées devant le juge Sharpe, puis de décider si, prises individuellement ou collectivement, elles soulèvent une crainte raisonnable que le tribunal n'ait pas été indépendant et impartial pour rendre jugement.

Dans ses motifs de jugement, le juge en chef Howland mentionne, comme le fait la question constitutionnelle, la double exigence d'un «tribunal indépendant et impartial». Cependant, il dit clairement, en un point de ses motifs, que l'impartialité du juge Sharpe n'est pas en cause et que la seule question qui se pose est de savoir si, en tant que juge de la Cour provinciale (Division criminelle), il constituait un tribunal indépendant au sens de l'al. 11*d*) de la *Charte*. Sur ce point, il affirme à la p. 423:

> [TRADUCTION] On notera que la *Charte*, tout comme la *Déclaration des droits*, parle d'un «tribunal indépendant et impartial». Dans le présent appel, la cour n'a à se préoccuper que de l'indépendance du tribunal et non de son impartialité, ou du fait qu'il soit exempt de toute partialité dans la mesure où cela influe sur cette indépendance. On n'a pas prétendu que le juge Sharpe avait un préjugé quelconque et qu'il n'était donc pas impartial. Un juge peut être impartial, en ce sens qu'il n'a aucun préjugé ou idée préconçue, réels ou apparents, sans nécessairement être indépendant.

Il s'agit de savoir si le critère appliqué par la Cour d'appel, qui de par son origine convenait à l'exigence d'impartialité, constitue un critère suffisant et approprié en ce qui concerne l'exigence d'indépendance. Même s'il existe de toute évidence un rapport étroit entre l'indépendance et l'impartialité, ce sont néanmoins des valeurs ou exigences séparées et distinctes. L'impartialité désigne un état d'esprit ou une attitude du tribunal vis-à-vis des points en litige et des parties dans une instance donnée. Le terme «impartial», comme l'a souligné le juge en chef Howland, connote une absence de préjugé, réel ou apparent. Le terme «indépendant», à l'al. 11*d*), reflète ou renferme la valeur constitutionnelle traditionnelle qu'est l'indépendance judiciaire. Comme tel, il connote non seulement un état d'esprit ou une attitude dans l'exercice concret des fonctions judiciaires, mais aussi un statut, une relation avec autrui, particulièrement avec l'organe exécutif du gouvernement, qui repose sur des conditions ou garanties objectives.

Fawcett, in *The Application of the European Convention on Human Rights* (1969), p. 156, commenting on the requirement of an "independent and impartial tribunal established by law" in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, puts the distinction between independence and impartiality as follows:

> The often fine distinction between independence and impartiality turns mainly, it seems, on that between the status of the tribunal determinable largely by objective tests and the subjective attitudes of its members, lay or legal. Independence is primarily freedom from control by, or subordination to, the executive power in the State; impartiality is rather absence in the members of the tribunal of personal interest in the issues to be determined by it, or some form of prejudice.

The scope of the necessary status or relationship of independence has been variously defined. For example, Shetreet, in *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (1976), emphasizes in the following passage at pp. 17-18 the importance of freedom from the influence of certain powerful non-governmental interests:

> Independence of the judiciary has normally been thought of as freedom from interference by the Executive or Legislature in the exercise of the judicial function. This, for example, was the conception expressed by the International Congress of Jurists at New Delhi in 1959 (*The Rule of Law in a Free Society*, 11 (Report of the International Congress of Jurists, New Delhi, 1959, prepared by N. S. Marsh)) and arises from the fact that historically the independence of the judiciary was endangered by parliaments and monarchs. In modern times, with the steady growth of the corporate giants, it is of utmost importance that the independence of the judiciary from business or corporate interests should also be secured (*Accord* G. Borrie, *Judicial Conflicts of Interest in Britain*, 18 Am. J. Comp. L. 697 (1970)). In short, independence of the judiciary implies not only that a judge should be free from governmental and political pressure and political entanglements but also that he should be removed from financial or business entanglements likely to affect, or rather to seem to affect, him in the exercise of his judicial functions.

À la page 156 de son ouvrage intitulé *The Application of the European Convention on Human Rights* (1969), Fawcett parle de l'exigence d'un «tribunal indépendant et impartial, établi par la loi» que l'on trouve à l'article 6 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, et fait la distinction suivante entre l'indépendance et l'impartialité:

> [TRADUCTION] La distinction souvent ténue entre l'indépendance et l'impartialité tient principalement, semble-t-il, à celle entre le statut du tribunal, qui peut être déterminé en grande partie en fonction de critères objectifs, et les attitudes subjectives de ses membres, juristes ou non. L'indépendance consiste avant tout à échapper au contrôle du pouvoir exécutif de l'État, ou à une subordination à celui-ci; l'impartialité, c'est plutôt l'absence chez les membres du tribunal d'intérêts personnels dans les questions sur lesquelles il doit statuer ou d'une forme quelconque de préjugé.

L'étendue du statut ou de la relation d'indépendance nécessaires a été définie de diverses manières. Par exemple, dans *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (1976), Shetreet souligne dans le passage suivant, aux pp. 17 et 18, l'importance d'être à l'abri de l'influence de certains intérêts puissants non gouvernementaux:

> [TRADUCTION] L'indépendance du pouvoir judiciaire est normalement conçue comme le fait d'être à l'abri de toute intervention du pouvoir exécutif ou du corps législatif dans l'exercice des fonctions judiciaires. C'était là par exemple la conception du Congrès international de juristes qui s'est tenu à New Delhi, en 1959 (*Le principe de la légalité dans une société libre*, 11 (Rapport des travaux du Congrès international de juristes tenu à New Delhi, 1959, rédigé par N. S. Marsh)); elle découle du fait qu'historiquement l'indépendance du pouvoir judiciaire était menacée par les parlements et les monarques. De nos jours, avec la croissance incessante de sociétés géantes, il est de la plus grande importance d'assurer aussi l'indépendance du pouvoir judiciaire vis-à-vis des intérêts d'entreprises ou de sociétés (*Accord* G. Borrie, *Judicial Conflicts of Interest in Britain*, 18 Am. J. Comp. L. 697 (1970)). En bref, l'indépendance du pouvoir judiciaire implique non seulement qu'un juge doit être à l'abri des pressions gouvernementales et politiques et des démêlés politiques, mais qu'il doit aussi être tenu à l'écart des démêlés financiers ou d'affaires susceptibles d'influer, ou plutôt de sembler influer, sur lui dans l'exercice de ses fonctions judiciaires.

The scope of the status or relationship of judicial independence was defined in a very comprehensive manner by Sir Guy Green, Chief Justice of the State of Tasmania, in "The Rationale and Some Aspects of Judicial Independence," (1985), 59 *A.L.J.* 135, at p. 135 as follows:

> I thus define judicial independence as the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extend that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control.

The focus in the appeal, as indicated by the nature of the various objections to the status of provincial court judges, is on the relationship of the judges and the Provincial Court (Criminal Division) to the executive government of Ontario, and in particular to the Ministry of the Attorney General.

It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government. See Lederman, "The Independence of the Judiciary" in *The Canadian Judiciary* (1976, ed. A. M. Linden), p. 7; and Deschênes, *Masters in their own house* (1981), *passim*, where the notion of institutional independence is referred to as "collective" independence. The objections in the present case to the status of provincial court judges under the legislation and regulations that prevailed at the time Sharpe J. declined jurisdiction raise issues of both individual and institutional independence. The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.

L'étendue du statut ou de la relation d'indépendance judiciaire a été définie de façon très exhaustive par sir Guy Green, juge en chef de l'État de Tasmanie, dans son article intitulé «The Rationale and Some Aspects of Judicial Independence» (1985), 59 *A.L.J.* 135, à la p. 135:

> [TRADUCTION] Je définis donc l'indépendance judiciaire comme la capacité des tribunaux d'exercer leurs fonctions constitutionnelles à l'abri de toute intervention réelle ou apparente de la part de toutes personnes ou institutions sur lesquelles ils n'exercent pas un contrôle direct, y compris, notamment, l'organe exécutif du gouvernement, et dans la mesure où cela est constitutionnellement possible en étant exempts de toute dépendance réelle ou apparente vis-à-vis de celles-ci.

On s'est concentré dans ce pourvoi, comme l'indique la nature des diverses objections portant sur le statut des juges de cour provinciale, sur le rapport qu'il y a entre, d'une part, les juges et la Cour provinciale (Division criminelle) et, d'autre part, le pouvoir exécutif ontarien, et en particulier le ministère du Procureur général.

On admet généralement que l'indépendance judiciaire fait intervenir des rapports tant individuels qu'institutionnels: l'indépendance individuelle d'un juge, qui se manifeste dans certains de ses attributs, telle l'inamovibilité, et l'indépendance institutionnelle de la cour ou du tribunal qu'il préside, qui ressort de ses rapports institutionnels ou administratifs avec les organes exécutif et législatif du gouvernement. Voir Lederman, «The Independence of the Judiciary» dans *The Canadian Judiciary* (1976, ed. A. M. Linden), p. 7, et Deschênes, *Maîtres chez eux* (1981), *passim*, où la notion d'indépendance institutionnelle est appelée indépendance «collective». Les objections en l'espèce concernant le statut que possédaient les juges de cour provinciale, en vertu de la législation et de la réglementation qui prévalaient à l'époque où le juge Sharpe a décliné compétence, soulèvent des questions d'indépendance tant individuelle qu'institutionnelle. Le rapport entre ces deux aspects de l'indépendance judiciaire est qu'un juge, pris individuellement, peut jouir des conditions essentielles à l'indépendance judiciaire, mais si la cour ou le tribunal qu'il préside n'est pas indépendant des autres organes du gouvernement dans ce qui est essentiel à sa fonction, on ne peut pas dire qu'il constitue un tribunal indépendant.

In his reasons for judgment Howland C.J.O. referred in various ways to the independence required by s. 11(*d*) of the *Charter*. In some expressions of the issue he suggested that the question was whether the objections to the status of a provincial court judge gave rise to a reasonable apprehension that the tribunal would not act in an independent manner in the particular adjudication. This is suggested by the words "it could not be reasonably apprehended that the tribunal would not be independent and impartial in its adjudication". This view of the issue would give the word "independent" essentially the same kind of meaning and effect as the word "impartial", as referring to the state of mind or attitude of the tribunal in the actual exercise of its judicial function. In other expressions of the issue, however, Howland C.J.O. referred to the question as being whether the various objections to the status of a provincial court judge gave rise to a reasonable apprehension that the tribunal lacked the capacity to adjudicate in an independent manner. This is suggested by the words "a tribunal which could make an independent and impartial adjudication" in the statement of the test for independence which has been quoted above and by the words "a reasonable apprehension that they would impair the ability of Judge Sharpe to make an independent and impartial adjudication". This I take to be more clearly a reference to the objective status or relationship of judicial independence, which in my opinion is the primary meaning to be given to the word "independent" in s. 11(*d*). Of course, the concern is ultimately with how a tribunal will actually act in a particular adjudication, and a tribunal that does not act in an independent manner cannot be held to be independent within the meaning of s. 11(*d*) of the *Charter*, regardless of its objective status. But a tribunal which lacks the objective status or relationship of independence cannot be held to be independent within the meaning of s. 11(*d*), regardless of how it may appear to have acted in the particular adjudication. It is the objective status or relationship of judicial independence that is to provide the assurance that the tribunal has the capacity to act in an independent manner and will in fact act in such a manner. It is, therefore, necessary to consider what should be

Dans ses motifs de jugement, le juge en chef Howland s'est référé de diverses manières à l'indépendance requise par l'al. 11*d*) de la *Charte*. Dans certaines formulations de la question en litige, il laisse entendre qu'il s'agit de déterminer si les objections au statut d'un juge de cour provinciale laissent raisonnablement craindre que le tribunal n'agira pas d'une manière indépendante dans une espèce particulière. C'est ce que donne à entendre la phrase [TRADUCTION] «on ne pouvait raisonnablement craindre que le tribunal ne serait pas indépendant et impartial pour rendre jugement». Cette conception de la question litigieuse a pour effet de donner au terme «indépendant» essentiellement les mêmes sens et effet que ceux du terme «impartial», comme désignant l'état d'esprit ou l'attitude du tribunal lorsqu'il exerce concrètement ses fonctions judiciaires. Dans d'autres formulations de la question litigieuse cependant, le juge en chef Howland parle de la question comme étant de savoir si les diverses objections au statut de juge de cour provinciale faisaient naître une crainte raisonnable que le tribunal n'ait pas la capacité de statuer d'une manière indépendante. C'est ce que laisse entendre l'expression «un tribunal en mesure de statuer en toute indépendance et impartialité» dans son exposé du critère d'indépendance que j'ai déjà cité, ainsi que la phrase «ne permettent pas raisonnablement de craindre qu'il y ait atteinte à la capacité du juge Sharpe de statuer en toute indépendance et impartialité». Je pense que c'est là plus précisément une référence au statut objectif ou à la relation d'indépendance judiciaire, qui, à mon avis, est le premier sens qu'il faut donner au terme «indépendant» de l'al. 11*d*). Naturellement, on se préoccupe finalement de la manière dont un tribunal agira concrètement dans une espèce particulière, et un tribunal qui n'agit pas en toute indépendance ne saurait être considéré comme indépendant au sens de l'al. 11*d*) de la *Charte*, quel que soit son statut objectif. Mais un tribunal dépourvu du statut objectif ou de la relation d'indépendance ne peut être considéré comme indépendant aux termes de l'al. 11*d*), quelle que soit la manière dont il paraît avoir agi dans une espèce particulière. C'est le statut objectif ou la relation d'indépendance judiciaire qui doit fournir l'assurance que le tribunal peut agir d'une manière

regarded, with reference to the various objections to the status of provincial court judges, as the essential conditions of judicial independence for purposes of s. 11(*d*). Before doing that, however, it is necessary to consider the requirement in the test applied by the Court of Appeal that the status or relationship of judicial independence for purposes of s. 11(*d*) be one which a reasonable, well informed person would perceive as sufficient.

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

This view of the test for independence is somewhat different from, but not in my opinion necessarily in conflict with, that suggested by the majority of this Court in *MacKay v. The Queen*, [1980] 2 S.C.R. 370, which was relied on to some extent by Howland C.J.O. in his reasons for judgment. In that case the relevant issue, for purposes of this appeal, was whether a Standing Court Martial trying a member of the armed forces for an offence under the criminal law and composed of

indépendante et qu'il agira effectivement de cette manière. Il est donc nécessaire de rechercher ce qui doit être considéré, en rapport avec les diverses objections au statut des juges de cour provinciale, comme les conditions essentielles de l'indépendance judiciaire aux fins de l'al. 11*d*). Avant de ce faire cependant, il est nécessaire d'examiner l'exigence du critère appliqué par la Cour d'appel, portant que le statut ou le rapport d'indépendance judiciaire aux fins de l'al. 11*d*) doit en être un qu'une personne raisonnable et bien informée percevrait comme suffisant.

Même si l'indépendance judiciaire est un statut ou une relation reposant sur des conditions ou des garanties objectives, autant qu'un état d'esprit ou une attitude dans l'exercice concret des fonctions judiciaires, il est logique, à mon avis, que le critère de l'indépendance aux fins de l'al. 11*d*) de la *Charte* soit, comme dans le cas de l'impartialité, de savoir si le tribunal peut raisonnablement être perçu comme indépendant. Tant l'indépendance que l'impartialité sont fondamentales non seulement pour pouvoir rendre justice dans un cas donné, mais aussi pour assurer la confiance de l'individu comme du public dans l'administration de la justice. Sans cette confiance, le système ne peut commander le respect et l'acceptation qui sont essentiels à son fonctionnement efficace. Il importe donc qu'un tribunal soit perçu comme indépendant autant qu'impartial et que le critère de l'indépendance comporte cette perception qui doit toutefois, comme je l'ai proposé, être celle d'un tribunal jouissant des conditions ou garanties objectives essentielles d'indépendance judiciaire, et non pas une perception de la manière dont il agira en fait, indépendamment de la question de savoir s'il jouit de ces conditions ou garanties.

Cette conception du critère de l'indépendance diffère quelque peu, quoique à mon avis elle ne soit pas nécessairement incompatible avec elle, de celle proposée par cette Cour à la majorité, dans l'arrêt *MacKay c. La Reine*, [1980] 2 R.C.S. 370, sur laquelle s'est appuyé, dans une certaine mesure, le juge en chef Howland dans ses motifs de jugement. Dans cette affaire, la question qui nous intéresse aux fins du présent pourvoi était de savoir si une cour martiale permanente, jugeant un membre des

an officer of the armed forces in the Judge Advocate General's branch was an independent tribunal within the meaning of s. 2(*f*) of the *Canadian Bill of Rights*, which provides:

> **2.** Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> . . .
>
> (*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; . . .

The majority held that the fact the president of the Standing Court Martial was an officer of the armed forces did not prevent the tribunal from being an independent tribunal within the meaning of s. 2(*f*). In the reasons for judgment of Ritchie J., with whom Martland, Pigeon, Beetz and Chouinard JJ. concurred, there is a suggestion that the issue of independence was viewed as being whether the tribunal had in fact acted in an idependent manner. Ritchie J. referred to the evidence and said at p. 395:

> There is no evidence whatever in the record of the trial to suggest that the president acted in anything but an independent and impartial manner or that he was otherwise unfitted for the task to which he was appointed.
>
> . . .
>
> I can find no support in the evidence for the contention that the appointment of the president of the Court resulted or was calculated to result in the appellant being deprived of a trial before an independent and impartial tribunal.

While the emphasis in these observations would appear to be on how the tribunal acted, it is my impression that both Ritchie J. and McIntyre J., who wrote separate reasons concurring in the result, and with whom Dickson J. (as he then was) concurred, both looked at the status or relationship

forces armées pour une infraction de droit criminel et composée d'un officier des forces armées relevant de la Direction du juge-avocat général, constituait un tribunal indépendant au sens de l'al. 2*f*) de la *Déclaration canadienne des droits*, qui porte:

> **2.** Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme
>
> . . .
>
> *f*) privant une personne accusée d'un acte criminel du droit à la présomption d'innocence jusqu'à ce que la preuve de sa culpabilité ait été établie en conformité de la loi, après une audition impartiale et publique de sa cause par un tribunal indépendant et non préjugé, ou la privant sans juste cause du droit à un cautionnement raisonnable . . .

La Cour à la majorité a jugé que même si le président de la Cour martiale permanente était un officier des forces armées, cela n'empêchait pas ce tribunal d'être un tribunal indépendant au sens de l'al. 2*f*). Dans les motifs de jugement du juge Ritchie, auxquels ont souscrit les juges Martland, Pigeon, Beetz et Chouinard, on laisse entendre que la question de l'indépendance a été considérée comme s'il s'était agi de savoir si le tribunal avait en fait agi d'une manière indépendante. Le juge Ritchie se référant à la preuve affirme, à la p. 395:

> Absolument rien au dossier du procès ne laisse entendre que le président ait agi autrement que d'une façon indépendante et non préjugée ou qu'il ait par ailleurs été inapte à s'acquitter de la tâche qu'on lui avait confiée.
>
> . . .
>
> Je ne trouve rien dans la preuve qui fonde la prétention que la nomination du président de la cour pour le procès a eu pour résultat de priver l'appelant d'un procès devant un tribunal indépendant et non préjugé ou qu'elle visait ce résultat.

Si l'on paraît insister dans ces observations sur la manière dont le tribunal a agi, j'ai l'impression que le juge Ritchie et le juge McIntyre, qui a écrit des motifs distincts concordants quant au résultat, auxquels le juge Dickson (maintenant juge en chef) a souscrit, ont tous deux examiné le statut ou

to the armed forces of the president of the Standing Court Martial Appeal as an objective matter to be considered in determining whether the tribunal could be regarded as independent. Both emphasized the long-established tradition of a separate system of military law applied by tribunals presided over by military officers. Both also emphasized the status of the Court Martial Appeal Court and its independence of the armed forces as ensuring that the person charged would be presumed innocent until proved guilty by an independent tribunal. I am, therefore, of the respectful opinion that the reasoning of this Court in *MacKay* does not preclude the view that the word "independent" in s. 11(*d*) of the *Charter* is to be understood as referring to the status or relationship of judicial independence as well as to the state of mind or attitude of the tribunal in the actual exercise of its judicial function.

III

What should be considered as the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*—that is, those which may be reasonably perceived as such—is a difficult question. The concept of judicial independence has been an evolving one. See Shetreet, *op. cit.*, pp. 383-84. The history of judicial independence in Great Britain and Canada is analyzed by Professor Lederman in his classic and frequently cited essay on the subject, "The Independence of the Judiciary" (1956), 34 *Can. Bar Rev.* 769, 769-809 and 1139-1179. The reasons of Howland C.J.O. in the case at bar contain a succinct and helpful review of the main features of the development of judicial independence in England and Canada, with particular reference to the status of provincial magistrates and courts. Modern views on the subject of judicial independence are reflected in the Deschênes report to which reference has been made, and in the recent report of the Canadian Bar Association's Committee on *The Independence of the Judiciary in Canada*. There have also been a number of international declarations of principle on judicial independence, of which the Universal Declaration on the Independence of Justice produced by the First World Conference on the Independence of Justice held in Montreal in June,

la relation entre les forces armées et le président de la Cour martiale permanente, à titre de question objective dont il fallait tenir compte pour décider si le tribunal pouvait être considéré comme indépendant. Tous deux ont insisté sur la tradition fort ancienne d'un système distinct de justice militaire administré par des tribunaux présidés par des militaires. Tous deux ont aussi souligné que le statut du Tribunal d'appel des cours martiales et son indépendance des forces armées assuraient que l'inculpé serait présumé innocent, jusqu'à preuve du contraire, par un tribunal indépendant. Avec égards, je suis donc d'avis que le raisonnement de cette Cour dans l'arrêt *MacKay* n'exclut pas l'opinion que le terme «indépendant» de l'al. 11*d*) de la *Charte* doit être interprété comme visant le statut ou la relation d'indépendance judiciaire, autant que l'état d'esprit ou l'attitude du tribunal dans l'exercice concret de ses fonctions judiciaires.

III

Que doit-on considérer comme conditions essentielles de l'indépendance judiciaire aux fins de l'al. 11*d*) de la *Charte*, c.-à-d. celles qu'on peut raisonnablement percevoir comme telles? C'est là une question difficile. La notion d'indépendance judiciaire a évolué. Voir Shetreet, précité, aux pp. 383 et 384. L'histoire de l'indépendance judiciaire en Grande-Bretagne et au Canada est analysée par le professeur Lederman dans un essai classique fréquemment cité sur le sujet: «The Independence of the Judiciary» (1956), 34 *R. du B. can.* 769, 769 à 809 et 1139 à 1179. Les motifs du juge en chef Howland en l'espèce comportent une étude succincte et utile des principales caractéristiques de l'évolution de l'indépendance judiciaire en Angleterre et au Canada, où l'on mentionne de façon particulière le statut des magistrats et tribunaux provinciaux. Les points de vue contemporains sur l'indépendance judiciaire se reflètent dans le rapport Deschênes, déjà mentionné, et dans le rapport récent du Comité de l'Association du Barreau canadien sur *L'Indépendance de la magistrature au Canada*. Il y a aussi eu un bon nombre de déclarations internationales de principe sur l'indépendance judiciaire, dont la plus importante est peut-être la Déclaration universelle sur l'indépendance de la Justice de la Première conférence

1983 is perhaps the most important. The recently published collection of papers and addresses, *Judicial Independence: The Contemporary Debate* (1985), edited by Shetreet and Deschênes, reflects the most up-to-date thinking on the subject. The concluding paper by Shetreet, entitled "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", provides a valuable overview of the conceptual development in this area.

Conceptions have changed over the years as to what ideally may be required in the way of substance and procedure for securing judicial independence in as ample a measure as possible. Opinions differ on what is necessary or desirable, or feasible. This is particularly true, for example, of the degree of administrative independence or autonomy it is thought the courts should have. It is also true of the extent to which certain extra-judicial activity of judges may be perceived as impairing the reality or perception of judicial independence. There is renewed concern about the procedure and criteria for the appointment of judges as that may bear on the perception of judicial independence. Professional and lay concern about judicial independence has increased with the new power and responsibility given to the courts by the *Charter*. Reports and speeches on the subject of judicial independence in recent years have urged the general adoption of the highest standards or safeguards, not only with respect to the traditional elements of judicial independence, but also with respect to other aspects now seen as having an important bearing on the reality and perception of judicial independence. These efforts, particularly by the legal profession and the judiciary, to strengthen the conditions of judicial independence in Canada may be expected to continue as a movement towards the ideal. It would not be feasible, however, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(*d*) of the *Charter*, which may have to be applied to a variety of tribunals. The legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence exhibit a great range and variety. The essential conditions of judicial independence mondiale sur l'indépendance de la justice tenue à Montréal en 1983. Le recueil d'articles et d'allocutions récemment publié, *Judicial Independence: The Contemporary Debate* (1985), sous la direction de Shetreet et Deschênes, traduit la pensée la plus récente sur ce sujet. Servant de conclusion, l'article de Shetreet, intitulé «Judicial Independence: New Conceptual Dimensions and Contemporary Challenges», présente une vue d'ensemble précieuse de l'évolution des idées dans ce domaine.

Les idées ont évolué au cours des années sur ce qui idéalement peut être requis, sur le plan du fond comme sur celui de la procédure, pour assurer une indépendance judiciaire aussi grande que possible. Les opinions diffèrent sur ce qui est nécessaire ou souhaitable, ou encore réalisable. Cela est particulièrement vrai, par exemple, en ce qui concerne le degré d'indépendance ou d'autonomie que les tribunaux, pense-t-on devraient avoir sur le plan administratif. Cela est vrai aussi de la mesure dans laquelle certaines activités extrajudiciaires des juges peuvent être perçues comme portant atteinte à la réalité ou à la perception de l'indépendance judiciaire. Il y a un regain d'intérêt pour la procédure et les critères de nomination des juges, car ils peuvent avoir un effet sur la perception de l'indépendance judiciaire. Les préoccupations des juristes et des profanes concernant l'indépendance judiciaire se sont accrues avec les nouvelles attributions et responsabilités que la *Charte* a conférées aux tribunaux. Dans des rapports et des discours sur l'indépendance judiciaire, on a réclamé, ces dernières années, l'adoption généralisée des plus hautes normes ou garanties, non seulement à l'égard des éléments traditionnels de l'indépendance judiciaire, mais aussi à l'égard des autres aspects considérés aujourd'hui comme ayant un effet important sur la réalité et la perception de l'indépendance judiciaire. On peut s'attendre que ces efforts, déployés particulièrement par les milieux juridique et judiciaire en vue d'affermir les conditions de l'indépendance judiciaire au Canada, vont continuer à viser l'idéal. Il ne serait cependant pas possible d'appliquer les conditions les plus rigoureuses et les plus élaborées de l'indépendance judiciaire à l'exigence constitutionnelle d'indépendance qu'énonce l'al. 11*d*) de la *Charte*, qui peut devoir s'appliquer à différents tribunaux. Les dis-

dependence for purposes of s. 11(*d*) must bear some reasonable relationship to that variety. Moreover, it is the essence of the security afforded by the essential conditions of judicial independence that is appropriate for application under s. 11(*d*) and not any particular legislative or constitutional formula by which it may be provided or guaranteed.

Counsel for the Provincial Court Judges Association submitted that there should be a uniform standard of judicial independence under s. 11(*d*) and that it should be essentially the one embodied by ss. 99 and 100 of the *Constitution Act, 1867*, which provide:

99. (1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

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

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

These provisions are generally regarded as representing the highest degree of constitutional guarantee of security of tenure and security of salary and pension. They find their historical inspiration in the provisions of the *Act of Settlement* of 1701 [12 & 13 Will. 3, c. 2], which provided that judges should hold office during good behaviour, subject to removal on an address of both Houses of Parliament, and that their salaries should be "ascertained and established". Provincial court judges contend that they should have the same constitutional guarantees of security of tenure and security

positions législatives et constitutionnelles qui, au Canada, régissent les questions ayant une portée sur l'indépendance judiciaire des tribunaux qui jugent les personnes accusées d'une infraction sont fort diverses et variées. Les conditions essentielles de l'indépendance judiciaire, pour les fins de l'al. 11*d*), doivent avoir un lien raisonnable avec cette diversité. De plus, c'est l'essence de la garantie fournie par les conditions essentielles de l'indépendance judiciaire qu'il convient d'appliquer en vertu de l'al. 11*d*), et non pas quelque formule législative ou constitutionnelle particulière qui peut l'offrir ou l'assurer.

Les avocats de l'Association des juges des cours provinciales ont fait valoir qu'il devrait y avoir une norme uniforme d'indépendance judiciaire en vertu de l'al. 11*d*) et que ce devrait essentiellement être celle que l'on trouve aux art. 99 et 100 de la *Loi constitutionnelle de 1867*, qui portent:

99. (1) Sous réserve du paragraphe (2) du présent article, les juges des cours supérieures resteront en fonctions à titre inamovible, mais ils pourront être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des communes.

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

100. Les traitements, allocations et pensions des juges des cours supérieures, de district et de comté (sauf les cours de vérification en Nouvelle-Écosse et au Nouveau-Brunswick) et des cours de l'Amirauté, lorsque ces juges reçoivent actuellement un traitement, seront fixés et assurés par le Parlement du Canada.

Ces dispositions sont généralement considérées comme représentant le plus haut degré de garantie constitutionnelle d'inamovibilité et de sécurité de traitement et de pension. Elles s'inspirent historiquement des dispositions de l'*Acte d'établissement* de 1701 [12 & 13 Will. 3, chap. 2], qui prévoyait que les juges occuperaient leur charge durant bonne conduite, sous réserve de révocation par une adresse des deux chambres du Parlement, et que leur salaire serait [TRADUCTION] «fixé et établi». Les juges de cour provinciale soutiennent qu'ils devraient jouir des mêmes garanties constitution-

of salary and pension as superior court judges. Whatever may be the merits of this contention from the point of view of legislative or constitutional policy, I do not think that it can be given effect to in the construction and application of s. 11(*d*). To do so would be, in effect, to amend the judicature provisions of the Constitution. The standard of judicial independence for purposes of s. 11(*d*) cannot be a standard of uniform provisions. It must necessarily be a standard that reflects what is common to, or at the heart of, the various approaches to the essential conditions of judicial independence in Canada.

IV

It is necessary then to consider the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*, as they relate to the various objections to the status of provincial court judges raised before Sharpe J. Certain of these objections touch on the question of security of tenure. Security of tenure, because of the importance that has traditionally been attached to it, must be regarded as the first of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*.

The provisions in Ontario governing the security of tenure of provincial court judges up to the age of retirement at the time Sharpe J. declined jurisdiction were contained in s. 4 of the *Provincial Courts Act*. Section 4 provided that a provincial court judge could be removed from office only "for misbehaviour or for inability to perform his duties properly" and only after an inquiry by a superior court judge at which the Provincial Court judge affected had been given a full opportunity to be heard. The report of the inquiry had to be laid before the Legislative Assembly, but the Lieutenant Governor in Council was not bound to act in accordance with its findings or recommendations. Under the provision for removal before retirement which now applies to provincial court judges—s. 56(1) of the *Courts of Justice Act, 1984*, 1984 (Ont.), c. 11, which came into force on January 1, 1985—a judge may be removed from office before

nelles d'inamovibilité et de sécurité de traitement et de pension que les juges des cours supérieures. Quel que soit le bien-fondé de cet argument du point de vue de la politique législative ou constitutionnelle, je ne pense pas qu'il puisse s'appliquer quand il s'agit d'interpréter et d'appliquer l'al. 11*d*). Ce faire reviendrait en fait à modifier les dispositions de la Constitution relatives à la magistrature. La norme de l'indépendance judiciaire, pour les fins de l'al. 11*d*), ne peut être l'uniformité des dispositions. Ce doit nécessairement être une norme qui reflète ce qui est commun aux diverses conceptions des conditions essentielles de l'indépendance judiciaire au Canada ou ce qui est au centre de ces conceptions.

IV

Il est donc nécessaire d'examiner les conditions essentielles de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*, étant donné le rapport qu'elles ont avec les diverses objections au statut des juges de cour provinciale soulevées devant le juge Sharpe. Certaines de ces objections touchent à la question de l'inamovibilité. L'inamovibilité, de par l'importance qui y a été attachée traditionnellement, doit être considérée comme la première des conditions essentielles de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*.

Les dispositions ontariennes régissant l'inamovibilité des juges de cour provinciale jusqu'à l'âge de la retraite, à l'époque où le juge Sharpe a décliné compétence, se trouvaient à l'art. 4 de la *Loi sur les cours provinciales*. L'article 4 portait qu'un juge de cour provinciale ne pouvait être démis de ses fonctions que [TRADUCTION] «pour mauvaise conduite ou pour incapacité d'exercer convenablement ses fonctions», et ce, uniquement après la tenue d'une enquête par un juge de cour supérieure, au cours de laquelle le juge de cour provinciale en cause avait eu pleinement l'occasion de se faire entendre. Le rapport de l'enquête devait être déposé à l'Assemblée législative, mais le lieutenant-gouverneur en conseil n'était pas obligé de se conformer à ses conclusions ou recommandations. En vertu de la disposition de révocation avant retraite qui s'applique aujourd'hui aux juges de cour provinciale—le par. 56(1) de la *Loi de 1984*

the age of retirement only if a complaint has been made to the Judicial Council for Provincial Judges and if the removal is recommended by a judicial inquiry on the ground that the judge has become incapacitated or disabled from the due execution of the office by reason of infirmity, by conduct that is incompatible with the execution of the office, or by having failed to perform the duties of the office. The judge may be removed by the Lieutenant Governor in Council only on an address of the Legislative Assembly.

There are, of course, a variety of ways in which the essentials of security of tenure may be provided by constitutional or legislative provision. As I have indicated, superior court judges in Canada enjoy what is generally regarded as the highest degree of security of tenure in the constitutional guarantee of s. 99 of the *Constitution Act, 1867* that they shall hold office during good behaviour until the age of seventy-five, subject to removal by the Governor General on address of the Senate and House of Commons. The judges of this Court, the Federal Court of Canada and the Tax Court of Canada also enjoy, under their respective governing statutes, a tenure during good behaviour until a specified age of retirement, subject to removal only on address of the Senate and House of Commons. The judges of the county courts hold office during good behaviour but are removable by the Governor in Council, on the recommendation of the Minister of Justice, following an inquiry or investigation and report by the Canadian Judicial Council, pursuant to ss. 40 and 41 of the *Judges Act*, R.S.C. 1970, c. J-1. Under these sections, which provide for an inquiry or investigation by the Council into the conduct or capacity of a judge of a superior, district or county court or of the Tax Court of Canada, the Council is empowered to recommend the removal of a judge. The grounds on which it may do so, as set out in s. 41, are that the judge has become incapacitated or disabled from the due execution of office by age or infirmity, by having been guilty of misconduct, by having failed in the due execution of office, or by having been placed by misconduct or otherwise in a position incompatible with the due execution of office.

sur les tribunaux judiciaires, 1984 (Ont.), chap. 11, entré en vigueur le 1er janvier 1985—un juge ne peut se voir démis de ses fonctions avant l'âge de la retraite que par suite d'une plainte portée au Conseil de la magistrature des juges provinciaux et que si la révocation est recommandée, après enquête judiciaire, pour le motif que le juge est devenu incapable de remplir dûment ses fonctions pour cause d'infirmité ou de conduite incompatible avec sa charge, ou parce qu'il n'a pas rempli les devoirs de sa charge. Le lieutenant-gouverneur en conseil ne peut démettre le juge de ses fonctions que sur adresse de l'Assemblée législative.

Il existe bien entendu diverses façons de prévoir les conditions essentielles de l'inamovibilité par une disposition constitutionnelle ou législative. Comme je l'ai indiqué, les juges de cour supérieure au Canada jouissent de ce qui est généralement considéré comme le plus haut degré d'inamovibilité qu'offre la garantie constitutionnelle de l'art. 99 de la *Loi constitutionnelle de 1867*: ils occupent leur charge à titre inamovible jusqu'à l'âge de soixante-quinze ans à moins d'être révoqués par le gouverneur général sur adresse du Sénat et de la Chambre des communes. En vertu des lois qui les régissent respectivement, les juges de cette Cour, ceux de la Cour fédérale du Canada et ceux de la Cour canadienne de l'impôt occupent également leur charge à titre inamovible jusqu'à un âge précis de mise à la retraite, à moins seulement d'être révoqués sur adresse du Sénat et de la Chambre des communes. Les juges des cours de comté occupent leur charge à titre inamovible, mais peuvent être démis de leurs fonctions par le gouverneur en conseil, sur la recommandation du ministre de la Justice, après enquête et rapport du Conseil canadien de la magistrature, conformément aux art. 40 et 41 de la *Loi sur les juges*, S.R.C. 1970, chap. J-1. En vertu de ces articles qui prévoient la tenue d'une enquête sur la conduite ou la capacité d'un juge d'une cour supérieure, d'une cour de district, d'une cour de comté ou de la Cour canadienne de l'impôt, le Conseil peut recommander la révocation d'un juge. Les motifs pour lesquels il peut le faire, énoncés à l'art. 41, sont que le juge est frappé d'une incapacité ou d'une invalidité qui l'empêche de remplir utilement ses fonctions et est due à l'âge ou à une infirmité, au fait qu'il s'est

office. The judge must be given an opportunity to be heard, in person or by counsel, and to cross-examine witnesses and adduce evidence. Where a judge may be removed by the Governor in Council following a report of the Council, as in the case of a county court judge, the Governor in Council is not bound by the report. The security of tenure provided for provincial court judges in Canada is, generally speaking, that they may be removed by the executive government before the age of retirement only for misbehaviour or disability following a judicial inquiry. There is considerable variation in the relevant provisions of the provincial legislation. In some cases it is expressly provided that they shall hold office during good behaviour; in others, the specific grounds for removal are spelled out and may, as I have indicated, be generally summarized as misbehaviour or misconduct rendering the judge unfit for office or incapacity by reason of infirmity. The essence of these provisions is that a provincial judge may be removed before the age of retirement only for cause. There is also provision for a judicial inquiry into whether there is cause at which the judge affected is afforded a full opportunity to be heard. In some cases the executive government is bound by the report of the inquiry; in most cases the government is not bound by it.

The Deschênes report recommended that all judges should enjoy a tenure expressly defined as being "during good behaviour" and that they should be removable only upon an address of the legislature. Alternatively, the report recommended that if the power of removal by the executive without an address of the legislature were retained, the executive should be bound by the report of the judicial inquiry. The report of the Canadian Bar Association Committee on judicial independence recommended that "All judges of Canadian Courts be guaranteed tenure during good behaviour". There is also an implication at p. 16 of the report that the committee was of the view that a

rendu coupable de mauvaise conduite, au fait qu'il n'a pas rempli utilement ses fonctions ou à celui que, par sa conduite ou pour toute autre raison, il s'est mis dans une situation telle qu'il ne peut remplir utilement ses fonctions. Le juge doit avoir la possibilité de se faire entendre, personnellement ou par avocat, et de contre-interroger des témoins et de produire une preuve. Lorsqu'un juge ne peut être révoqué que par le gouverneur en conseil après rapport du Conseil canadien de la magistrature, le gouverneur en conseil n'est pas lié par le rapport. L'inamovibilité prévue pour les juges de cour provinciale au Canada consiste, en général, dans le fait qu'ils ne peuvent être révoqués par le pouvoir exécutif avant l'âge de la retraite que pour mauvaise conduite ou invalidité, après enquête judiciaire. Les dispositions pertinentes des lois provinciales présentent une grande diversité. Dans certains cas, il est expressément prévu qu'ils occupent leur charge à titre inamovible. Dans d'autres cas, les motifs spécifiques de révocation sont énoncés bien clairement et, comme je l'ai déjà indiqué, se ramènent à la mauvaise conduite ou à un mauvais comportement qui rend le juge indigne de sa charge, ou à l'incapacité pour cause d'infirmité. Essentiellement, ces dispositions prévoient qu'un juge de cour provinciale ne peut être révoqué avant l'âge de la retraite que pour un motif déterminé. Une enquête judiciaire est aussi prévue pour établir si ce motif existe, le juge visé devant avoir pleinement l'occasion de s'y faire entendre. Dans certains cas, le pouvoir exécutif est lié par le rapport d'enquête; dans la plupart des cas, le gouvernement ne l'est pas.

Le rapport Deschênes recommande que tous les juges occupent leur charge à titre expressément défini comme «inamovible» et qu'ils ne puissent être révoqués que sur adresse du corps législatif. Subsidiairement, le rapport recommande que si le pouvoir de l'exécutif de révoquer sans adresse du corps législatif devait être maintenu, l'exécutif devrait être lié par le rapport d'enquête judiciaire. Le rapport d'un comité de l'Association du Barreau canadien sur l'indépendance de la magistrature recommande que «tous les juges des cours canadiennes soient nommés à titre inamovible». Il découle aussi du rapport, à la p. 17, que le comité était d'avis qu'un juge ne devrait être révoqué que

judge should be removable only on an address of the legislature. After referring to s. 99 of the *Constitution Act, 1867* respecting the tenure of superior court judges, the committee said: "Since the independence of the judiciary depends to a significant extent on the judges' security of tenure it is appropriate that their removal be a major undertaking, bringing the politicians who must accomplish it under close scrutiny. The removal of a judge is not to be undertaken lightly." It may be desirable that the tenure of judges should be expressed as being during good behaviour, which leaves cause for removal to be determined according to the common law meaning of those words (see Shetreet, *op. cit.*, pp. 89*ff* for the meaning of "during good behaviour" at common law) rather than have the grounds for removal specified in legislation, but I do not think it is reasonable to require that as an essential condition of judicial independence for purposes of s. 11(*d*) of the *Charter*. It is sufficient if a judge may be removed only for cause related to the capacity to perform judicial functions. It may be, as suggested by the Deschênes report, that the specified grounds for removal to be found in some of the provincial legislation are too broad, but this would not appear to be true of the grounds for removal specified in s. 4 of the *Provincial Courts Act* and s. 56(1) of the *Courts of Justice Act, 1984*. Similarly, it may be desirable, as now provided for in s. 56(1), that a judge should be removable from office only on an address of the legislature, but again I do not think it is reasonable to require this as essential for security of tenure for purposes of s. 11(*d*) of the *Charter*. It may be that the requirement of an address of the legislature makes removal of a judge more difficult in practice because of the solemn, cumbersome and publicly visible nature of the process, but the requirement of cause, as defined by statute, together with a provision for judicial inquiry at which the judge affected is given a full opportunity to be heard, is in my opinion a sufficient restraint upon the power of removal for purposes of s. 11(*d*). Whether or not the Executive should be bound by the report of the judicial inquiry—that is, whether the power to remove should be conditional upon a finding of cause by the judicial inquiry, as is now provided by

sur adresse du corps législatif. Après avoir mentionné l'art. 99 de la *Loi constitutionnelle de 1867*, concernant l'inamovibilité des juges de cour supérieure, le comité affirme: «Puisque l'indépendance du pouvoir judiciaire dépend dans une très large mesure de l'inamovibilité des juges, il est normal que leur destitution soit une décision majeure impliquant les politiciens, qui doivent accomplir leur travail sous l'œil vigilant du public. La destitution d'un juge ne peut pas être prise à la légère.» Il est peut-être souhaitable que la charge des juges soit déclarée inamovible, les motifs de révocation devant alors être déterminés en fonction du sens qu'ont ces termes en *common law* (voir Shetreet, précité, aux pp. 89 et suiv. pour la signification du terme «inamovibilité» en *common law*) plutôt que de les voir spécifiés dans les lois; cependant, je ne pense pas qu'il soit raisonnable d'exiger cela comme condition essentielle d'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*. Il suffit qu'un juge ne puisse être révoqué que pour un motif lié à sa capacité d'exercer les fonctions judiciaires. Il se peut, comme le laisse entendre le rapport Deschênes, que les motifs exprès de révocation que l'on trouve dans certaines lois provinciales soient trop larges, mais il ne semble pas que ce soit le cas des motifs de révocation prévus par l'art. 4 de la *Loi sur les cours provinciales* et par le par. 56(1) de la *Loi de 1984 sur les tribunaux judiciaires*. De même, il est peut-être souhaitable, comme le prévoit maintenant le par. 56(1), qu'un juge ne puisse être révoqué que sur adresse du corps législatif mais, ici encore, je ne pense pas qu'il soit raisonnable d'exiger cela comme étant essentiel à l'inamovibilité pour les fins de l'al. 11*d*) de la *Charte*. Il se peut que la nécessité d'une adresse du corps législatif rende la révocation d'un juge plus difficile en pratique à cause de la solennité, de la lourdeur et de la visibilité de la procédure, mais qu'un motif soit nécessaire, comme le définit la loi, et qu'une enquête judiciaire soit prévue au cours de laquelle le juge visé a pleinement l'occasion de se faire entendre, constituent à mon avis, une restriction suffisante du pouvoir de révocation pour les fins de l'al. 11*d*). J'estime qu'il est plus difficile de déterminer si l'exécutif doit ou non être lié par le rapport de l'enquête judiciaire, c.-à-d. si le pouvoir de révocation doit être assujetti

s. 56(1) of the *Courts of Justice Act, 1984*—I find more difficult. Certainly, it is preferable, but I do not think it can be required as essential to security of tenure for purposes of s. 11(*d*). The existence of the report of the judicial inquiry is a sufficient restraint upon the power of removal, particularly where, as provided by s. 4 of the *Provincial Courts Act*, the report is required to be laid before the legislature.

In sum, I am of the opinion that while the provision concerning security of tenure up to the age of retirement which applied to provincial court judges when Sharpe J. declined jurisdiction falls short of the ideal or highest degree of security, it reflects what may be reasonably perceived as the essentials of security of tenure for purposes of s. 11(*d*) of the *Charter*: that the judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s. 11(*d*) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.

The most serious issue with respect to the security of tenure of provincial court judges under the statutory provisions that applied when Sharpe J. declined jurisdiction is the provision in s. 5(4) of the *Provincial Courts Act* for the reappointment of a judge, upon attaining the age of retirement, to hold office during pleasure. Such reappointment, to be made by the Lieutenant Governor in Council upon the recommendation of the Attorney General, was the subject of two objections: first, that an appointment to hold office during the pleasure of the Executive was incompatible with the requirement of judicial independence; and second, that the need in some cases of such a reappointment to complete entitlement to pension could give rise to a reasonable perception of dependence upon the

à la condition que l'enquête judiciaire ait constaté l'existence d'un motif, comme le prévoit maintenant le par. 56(1) de la *Loi de 1984 sur les tribunaux judiciaires*. Cela est certainement préférable, mais je ne pense pas que cela puisse être posé comme essentiel à l'inamovibilité pour les fins de l'al. 11*d*). L'existence du rapport d'enquête judiciaire constitue une restriction suffisante du pouvoir de révocation, particulièrement lorsque, comme le prévoit l'art. 4 de la *Loi sur les cours provinciales*, le rapport doit être déposé devant le corps législatif.

En somme, je suis d'avis que si la disposition concernant l'inamovibilité jusqu'à l'âge de la retraite, qui s'appliquait aux juges de cour provinciale lorsque le juge Sharpe a décliné compétence, ne fournit une inamovibilité ni idéale ni parfaite, elle fait néanmoins ressortir ce qu'on peut raisonnablement percevoir comme les conditions essentielles de l'inamovibilité pour les fins de l'al. 11*d*) de la *Charte*: que le juge ne puisse être révoqué que pour un motif déterminé, et que ce motif fasse l'objet d'un examen indépendant et d'une décision selon une procédure qui offre au juge visé toute possibilité de se faire entendre. L'essence de l'inamovibilité pour les fins de l'al. 11*d*), que ce soit jusqu'à l'âge de la retraite, pour une durée fixe, ou pour une charge *ad hoc*, est que la charge soit à l'abri de toute intervention discrétionnaire ou arbitraire de la part de l'exécutif ou de l'autorité responsable des nominations.

Le point le plus sérieux, en ce qui concerne l'inamovibilité des juges de cour provinciale conférée par les dispositions légales qui s'appliquaient lorsque le juge Sharpe a décliné compétence, c'est ce que prévoit le par. 5(4) de la *Loi sur les cours provinciales* au sujet de la nouvelle nomination à titre amovible d'un juge, lorsqu'il atteint l'âge de la retraite. Cette nouvelle nomination, qui doit être faite par le lieutenant-gouverneur en conseil sur la recommandation du procureur général, a fait l'objet de deux objections: premièrement, une nomination à titre amovible par l'exécutif est incompatible avec l'exigence d'indépendance judiciaire et, deuxièmement, la nécessité dans certains cas de procéder à cette nouvelle nomination afin de rendre admissible à la pension, peut susciter une

Executive. Under the pension provisions which applied when Sharpe J. declined jurisdiction, a provincial court judge was entitled to a pension upon attaining the age of sixty-five if he or she had served ten or more years. A judge who had been appointed after the age of fifty-five might be perceived as dependent upon the favour of the Executive for a post-retirement reappointment to complete pension entitlement. The first objection to the provision for post-retirement reappointment in s. 5(4) of the *Provincial Courts Act* relates to the question of security of tenure, which is the issue presently being considered. The second objection falls into the general category of objections to the status of provincial court judges based upon alleged dependence on the Executive for discretionary benefits or advantages. I propose to address that issue later.

Howland C.J.O. disposed of the objections to the provision for post-retirement reappointment which applied when Sharpe J. declined jurisdiction mainly on the ground that the incumbent Attorney General had, during his seven years in office, always acted with respect to such reappointments on the recommendation of the chief judge of the provincial court in question. That practice or "tradition", as it was referred to, was perhaps more relevant to the second objection to the provision for post-retirement appointment at pleasure—the dependence of provincial court judges on such reappointment to complete pension entitlement—than to the first objection—the lack of security of tenure under such a reappointment—but it may have been assumed that if the Attorney General made a post-retirement reappointment only on the recommendation of a chief judge he could be expected to act only on such recommendation with respect to the termination of such a reappointment. In any event, Howland C.J.O. placed considerable emphasis on the role of tradition as an objective condition or safeguard of judicial independence. Since tradition has most often been invoked in connection with the issue of security of

perception raisonnable de dépendance envers l'exécutif. En vertu des dispositions portant sur la pension, qui s'appliquaient lorsque le juge Sharpe a décliné compétence, un juge de cour provinciale avait droit à une pension quand il atteignait l'âge de soixante-cinq ans, s'il avait occupé sa charge pendant dix ans ou plus. Le juge nommé après l'âge de cinquante-cinq ans pouvait être perçu comme dépendant du bon vouloir de l'exécutif s'il voulait obtenir une nouvelle nomination après avoir atteint l'âge de retraite, en vue de devenir admissible à la pension. La première objection à la nouvelle nomination après avoir atteint l'âge de la retraite, prévue au par. 5(4) de la *Loi sur les cours provinciales*, touche à la question de l'inamovibilité, le point présentement examiné. La seconde objection se situe dans la catégorie générale des objections au statut des juges de cour provinciale, fondées sur une prétendue dépendance envers l'exécutif pour ce qui est d'obtenir des bénéfices ou avantages discrétionnaires. Je propose de traiter cette question plus loin.

Le juge en chef Howland a repoussé les objections à la disposition relative à la nouvelle nomination après l'âge de la retraite, qui s'appliquait lorsque le juge Sharpe a décliné compétence, principalement pour le motif que le procureur général en poste avait, durant les sept ans d'exercice de son mandat, toujours agi, en ce qui concerne ces nouvelles nominations, sur la recommandation du juge en chef de la cour provinciale en question. Cette pratique ou «tradition», comme on l'a appelée, est peut-être plus pertinente dans le cas de la seconde objection à la disposition sur les nominations à titre amovible après l'âge de la retraite—le fait que des juges de cour provinciale dépendent de cette nouvelle nomination pour avoir droit à leur pension—que dans le cas de la première objection—l'amovibilité dans le cas d'une nouvelle nomination—mais on peut avoir présumé que si le procureur général ne procédait à une nouvelle nomination après l'âge de la retraite que sur la recommandation d'un juge en chef, on pouvait s'attendre à ce qu'il n'agisse que sur une telle recommandation pour mettre fin à cette nouvelle nomination. De toute façon, le juge en chef Howland a accordé une importance considérable au

tenure it is convenient to consider its general role here.

I quote a passage on this subject from the reasons of Howland C.J.O., which refers to the opinions of several learned commentators on the importance of tradition. He said at pp. 431-32:

> Having considered the historical development of judicial independence in England and in Canada, it is necessary to refer to the importance of traditions. Quite apart from the Constitution or any statutory provisions, tradition has been an important factor in preserving judicial independence both in England and in Canada. In England a majority of the judges can be removed by the Lord Chancellor, who is an active member of the Government. However, the high tradition of the office of Lord Chancellor has resulted in very few abuses of this power. As Hogg states in his text *Constitutional Law of Canada* (1977), p. 120:
>
> > The independence of the judiciary has since become such a powerful tradition in the United Kingdom and Canada that there may be little point in a fine analysis of the language of the provisions by which it is formally guaranteed.
>
> Shetreet's text *Judges on Trial, a Study of the Appointment and Accountability of the English Judiciary* (1976), emphasized the importance of tradition so far as judicial independence is concerned. At pp. 392-3 he stated:
>
> > ... no executive or legislature can interfere with judicial independence contrary to popular opinion, and survive. "In Britain" wrote Professor de Smith, "the independence of the Judiciary rests not on formal constitutional guarantees and prohibitions but on an admixture of statutory and common-law rules, constitutional conventions and parliamentary practice, fortified by professional tradition and public opinion." (S.A. de Smith *Constitutional and Administrative Law* (1st ed. 1971), pp. 365-366 n. 35) Lord Sankey, L.C., said in Parliament:
> >
> > > "The independence and prestige which our judges have enjoyed in their position have rested far more upon the great tradition and long usage with which

rôle de la tradition en tant que condition ou garantie objectives de l'indépendance judiciaire. Étant donné que la tradition est, la plupart du temps, invoquée relativement à la question de l'inamovibilité, il convient d'examiner ici son rôle général.

À ce propos, je cite un passage des motifs de jugement du juge en chef Howland qui se réfère aux opinions de plusieurs savants glossateurs sur l'importance de la tradition. Il dit aux pp. 431 et 432:

> [TRADUCTION] Après l'examen de l'évolution historique de l'indépendance judiciaire en Angleterre et au Canada, il est nécessaire de mentionner l'importance des traditions. Tout à fait indépendamment de la Constitution ou des dispositions législatives, la tradition a été un facteur important pour la préservation de l'indépendance judiciaire tant en Angleterre qu'au Canada. En Angleterre, la majorité des juges peuvent être révoqués par le lord Chancelier, un membre actif du gouvernement. Toutefois, la haute tradition entourant l'office de lord Chancelier a fait qu'il n'y a eu qu'un fort petit nombre d'abus de ce pouvoir. Comme Hogg le dit dans son traité *Constitutional Law of Canada* (1977), à la p. 120:
>
> > L'indépendance du pouvoir judiciaire est devenue depuis une tradition tellement puissante au Royaume-Uni et au Canada que procéder à une analyse subtile des textes qui la garantissent formellement n'aurait guère d'utilité.
>
> La monographie de Shetreet, *Judges on Trial, a Study of the Appointment and Accountability of the English Judiciary* (1976), souligne l'importance de la tradition en ce qui concerne l'indépendance judiciaire. Aux pages 392 et 393, il dit:
>
> > ... aucun exécutif ou corps législatif ne peut porter atteinte à l'indépendance judiciaire contrairement à l'opinion publique, et survivre. «En Grande-Bretagne, écrit le professeur de Smith, l'indépendance du pouvoir judiciaire repose non sur des garanties et prohibitions constitutionnelles formelles, mais sur un mélange de règles de droit écrit et de *common law*, de conventions constitutionnelles et de pratiques parlementaires, fortifiées par la tradition du monde juridique et l'opinion publique.» (S. A. de Smith, *Constitutional and Administrative Law* (1st ed. 1971), aux pp. 365 et 366, note 35). Le lord chancelier Sankey a dit au Parlement:
> >
> > > «L'indépendance et le prestige dont nos juges jouissent en occupant leur charge reposent beaucoup plus sur la grande tradition et le long usage qui les

they have always been surrounded, than upon any Statute. The greatest safeguard of all may be found along these lines for traditions cannot be repealed, but an Act of Parliament can be."

The strength of tradition is measured not only by its observance but also by the intensity of the reaction to its violation .... Strong public reaction to a breach of tradition demonstrates that the violation will not pass unnoticed.

To these opinions on the importance of tradition as a safeguard of judicial independence may be added the following statement by Lord Denning in *The Road to Justice* (1955), at pp. 16-17:

The County Court judges have some measure of protection but the stipendiary magistrates and the justices of the peace have no security of tenure at all. They hold office during pleasure ....

Nevertheless, although these lesser judges can theoretically be dismissed at pleasure, the great principle that judges should be independent has become so ingrained in us that it extends in practice to them also. They do in fact hold office during good behaviour and they are in fact only dismissed for misconduct. If any Minister or Government Department should attempt to influence the decision of any one of them, there would be such an outcry that no Government could stand against it.

Tradition, reinforced by public opinion, operating as an effective restraint upon executive or legislative action, is undoubtedly a very important objective condition tending to ensure the independence in fact of a tribunal. That it is not, however, regarded by itself as a sufficient safeguard of judicial independence is indicated by the many calls for specific legislative provisions or constitutional guarantees to ensure that independence in a more ample and secure measure. Shetreet himself makes this point later on in the discussion of the role of tradition from which Howland C.J.O. quoted, where he says at pp. 392-93:

Others, however, do not entertain this unreserved trust in tradition and popular opinion. A growing number of legal scholars, lawyers and even judges are advocating a written and entrenched constitution to protect civil liberties and other important parts of constitutional law against alteration by a small temporary majority in Parliament. Significant support for this view came from Lord Justice Scarman, who in his Hamlyn

ont toujours entourés que sur quelque loi. La meilleure garantie peut s'y trouver, car les traditions ne peuvent être abrogées, alors qu'une loi du Parlement peut l'être.»

La force de la tradition se mesure non seulement par son observance, mais aussi par l'intensité de la réaction que soulève sa violation ... Une forte réaction de l'opinion publique à une atteinte à la tradition démontre qu'une violation ne saurait passer inaperçue.

À ces opinions sur l'importance de la tradition comme garantie de l'indépendance judiciaire, on peut ajouter ce que dit lord Denning dans *The Road to Justice* (1955), aux pp. 16 et 17:

[TRADUCTION] Les juges de cour de comté sont protégés dans une certaine mesure, mais les magistrats stipendiaires et les juges de paix sont tout à fait amovibles. Ils occupent leur charge durant bon plaisir ...

Néanmoins, si ces juges d'instance inférieure sont théoriquement amovibles, le grand principe que les juges doivent être indépendants est tellement ancré en nous qu'il s'applique en pratique à eux aussi. Ils sont en fait inamovibles et ne peuvent être révoqués que pour mauvaise conduite. Si un ministre ou un ministère tentait d'influencer la décision de l'un deux, cela soulèverait un tel tollé qu'aucun gouvernement ne pourrait y résister.

La tradition, renforcée par l'opinion publique, joue le rôle d'un frein efficace à l'action de l'exécutif ou du législatif et constitue sans nul doute une condition objective fort importante qui tend à assurer l'indépendance effective d'un tribunal. Que cela n'est pas cependant considéré en soi comme une garantie suffisante de l'indépendance judiciaire ressort des nombreux appels réclamant des dispositions législatives ou des garanties constitutionnelles spécifiques assurant cette indépendance d'une manière plus large et plus certaine. Shetreet lui-même le dit plus loin dans son analyse du rôle de la tradition, que cite le juge en chef Howland, aux pp. 392 et 393:

[TRADUCTION] D'autres toutefois ne partagent pas cette confiance absolue dans la tradition et l'opinion populaire. Un nombre croissant d'auteurs, de juristes et même de juges réclament une constitution écrite et enchâssée qui protégerait les libertés publiques et d'autres portions importantes du droit constitutionnel contre toute modification par une petite majorité provisoire au Parlement. Cette opinion a reçu un appui de taille, celui

Lectures 1974 proposed a written Bill of Rights and judicial review of statutes. Individual rights, judicial independence and other parts of a democratic system of government can be better safeguarded by a written constitution supported by tradition and public opinion than by the latter alone.

Reports and addresses on judicial independence in recent years have indicated that the nature and importance of this constitutional value are not so well and widely understood as to give grounds for confidence that its protection can be safely left to the operation of tradition alone. This is clear, for example, from the observations and recommendations of the Deschênes report and from the recent report of the Canadian Bar Association committee on judicial independence. Indeed, a constitutional requirement of judicial independence such as that in s. 11(*d*) of the *Charter* presupposes that it does not automatically exist by reason of tradition alone. Important as tradition is as a support of judicial independence, I do not think that reliance on it should go so far as to treat other conditions or guarantees of independence as unnecessary or of no practical importance. I do not read the reasons of the Court of Appeal as suggesting that. It is a question of the relative importance that one is going to attach to tradition in a particular context as ensuring respect for judicial independence despite an apparent or potential power to interfere with it. Moreover, while tradition reinforced by public opinion may operate as a restraint upon the exercise of power in a manner that interferes with judicial independence, it cannot supply essential conditions of independence for which specific provision of law is necessary.

With the greatest respect for the contrary view, where, as in the case of provincial court judges at the time Sharpe J. declined jurisdiction, the legislature has expressly provided for two kinds of tenure—one under which a judge may be removed from office only for cause and the other under which a judge of the same court holds office during pleasure—I am of the opinion that the

du lord juge Scarman qui, dans ses Hamlyn Lectures de 1974, a proposé une déclaration des droits écrite et le contrôle judiciaire des lois. Les droits de l'individu, l'indépendance judiciaire et d'autres aspects d'un système démocratique de gouvernement pourraient être mieux protégés par une constitution écrite, appuyée par la tradition et l'opinion publique, que par cette dernière seulement.

Ces dernières années, des rapports et des allocutions sur l'indépendance judiciaire ont montré que la nature et l'importance de cette valeur constitutionnelle ne sont pas si bien et si largement comprises au point de justifier de croire que cette protection peut, en toute sécurité, être laissée à la tradition seule. Cela ressort clairement, par exemple, des observations et des recommandations du rapport Deschênes et du récent rapport du Comité de l'Association du Barreau canadien sur l'indépendance de la magistrature. D'ailleurs, une exigence constitutionnelle d'indépendance judiciaire, comme celle de l'al. 11*d*) de la *Charte*, présuppose qu'elle n'existe pas automatiquement en raison de la tradition seule. Si importante que soit la tradition en tant que support de l'indépendance judiciaire, je ne pense pas qu'on devrait s'y fier au point de considérer que les autres conditions ou garanties d'indépendance sont inutiles ou sans importance pratique. Suivant mon interprétation, les motifs de la Cour d'appel ne laissent pas entendre cela. Il s'agit plutôt de l'importance relative à donner à la tradition, dans un contexte particulier, en tant que moyen d'assurer le respect de l'indépendance judiciaire malgré l'existence d'un pouvoir apparent ou virtuel d'y porter atteinte. En outre, si la tradition, renforcée par l'opinion publique, peut permettre de freiner l'exercice d'un pouvoir qui porte atteinte à l'indépendance judiciaire, elle ne peut fournir les conditions essentielles d'indépendance qui doivent être prévues expressément par la loi.

Avec le plus grand respect pour les tenants de l'opinion contraire, lorsque, comme dans le cas des juges de cour provinciale à l'époque où le juge Sharpe a décliné compétence, le corps législatif a prévu expressément deux genres de charge, l'une où un juge peut être révoqué uniquement pour un motif déterminé, et l'autre où un juge du même tribunal est nommé à titre amovible, j'estime que

second class of tenure cannot reasonably be perceived as meeting the essential requirement of security of tenure for purposes of s. 11(*d*) of the *Charter*. The reasonable perception is that the legislature has deliberately, in the case of one category of judges, reserved to the Executive the right to terminate the holding of office without the necessity of any particular justification and without any inhibition or restraint arising from perceived tradition. I am thus of the view that a judge of the Provincial Court (Criminal Division) who held office during pleasure at the time Sharpe J. declined jurisdiction could not be an independent tribunal within the meaning of s. 11(*d*) of the *Charter*.

This conclusion could not, however, affect the independence of Sharpe J. personally because, as noted by the Court of Appeal, he did not hold office under a post-retirement reappointment. It was, nevertheless, contended that the provision for post-retirement reappointment at pleasure prevented the Provincial Court (Criminal Division) as a whole from being an independent tribunal within the meaning of s. 11(*d*) of the *Charter*. In my opinion, the fact that certain judges of the Court may have held office during pleasure at the time Sharpe J. declined jurisdiction could not impair or destroy the independence of the Court as a whole. The objection would have to be taken to the status of the particular judge constituting the tribunal.

As a further reason for rejecting the objections to the provision for post-retirement reappointment Howland C.J.O. referred to the declared intention of the Attorney General to introduce legislation at the next session of the legislature to make post-retirement reappointment subject to the approval of the Chief Judge of the Provincial Court. Such legislation was in fact introduced by s. 1 of the *Provincial Courts Amendment Act, 1983*, 1983 (Ont.) c. 18, which came into force on May 26, 1983 and amended s. 5(4) of the *Provincial Courts Act* to permit a provincial court judge who has attained the age of retirement to continue in office, with the annual approval of the chief judge of the court, until the age of seventy, and to continue in

la charge du second genre ne peut être raisonnablement perçue comme satisfaisant à l'exigence essentielle d'inamovibilité pour les fins de l'al. 11*d*) de la *Charte*. Il est raisonnable de croire que le corps législatif a délibérément, dans le cas d'une catégorie de juges, réservé à l'exécutif le droit de mettre fin à une charge, sans qu'aucune justification particulière ne soit nécessaire et sans aucune inhibition ou restriction imposée par une certaine perception de la tradition. Je suis donc d'avis qu'un juge de la Cour provinciale (Division criminelle), qui occupait sa charge à titre amovible à l'époque où le juge Sharpe a décliné compétence, ne pouvait pas être un tribunal indépendant au sens de l'al. 11*d*) de la *Charte*.

Cette conclusion ne peut toutefois influer sur l'indépendance du juge Sharpe personnellement parce que, comme l'a noté la Cour d'appel, il n'occupait pas sa charge en vertu d'une nouvelle nomination faite après qu'il eut atteint l'âge de la retraite. On a néanmoins soutenu que la disposition sur la nouvelle nomination à titre amovible, après l'âge de la retraite, empêchait la Cour provinciale (Division criminelle), dans son ensemble, d'être un tribunal indépendant au sens de l'al. 11*d*) de la *Charte*. À mon avis, le fait que certains juges de la cour aient pu occuper leur charge à titre amovible, au moment où le juge Sharpe a décliné compétence, ne saurait altérer ni détruire l'indépendance de la cour dans son ensemble. L'objection aurait dû viser le statut du juge particulier qui constituait le tribunal saisi.

Comme motif supplémentaire de rejet des objections apportées à la disposition relative aux nouvelles nominations après l'âge de la retraite, le juge en chef Howland a mentionné l'intention déclarée du procureur général de présenter, à la session suivante de l'Assemblée législative, un projet de loi qui assujettirait ces nouvelles nominations après l'âge de la retraite à l'approbation du juge en chef de la Cour provinciale. Cette mesure a en fait été déposée; c'est l'art. 1 de la *Loi de 1983 modifiant la Loi sur les cours provinciales*, 1983 (Ont.), chap. 18, qui est entré en vigueur le 26 mai 1983 et a modifié le par. 5(4) de la *Loi sur les cours provinciales* pour permettre à un juge de cour provinciale ayant atteint l'âge de la retraite de

office thereafter until the age of seventy-five, with the annual approval of the Judicial Council for Provincial Judges, a body composed of the Chief Justice of Ontario, the Chief Justice of the High Court, the Chief Justice of the District Court, the Chief Judges of the various divisions of the Provincial Court, the Treasurer of the Law Society of Upper Canada, and not more than two other persons appointed by the Lieutenant Governor in Council. The same provision is now found in s. 54(4) of the *Courts of Justice Act, 1984*, which came into force on January 1, 1985. This change in the law, while creating a post-retirement status that is by no means ideal from the point of view of security of tenure, may be said to have removed the principal objection to the provision which applied when Sharpe J. declined jurisdiction since it replaces the discretion of the Executive by the judgment and approval of senior judicial officers who may be reasonably perceived as likely to act exclusively out of consideration for the interests of the Court and the administration of justice generally.

V

The second essential condition of judicial independence for purposes of s. 11(*d*) of the *Charter* is, in my opinion, what may be referred to as financial security. That means security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to a pension and a pension that depends on the grace or favour of the Executive.

The salaries of provincial court judges were at the time Sharpe J. declined jurisdiction, and still are, fixed by regulation made by the Lieutenant Governor in Council pursuant to the authority formerly conferred by s. 34(1) of the *Provincial*

continuer d'occuper sa charge, avec l'approbation annuelle du juge en chef de la cour, jusqu'à l'âge de soixante-dix ans, et de continuer à siéger par la suite jusqu'à l'âge de soixante-quinze ans, avec l'approbation annuelle du Conseil de la magistrature pour les juges de la Cour provinciale, composé du juge en chef de l'Ontario, du juge en chef de la Haute Cour, du juge en chef de la Cour de district, des juges en chef des diverses divisions de la Cour provinciale, du trésorier de la Law Society of Upper Canada et d'au plus deux autres personnes nommées par le lieutenant-gouverneur en conseil. La même disposition se retrouve maintenant au par. 54(4) de la *Loi de 1984 sur les tribunaux judiciaires*, qui est entrée en vigueur le 1er janvier 1985. Ce changement dans la loi, même s'il crée un statut d'après-retraite qui est loin d'être idéal du point de vue de l'inamovibilité, peut être considéré comme ayant supprimé l'objection principale apportée à la disposition qui s'appliquait lorsque le juge Sharpe a décliné compétence, puisqu'il remplace le pouvoir discrétionnaire de l'exécutif par le jugement et l'approbation d'officiers de justice supérieurs qu'on peut raisonnablement percevoir comme susceptibles d'agir exclusivement en fonction des intérêts de la cour et de l'administration de la justice en général.

V

La deuxième condition essentielle de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte* est, à mon avis, ce que l'on pourrait appeler la sécurité financière. Cela veut dire un traitement ou autre rémunération assurés et, le cas échéant, une pension assurée. Cette sécurité consiste essentiellement en ce que le droit au traitement et à la pension soit prévu par la loi et ne soit pas sujet aux ingérences arbitraires de l'exécutif, d'une manière qui pourrait affecter l'indépendance judiciaire. Dans le cas de la pension, la distinction essentielle est entre un droit à une pension et une pension qui dépend du bon vouloir ou des bonnes grâces de l'exécutif.

Les traitements des juges de cour provinciale étaient, à l'époque où le juge Sharpe a décliné compétence, et le sont toujours, fixés par règlement pris par le lieutenant-gouverneur en conseil, conformément à l'autorité que lui conférait aupa-

Courts Act and now conferred by s. 87(1) of the *Courts of Justice Act, 1984*, which came into force on January 1, 1985. The amount of the salary has been fixed by s. 2 of Regulation 811 of the Revised Regulations of Ontario, 1980, as amended from time to time. The government receives recommendations concerning the salaries of provincial court judges from the Ontario Provincial Courts Committee, which was first established by Order in Council 643/80 dated March 5, 1980 and was later given statutory recognition by s. 2(2) of the *Provincial Judges and Masters Statute Law Amendment Act, 1983*, 1983 (Ont.), c. 78, which added a new s. 35 to the *Provincial Courts Act*, establishing the Committee with three members: one appointed by provincial court and family court judges' associations; one appointed by the government; and the third, the chairman, appointed jointly by the associations and the government. Section 35 provided that the annual report and recommendations of the Committee be laid before the Legislative Assembly. The same provision is now made for the Committee and its role in relation to the remuneration, allowances and benefits of provincial court judges in s. 88 of the *Courts of Justice Act, 1984*, which came into force on January 1, 1985.

The principal objections to the manner in which the salaries of provincial court judges are provided for is that they are not fixed by the legislature and they are not made a charge on the Consolidated Revenue Fund. These two requirements have traditionally been regarded as affording the highest degree of security in respect of judicial salaries. Section 100 of the *Constitution Act, 1867* requires that the salaries of superior, district and county court judges be fixed by Parliament. The salaries of these and other federally-appointed judges are fixed by Parliament in the *Judges Act*, which provides in s. 33(1) that the salaries payable under the Act shall be paid out of the Consolidated Revenue Fund. In all of the other provinces the salaries of provincial judges are, as in Ontario, fixed by the executive government by regulation.

ravant le par. 34(1) de la *Loi sur les cours provinciales*, et que lui confère maintenant le par. 87(1) de la *Loi de 1984 sur les tribunaux judiciaires*, entrée en vigueur le 1er janvier 1985. Le montant du traitement est fixé par l'art. 2 du règlement 811 des Règlements refondus de l'Ontario de 1980 et ses modifications. Le gouvernement reçoit des recommandations concernant les traitements des juges de cour provinciale de l'Ontario Provincial Courts Committee qui a été établi initialement par le décret 643/80 en date du 5 mars 1980 et qui, par la suite a reçu reconnaissance légale par le par. 2(2) de la *Provincial Judges and Masters Statute Law Amendment Act, 1983*, 1983 (Ont.), chap. 78, qui a ajouté à la *Loi sur les cours provinciales* un nouvel art. 35 créant un comité formé de trois membres: un membre nommé par les associations des juges de cour provinciale et de cour de la famille, un membre nommé par le gouvernement et, troisièmement, le président, nommé conjointement par les associations et le gouvernement. L'article 35 prévoyait que le rapport annuel et les recommandations du comité, devaient être déposés à l'Assemblée législative. On trouve maintenant la même disposition, concernant le comité et son rôle en matière de rémunération, d'allocations et de bénéfices pour les juges de cour provinciale, à l'art. 88 de la *Loi de 1984 sur les tribunaux judiciaires*, entrée en vigueur le 1er janvier 1985.

La principale objection apportée à la façon dont les traitements des juges de cour provinciale sont fixés, est qu'ils ne sont pas fixés par le corps législatif et qu'ils ne grèvent pas le Fonds du revenu consolidé. Ces deux conditions ont traditionnellement été considérées comme offrant le plus haut degré de sécurité en matière de traitement des juges. L'article 100 de la *Loi constitutionnelle de 1867* requiert que les traitements des juges des cours supérieures, de district et de comté, soient fixés par le Parlement. Les traitements de ceux-ci et des autres juges de nomination fédérale sont fixés par le législateur fédéral dans la *Loi sur les juges* qui prévoit, au par. 33(1), que les traitements payables en vertu de cette loi seront prélevés sur le Fonds du revenu consolidé. Dans toutes les autres provinces, les traitements des juges de cour provinciale sont, comme en Ontario, fixés par règlement par le pouvoir exécutif. Dans certaines

In some, but not all provinces, they are paid out of the Consolidated Revenue Fund.

Although it may be theoretically preferable that judicial salaries should be fixed by the legislature rather than the executive government and should be made a charge on the Consolidated Revenue Fund rather than requiring annual appropriation, I do not think that either of these features should be regarded as essential to the financial security that may be reasonably perceived as sufficient for independence under s. 11(*d*) of the *Charter*. At the present time in Canada the amount of judges' salaries is a matter for the initiative of the Executive, whether they are fixed by act of the legislature or by regulation. Moreover, it is far from clear that having to bring proposed increases to judges' salaries before the legislature is more desirable from the point of view of judicial independence, and indeed adequate salaries, than having the question determined by the Executive alone, pursuant to a general legislative authority. In the case of the salaries of provincial court judges in Ontario, assurance that proper consideration will be given to the adequacy of judicial salaries is provided by the role assigned to the Ontario Provincial Courts Committee, although I do not consider the existence of such a committee to be essential to security of salary for purposes of s. 11(*d*). The essential point, in my opinion, is that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge. Making judicial salaries a charge on the Consolidated Revenue Fund instead of having to include them in annual appropriations is, I suppose, theoretically a measure of greater security, but practically it is impossible that the legislature would refuse to vote the annual appropriation in order to attempt to exercise some control or influence over a class of judges as a whole. For these reasons I am of the opinion that under the provisions of law which applied when Sharpe J. declined jurisdiction and which now apply, provincial court judges may be reasonably perceived to have the

provinces, mais non dans toutes, ils sont prélevés à même le Fonds du revenu consolidé.

Bien qu'il puisse être théoriquement préférable que les traitements des juges soient fixés par le corps législatif, plutôt que par le pouvoir exécutif, et qu'ils grèvent le Fonds du revenu consolidé, plutôt que d'exiger une affectation de crédit annuelle, je ne pense pas que l'une ou l'autre de ces caractéristiques doive être considérée comme essentielle à la sécurité financière qui peut être raisonnablement perçue comme suffisante pour assurer l'indépendance au sens de l'al. 11*d*) de la *Charte*. À l'heure actuelle au Canada, le montant du traitement des juges est laissé à l'initiative de l'exécutif peu importe qu'ils soient fixés par une loi ou par règlement. De plus, il est loin d'être clair que l'obligation de soumettre au corps législatif les projets de hausses de traitement des juges soit plus souhaitable du point de vue de l'indépendance judiciaire et, d'ailleurs, de celui d'un traitement adéquat, que de laisser à l'exécutif le soin de régler la question seul, conformément à une autorisation législative générale. Dans le cas des traitements des juges de cour provinciale en Ontario, le rôle assigné à l'Ontario Provincial Courts Committee donne l'assurance qu'on veillera dûment à ce que les traitements des juges soient suffisants, quoique je n'estime pas que l'existence de ce comité soit essentielle à la sécurité de traitement pour les fins de l'al. 11*d*). L'essentiel, à mon avis, est que le droit du juge de cour provinciale à un traitement soit prévu par la loi et qu'en aucune manière l'exécutif ne puisse empiéter sur ce droit de façon à affecter l'indépendance du juge pris individuellement. Faire en sorte que les traitements des juges grèvent le Fonds du revenu consolidé, plutôt que d'avoir à les inclure dans les affectations annuelles de crédit est, je suppose, une mesure de sûreté plus grande théoriquement mais, en pratique, il est impossible que le corps législatif refuse de voter l'affectation de crédit annuelle dans le but de tenter d'exercer un contrôle ou d'influer sur une catégorie de juges dans son ensemble. Pour ces motifs, je suis d'avis qu'en vertu des dispositions législatives qui s'appliquaient lorsque le juge Sharpe a décliné compétence et qui s'appliquent aujourd'hui, on peut raisonnablement considérer que les juges de cour provinciale jouissent de la

essential security of salary required for independence within the meaning of s. 11(*d*).

Although at the time Sharpe J. declined jurisdiction s. 34(1) of the *Provincial Courts Act* empowered the Lieutenant Governor in Council to make provision by regulation for the pensions of provincial court judges, no such regulation had been adopted. The right to pension enjoyed by provincial court judges was that provided for members of the public service by the *Public Service Superannuation Act*, R.S.O. 1980, c. 419, which was made applicable by s. 26 to every full time provincial judge. It was not until May 25, 1984 that Ontario Regulation 332/84 under the *Provincial Courts Act* was adopted making special provision for the pensions of provincial court judges.

The chief objection to the provision for pension which applied when Sharpe J. declined jurisdiction was, as I understood the argument, that it treated provincial court judges in the same way as civil servants. Indeed, the same objection was made to the provision for other benefits of a financial nature, such as sick leave with pay and group insurance benefits of various kinds. The provisions which governed these benefits in Ontario Regulation 881, under the *Public Service Act* were made applicable to provincial court judges by s. 7 of Ontario Regulation 811, under the *Provincial Courts Act*. It was not until May 25, 1984 that Ontario Regulation 332/84, to which reference has been made, made special provision for such benefits in the case of provincial court judges, although some of the provisions in Ontario Regulation 881, that had been made applicable to provincial court judges continued to apply to them.

In my opinion this objection to the provisions for pension and other financial benefits which were applicable to provincial court judges at the time Sharpe J. declined jurisdiction does not touch an essential condition of the independence required by s. 11(*d*). The provisions established a right to pension and other benefits which could not be

sécurité de traitement essentielle pour être indépendants au sens de l'al. 11*d*).

Bien que, à l'époque où le juge Sharpe a décliné compétence, le par. 34(1) de la *Loi sur les cours provinciales* habilitait le lieutenant-gouverneur en conseil à pourvoir par règlement aux pensions des juges de cour provinciale, aucun règlement de ce genre n'a été adopté. Le droit à une pension, dont jouissent les juges de cour provinciale, était celui prévu pour les fonctionnaires par la *Loi sur le régime de retraite des fonctionnaires*, L.R.O. 1980, chap. 419, rendue applicable, en vertu de son art. 26, à tout juge de cour provinciale à plein temps. Ce n'est que le 25 mai 1984 que le Règlement de l'Ontario 332/84, adopté en vertu de la *Loi sur les cours provinciales*, a prévu par une disposition spéciale des pensions pour les juges de cour provinciale.

La principale objection apportée à la disposition sur la pension qui s'appliquait lorsque le juge Sharpe a décliné compétence était, si j'ai bien compris l'argument, qu'elle traitait les juges de cour provinciale comme des fonctionnaires. D'ailleurs, la même objection a été apportée à la disposition régissant d'autres avantages de nature financière, comme les congés de maladie payés et les indemnités d'assurance-groupe de divers genres. Les dispositions qui régissent ces avantages dans le Règlement de l'Ontario 881, pris en application de la *Loi sur la fonction publique*, ont été rendues applicables aux juges de cour provinciale par l'art. 7 du Règlement de l'Ontario 811, pris en application de la *Loi sur les cours provinciales*. Ce n'est que le 25 mai 1984 que le Règlement de l'Ontario 332/84, déjà mentionné, a prévu spécialement ces avantages dans le cas des juges de cour provinciale, bien que certaines des dispositions du Règlement de l'Ontario 881, qui avaient été étendues aux juges de cour provinciale, aient continué de leur être applicables.

À mon avis, cette objection apportée aux dispositions relatives à la pension et aux autres avantages financiers, qui étaient applicables aux juges de cour provinciale à l'époque où le juge Sharpe a décliné compétence, ne touche pas une condition essentielle de l'indépendance requise par l'al. 11*d*). Ces dispositions créent un droit à une pension et à

interfered with by the Executive on a discretionary or arbitrary basis. That, as I have indicated, is the essential requirement for purposes of s. 11(*d*). Making the provisions governing civil servants applicable to the provincial court judges did not purport to characterize provincial judges as civil servants or increase the discretionary control of the Executive over the judges. It may well be preferable that the pensions and other financial benefits of judges should be given special and separate treatment in the law, as they now are, because of the special position and requirements of judges in this respect, but the application of the civil standards to provincial court judges at the time Sharpe J. declined jurisdiction did not, for the reasons I have indicated, affect their essential security in respect of pensions and benefits.

VI

The third essential condition of judicial independence for purposes of s. 11(*d*) is in my opinion the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function. The degree to which the judiciary should ideally have control over the administration of the courts is a major issue with respect to judicial independence today. Howland C.J.O. drew a distinction, for purposes of the issues in the appeal, between adjudicative independence and administrative independence, which is reflected in the following passages from his reasons for judgment at pp. 432-33:

When considering the independence of the judiciary, it is necessary to draw a careful distinction between independent adjudication and independent administration. It is independent adjudication about which the Court is concerned in this appeal. The position of the judiciary under the English and Canadian Constitutions is quite different from that under the American Constitution. In the United States the federal judiciary is a separate branch which includes judicial administration. While the report of Chief Justice Jules Deschênes, "Masters in their Own House", September, 1981, recommended the independent judicial administration of the courts, the Canadian Judicial Council, in Septem-

d'autres avantages qui ne peut pas faire l'objet d'une atteinte discrétionnaire ou arbitraire de l'exécutif. C'est là, comme je l'ai dit, l'exigence essentielle pour les fins de l'al. 11*d*). Rendre applicables aux juges de cour provinciale les dispositions régissant les fonctionnaires n'avait pas pour but de qualifier de fonctionnaires les juges de cour provinciale, ni d'accroître le contrôle discrétionnaire de l'exécutif sur les juges. Il est sans doute préférable que les pensions et autres avantages financiers des juges reçoivent un traitement spécial et distinct dans la loi, comme c'est maintenant le cas, vu la situation et les exigences spéciales des juges à cet égard, mais l'application de normes de la Fonction publique aux juges de cour provinciale à l'époque où le juge Sharpe a décliné compétence n'a pas, pour les raisons que j'ai données, affecté leur sécurité essentielle en matière de pensions et d'avantages.

VI

La troisième condition essentielle de l'indépendance judiciaire pour les fins de l'al. 11*d*) est, à mon avis, l'indépendance institutionnelle du tribunal relativement aux questions administratives qui ont directement un effet sur l'exercice de ses fonctions judiciaires. Le degré de contrôle que le pouvoir judiciaire devrait idéalement exercer sur l'administration des tribunaux est un point majeur de l'indépendance judiciaire aujourd'hui. Le juge en chef Howland a fait la distinction, pour les fins des questions visées par l'appel, entre l'indépendance en matière de décisions et l'indépendance en matière d'administration, qu'on trouve dans les passages suivants de ses motifs de jugement aux pp. 432 et 433:

[TRADUCTION] Lorsqu'on étudie l'indépendance du pouvoir judiciaire, il est nécessaire de distinguer soigneusement entre l'indépendance en matière de décisions et l'indépendance en matière d'administration. C'est l'indépendance en matière de décisions qui intéresse la cour dans le présent appel. La situation du pouvoir judiciaire sous le régime des constitutions anglaise et canadienne est fort différente de celle sous le régime de la constitution américaine. Aux États-Unis, la magistrature fédérale est un pouvoir distinct qui comprend l'administration judiciaire. Si le rapport du juge en chef Jules Deschênes, «Maîtres chez eux», en date de septembre 1981, a recommandé que l'administration

ber, 1982, only approved of the first two stages of consultation and decision sharing between the Executive and the Judiciary and was not prepared to approve at that time of the third stage of independent judicial administration.

In Ontario, the primary role of the judiciary is adjudication. The Executive on the other hand is responsible for providing the court rooms and the court staff. The assignment of judges, the sittings of the court, and the court lists are all matters for the judiciary. The Executive must not interfere with, or attempt to influence the adjudicative function of the judiciary. However, there must necessarily be reasonable management constraints. At times there may be a fine line between interference with adjudication and proper management controls. The heads of the judiciary have to work closely with the representatives of the Executive unless the judiciary is given full responsibility for judicial administration.

In his conclusions Howland C.J.O. observed at p. 443:

> On the hearing of this appeal, no submission was made that the Attorney General in his role as prosecutor interfered in any way with the sittings of the court, its lists, or the process of adjudication.

Judicial control over the matters referred to by Howland C.J.O.—assignment of judges, sittings of the court, and court lists—as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or "collective" independence. See Lederman, "The Independence of the Judiciary" in *The Canadian Judiciary* (1976, ed. A. M. Linden), pp. 9-10; Deschênes, *Masters in their own house*, pp. 81 and 124.

As the reasons of Howland C.J.O. indicate, however, the claim for greater administrative autonomy or independence for the courts goes considerably beyond these matters. The insistence is chiefly on a stronger or more independent role in the financial aspects of court administration—budgetary preparation and presentation and allo-

judiciaire des tribunaux soit indépendante, le Conseil canadien de la magistrature, en septembre 1982, n'a approuvé que les deux premiers stades, ceux de la consultation et du partage des décisions entre le pouvoir exécutif et le pouvoir judiciaire, n'étant pas prêt à approuver à cette époque le troisième stade, celui d'une administration judiciaire indépendante.

En Ontario, le rôle premier du pouvoir judiciaire est de rendre des décisions. L'exécutif, d'autre part, a la responsabilité de fournir les salles d'audience et le personnel judiciaire. L'assignation des juges à une cause, les séances de la cour et son rôle relèvent tous du pouvoir judiciaire. L'exécutif ne doit pas s'immiscer dans la fonction décisionnelle du pouvoir judiciaire ni tenter de l'influencer. Toutefois, il doit nécessairement y avoir des contraintes raisonnables de gestion. Parfois la démarcation entre l'immixtion dans la fonction décisionnelle et les contrôles adéquats de gestion est ténue. Les responsables du pouvoir judiciaire doivent collaborer étroitement avec les représentants de l'exécutif à moins que le pouvoir judiciaire ne se voie conférer l'entière responsabilité de l'administration judiciaire.

Dans ses conclusions, le juge en chef Howland souligne à la p. 443:

> [TRADUCTION] À l'audition de l'appel, on n'a pas prétendu que le procureur général, dans son rôle de poursuivant, s'est immiscé de quelque manière dans les séances de la cour, dans la confection du rôle ou dans le processus décisionnel.

Le contrôle judiciaire sur les questions mentionnées par le juge en chef Howland, savoir l'assignation des juges aux causes, les séances de la cour, le rôle de la cour, ainsi que les domaines connexes de l'allocation de salles d'audience et de la direction du personnel administratif qui exerce ces fonctions, a généralement été considéré comme essentiel ou comme une exigence minimale de l'indépendance institutionnelle ou «collective». Voir Lederman, «The Independence of the Judiciary», dans *The Canadian Judiciary* (1976, ed. A. M. Linden), aux pp. 9 et 10; Deschênes, *Maîtres chez eux*, aux pp. 83, 84 et 130.

Cependant, comme l'indiquent les motifs du juge en chef Howland, la demande d'une plus grande autonomie ou indépendance administrative pour les tribunaux va beaucoup plus loin que cela. On insiste surtout sur un rôle plus important et plus autonome dans les aspects financiers de l'administration d'un tribunal, dont la préparation du

cation of expenditure—and in the personnel aspects of administration—the recruitment, classification, promotion, remuneration, and supervision of the necessary support staff. Probably the fullest exposition of the recommended enlargement of administrative autonomy or independence for the courts is to be found in the Deschênes report, with its three stage proposal for realization referred to by Howland C.J.O. consisting of consultation, decision sharing and independence. Strong support for the Deschênes recommendations in this area was recently expressed in the report of the Canadian Bar Association's Committee on judicial independence, which, while noting the reservations referred to by Howland C.J.O. concerning the third stage of full administrative autonomy or independence, recommended that the first two stages of consultation and decision sharing be implemented as soon as possible. The desirability of greater administrative independence, particularly with respect to financial and personnel matters, has also been the subject of important public addresses by leaders of the judiciary. In an address entitled "Some Observations on Judicial Independence" in 1980 the late Chief Justice Laskin had this to say on the subject:

Coming now to other elements which I regard as desirable supports for judicial independence, I count among them independence in budgeting and in expenditure of an approved budget, and independence in administration, covering not only the operation of the Courts but also the appointment and supervision of the supporting staff. Budget independence does not mean that Judges should be allowed to fix their own salaries; it means simply that the budget should not be part of any departmental budget but should be separately presented and dealt with. I do not, of course, preclude its presentation by a responsible Minister, but he should do this as a conduit, and yet as one able to support the budget after its preparation under the direction of the Chief Justice or Chief Judge and the chief administrative officer of the Court. So, too, should the Court, through its Chief Justice or Chief Judge and chief administrative officer, have supervision and direction of the staff of the Court

budget et la présentation et la répartition des dépenses, et dans les aspects de l'administration qui concernent le personnel, comme le recrutement, la classification, la promotion, la rémunération et la supervision du personnel de soutien nécessaire. Probablement l'exposé le plus complet de l'élargissement recommandé de l'autonomie ou de l'indépendance administrative des tribunaux se trouve dans le rapport Deschênes, et sa proposition en trois stades de réalisation, que mentionne le juge en chef Howland, comprenant la consultation, la participation et l'indépendance. Les recommandations Deschênes dans ce domaine ont récemment reçu l'appui, non négligeable, du rapport du Comité de l'Association du Barreau canadien sur l'indépendance de la magistrature qui, tout en prenant note des réserves que mentionne le juge en chef Howland concernant le troisième stade, celui de l'indépendance ou de l'autonomie administrative totale, a recommandé que les deux premiers stades de la consultation et de la participation soient mis en œuvre dès que possible. Le caractère souhaitable d'une plus grande indépendance administrative, particulièrement dans les domaines des finances et du personnel, a aussi fait l'objet d'allocutions publiques importantes de la part des leaders du pouvoir judiciaire. Dans un discours intitulé [TRADUCTION] «Quelques observations sur l'indépendance judiciaire», en 1980, feu le juge en chef Laskin avait eu ceci à dire à ce sujet:

[TRADUCTION] Pour en venir maintenant aux autres éléments que je considère comme souhaitables pour consolider l'indépendance judiciaire, j'y inclus l'indépendance dans la confection et dans les dépenses d'un budget approuvé, et l'indépendance dans l'administration, s'étendant non seulement au fonctionnement des tribunaux, mais aussi à la nomination et à la supervision du personnel de soutien. L'indépendance budgétaire ne signifie pas que les juges devraient être autorisés à fixer leur propre traitement; cela signifie simplement que le budget ne devrait faire partie d'aucun budget ministériel, mais qu'il devrait être présenté et traité séparément. Je ne m'oppose pas, bien entendu, à sa présentation par un ministre responsable, mais il devrait le faire comme intermédiaire, tout en étant en position de l'appuyer, après qu'il a été préparé sous la direction du juge en chef, ou du premier juge, et de l'administrateur en chef du tribunal. De même aussi, la cour, par son juge en chef, ou premier juge, et par l'administrateur en chef, devrait être chargée de la supervision et de la direction

and of the various supporting services such as the library and the Court's law reports.

The present Chief Justice of Canada, in his recent address to the annual meeting of the Canadian Bar Association, referred with approval to this statement of Laskin C.J. and said that "Preparation of judicial budgets and distribution of allocated resources should be under the control of the Chief Justices of the various courts, not the Ministers of Justice" and "Control over finance and administration must be accompanied by control over the adequacy and direction of support staff".

It is not entirely clear as to the extent to which the issue of institutional independence is actually raised by the various objections to the status of provincial court judges at the time Sharpe J. declined jurisdiction. As I understood the argument, the chief objection which could be said to relate to institutional independence was the extent to which the judges were treated as civil servants for purposes of pension and other financial benefits, such as group insurance and sick leave, and the control exercised by the Executive over such discretionary benefits or advantages as post-retirement reappointment, leave of absence with or without pay and the right to engage in extra-judicial employment. The contention was that the treatment of these matters and the executive control over them were calculated to make the Court appear as a branch of the Executive and the judges as civil servants. This impression, it was said, was reinforced by the manner in which the Court and its judges were associated with the Ministry of the Attorney General in printed material intended for public information. Dependence on the Executive for discretionary benefits or advantages was also said to affect the reality and the perception of the individual independence of the judges, an issue which must be considered separately from the question of institutional independence.

Although the increased measure of administrative autonomy or independence that is being recommended for the courts, or some degree of it,

de son personnel et des divers services de soutien, tels la bibliothèque et les recueils de jurisprudence de la cour.

L'actuel Juge en chef du Canada, dans un récent discours à l'assemblée annuelle de l'Association du Barreau canadien, s'est référé à ce qu'avait dit le juge en chef Laskin, l'approuvant et disant que [TRADUCTION] «La préparation des budgets judiciaires et la répartition des ressources allouées devraient être sous le contrôle des juges en chef des divers tribunaux, et non des ministres de la justice» et [TRADUCTION] «Le contrôle sur les finances et l'administration doit être assorti du contrôle sur la compétence et la direction du personnel de soutien.»

On ne voit pas tout à fait clairement dans quelle mesure la question de l'indépendance constitutionnelle est vraiment posée par les diverses objections apportées au statut des juges de cour provinciale de l'époque où le juge Sharpe a décliné compétence. Si je comprends bien l'argument, l'objection principale qui serait apportée en matière d'indépendance institutionnelle aurait trait à la mesure dans laquelle les juges étaient considérés comme des fonctionnaires aux fins des pensions et d'autres avantages financiers, tels l'assurance-groupe, les congés de maladie et le contrôle qu'exerce l'exécutif sur des bénéfices ou avantages discrétionnaires comme les nouvelles nominations après l'âge de la retraite, les congés payés ou non payés et le droit de s'adonner à des activités extrajudiciaires. On a soutenu que la façon de traiter ces questions et le contrôle de l'exécutif sur celles-ci étaient conçus de manière à faire percevoir la cour comme un organe de l'exécutif et les juges, comme des fonctionnaires. Cette impression, a-t-on dit, était renforcée par la manière dont la cour et ses juges étaient associés au ministère du Procureur général dans les brochures destinées à informer le public. La dépendance envers l'exécutif dans le cas des bénéfices ou avantages discrétionnaires, a-t-on ajouté, influait sur l'indépendance véritable des juges, pris individuellement, et sur l'idée qu'on s'en faisait, un point qui doit être examiné indépendamment de la question de l'indépendance institutionnelle.

Si la plus grande autonomie ou indépendance administrative qu'il est recommandé d'accorder aux tribunaux, ou une partie de celle-ci, peut se

may well be highly desirable, it cannot in my opinion be regarded as essential for purposes of s. 11(*d*) of the *Charter*. The essentials of institutional independence which may be reasonably perceived as sufficient for purposes of s. 11(*d*) must, I think, be those referred to by Howland C.J.O. They may be summed up as judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function. To the extent that the distinction between administrative independence and adjudicative independence is intended to reflect that limitation, I can see no objection to it. It may be open to objection, however, in so far as the desirable or recommended degree of administrative autonomy or independence of the courts is concerned. In my opinion, the fact that certain financial benefits applicable to civil servants were also made applicable to provincial court judges, that the Provincial Court (Criminal Division) and its judges were shown in printed material as associated with the Ministry of the Attorney General and that the Executive exercised administrative control over certain discretionary benefits or advantages affecting the judges did not prevent the Provincial Court (Criminal Division) at the time Sharpe J. declined jurisdiction from being reasonably perceived as possessing the essential institutional independence required for purposes of s. 11(*d*).

VII

It is necessary now to consider the effect on the individual independence of provincial court judges of the control exercised by the Executive over certain discretionary benefits or advantages. I have referred to the provisions of the *Provincial Courts Act* and the *Courts of Justice Act, 1984* concerning post-retirement reappointment or continuation in office, which may be necessary to permit a judge to complete entitlement to pension. Objection was also taken to the provisions for leave of absence with or without pay and for permission to engage in extra-judicial employment. The provisions for leave of absence that were applicable to provincial court judges at the time Sharpe J. declined jurisdiction were found in ss. 4 and 5 of Regulation 811 of the Revised Regulations of

révéler hautement souhaitable, elle ne saurait, à mon avis, être considérée comme essentielle pour les fins de l'al. 11*d*) de la *Charte*. Les aspects essentiels de l'indépendance institutionnelle qui peuvent raisonnablement être perçus comme suffisants pour les fins de l'al. 11*d*) doivent, je pense, se limiter à ceux mentionnés par le juge en chef Howland. On peut les résumer comme étant le contrôle par le tribunal des décisions administratives qui portent directement et immédiatement sur l'exercice des fonctions judiciaires. Dans la mesure où la distinction entre l'indépendance dans l'administration et l'indépendance dans les décisions se veut le reflet de cette limitation, je n'y vois aucune objection. On peut s'y opposer toutefois dans la mesure où le degré souhaitable ou recommandé d'indépendance ou d'autonomie administrative des tribunaux est concerné. À mon avis, le fait que certains avantages financiers applicables aux fonctionnaires soient aussi applicables aux juges de cour provinciale, que la Cour provinciale (Division criminelle) et ses juges soient, dans des brochures, associés au ministère du Procureur général, et que l'exécutif exerce un contrôle administratif sur certains bénéfices ou avantages discrétionnaires touchant les juges, n'empêchait pas la Cour provinciale (Division criminelle), à l'époque où le juge Sharpe a décliné compétence, d'être raisonnablement perçue comme possédant l'indépendance institutionnelle essentielle pour les fins de l'al. 11*d*).

VII

Il est maintenant nécessaire d'examiner l'effet qu'a, sur l'indépendance individuelle des juges de cour provinciale, le contrôle exercé par l'exécutif sur certains bénéfices ou avantages discrétionnaires. J'ai mentionné les dispositions de la *Loi sur les cours provinciales* et de la *Loi de 1984 sur les tribunaux judiciaires*, concernant les nouvelles nominations ou le maintien des juges dans leur charge après l'âge de la retraite, qui peuvent se révéler nécessaires pour permettre à un juge d'être admissible à une pension. On s'est aussi opposé aux dispositions concernant les congés payés ou non payés et l'autorisation de s'adonner à des activités extrajudiciaires. Les dispositions portant sur les congés qui s'appliquaient aux juges de cour provinciale, à l'époque où le juge Sharpe a décliné

Ontario, 1980, made under the *Provincial Courts Act*, and in ss. 75 and 76 of Regulation 881 of the Revised Regulations of Ontario, 1980, made under the *Public Service Act*. Sections 4 and 5 of Regulation 811 provide that the Attorney General, upon the recommendation of the chief judge of the provincial courts, may grant to a judge leave of absence without pay and without the accumulation of sick leave credits for a period up to three years, and that the Lieutenant Governor in Council, upon the recommendation of the Attorney General, may grant special leave of absence with pay to a judge for special or compassionate purposes for a period not exceeding one year. Sections 75(1) and 76(1) of Regulation 881, which were made applicable to provincial court judges by s. 7 of Regulation 811, provided that a deputy minister could grant to an employee in his ministry leave of absence with pay for a period of not more than one year for the purpose of undertaking employment under the auspices of the Government of Canada or other public agency and leave of absence without pay and without accumulation of credits for a period of not more than one year for the purpose of undertaking employment under the auspices of the Government of Canada or other public agency, or by a public or private corporation. A leave of absence granted under s. 75 or s. 76 of Regulation 881 could be renewed from year to year. By s. 32(3) of Ontario Regulation 332/84, made on May 25, 1984, the Chief Judge of the Provincial Court (Criminal Division) was given the authority, in place of the deputy minister, to grant leave of absence to provincial court judges under ss. 75 and 76 of Regulation 881. The provision concerning permission to engage in extra-judicial employment at the time Sharpe J. declined jurisdiction was s. 12 of the *Provincial Courts Act*, which read as follows:

12.—(1) Subject to subsection (2), unless authorized by the Lieutenant Governor in Council, a judge shall not practise or actively engage in any business, trade or occupation but shall devote his whole time to the performance of his duties as a judge.

compétence, se retrouvent aux art. 4 et 5 du règlement 811 des Règlements refondus de l'Ontario de 1980, pris en application de la *Loi sur les cours provinciales*, et aux art. 75 et 76 du règlement 881 des Règlements refondus de l'Ontario de 1980, pris en application de la *Loi sur la fonction publique*. Les articles 4 et 5 du règlement 811 prévoient que le procureur général, sur la recommandation du juge en chef des cours provinciales, peut accorder à un juge un congé, non payé et sans crédit de congés de maladie, pour une période pouvant aller jusqu'à trois ans, et que le lieutenant-gouverneur en conseil, sur la recommandation du procureur général, peut accorder un congé payé spécial à un juge, pour des raisons humanitaires ou spéciales, pour une durée maximale d'un an. Les paragraphes 75(1) et 76(1) du règlement 881, rendus applicables aux juges de cour provinciale par l'art. 7 du règlement 811, prévoient qu'un sous-ministre peut accorder à un employé de son ministère un congé payé d'une durée maximale d'un an, pour lui permettre de travailler sous les auspices du gouvernement du Canada ou d'un autre organisme public, et un congé, non payé et sans crédit de congés de maladie, d'une durée maximale d'un an, pour lui permettre de travailler sous les auspices du gouvernement du Canada ou d'un autre organisme public ou d'une société publique ou privée. Un congé accordé en vertu des art. 75 ou 76 du règlement 881 peut être renouvelé d'année en année. Selon le par. 32(3) du Règlement de l'Ontario 332/84, pris le 25 mai 1984, le juge en chef de la Cour provinciale (Division criminelle) a reçu le pouvoir, en lieu et place du sous-ministre, d'accorder un congé aux juges de cour provinciale en vertu des art. 75 et 76 du règlement 881. La disposition concernant l'autorisation de s'adonner à une activité extrajudiciaire, à l'époque où le juge Sharpe a décliné compétence, était l'art. 12 de la *Loi sur les cours provinciales*, dont voici le texte:

[TRADUCTION] **12.**—(1) Sous réserve du paragraphe (2), à moins d'une autorisation du lieutenant-gouverneur en conseil, un juge ne doit s'adonner à aucun commerce, métier ou occupation, ni y participer activement, mais doit consacrer tout son temps à l'exercice de ses fonctions de juge.

(2) A judge, with the previous consent of the Minister, may act as arbitrator, conciliator or member of a police commission.

The provision with respect to extra-judicial employment of provincial judges in the *Courts of Justice Act, 1984* is s. 53, which came into force on January 1, 1985 and reads as follows:

53.—(1) A provincial judge shall devote his or her whole time to the performance of his or her duties as a judge, except as authorized by the Lieutenant Governor in Council.

(2) Notwithstanding subsection (1), a provincial judge who, before the coming into force of this Part, had the consent of the Attorney General to act as an arbitrator or conciliator may continue to so act.

There are similar provisions respecting extra-judicial employment in the provincial courts legislation of the other provinces. In some cases it is specified that a judge shall not receive any additional remuneration for such employment.

While it may well be desirable that such discretionary benefits of advantages, to the extent that they should exist at all, should be under the control of the judiciary rather than the Executive, as recommended by the Deschênes report and others, I do not think that their control by the Executive touches what must be considered to be one of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*. In so far as the subjective aspect is concerned, I agree with the Court of Appeal that it would not be reasonable to apprehend that a provincial court judge would be influenced by the possible desire for one of these benefits or advantages to be less than independent in his or her adjudication.

For the foregoing reasons I am of the opinion that at the time he declined jurisdiction on December 16, 1982 Sharpe J. sitting as the Provincial Court (Criminal Division) was an independent tribunal within the meaning of s. 11(*d*) of the *Charter*. The same is true in my opinion of all the judges of the Court since the amendment in 1983 to s. 5(4) of the *Provincial Courts Act* removed the objection to the nature of the tenure under a post-retirement appointment or continuation in office. Accordingly I would dismiss the appeal and

(2) Un juge peut, après avoir reçu l'autorisation du Ministre, agir comme arbitre, conciliateur ou membre d'une commission de police.

La disposition concernant les emplois extrajudiciaires des juges provinciaux dans la *Loi de 1984 sur les tribunaux judiciaires* est l'art. 53, entré en vigueur le 1er janvier 1985, dont voici le texte:

53.—(1) Le juge d'une cour provinciale se consacre à ses fonctions à l'exclusion de toutes autres, sauf avec l'autorisation du lieutenant-gouverneur en conseil.

(2) Par dérogation au par. (1), le juge qui, avant l'entrée en vigueur de la présente partie, avait l'autorisation du procureur général pour agir à titre d'arbitre ou de conciliateur peut continuer d'occuper ces fonctions.

Il y a des dispositions semblables concernant les activités extrajudiciaires dans la législation des autres provinces sur les cours provinciales. Dans certains cas, il est spécifié qu'un juge ne touchera aucune rémunération additionnelle pour une telle activité.

S'il peut être souhaitable que ces bénéfices ou avantages discrétionnaires, dans la mesure où il devrait y en avoir, soient contrôlés par le pouvoir judiciaire plutôt que par l'exécutif, comme le rapport Deschênes et d'autres l'on recommandé, je ne pense pas que leur contrôle par l'exécutif touche à ce qui doit être considéré comme l'une des conditions essentielles de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*. Pour ce qui est de l'aspect subjectif, je conviens avec la Cour d'appel qu'il ne serait pas raisonnable de craindre qu'un juge de cour provinciale, influencé par l'éventuelle volonté d'obtenir l'un de ces bénéfices ou avantages, soit loin d'être indépendant au moment de rendre jugement.

Pour les motifs qui précèdent, je suis d'avis qu'à l'époque où il a décliné compétence, soit le 16 décembre 1982, le juge Sharpe siégeant en Cour provinciale (Division criminelle) constituait un tribunal indépendant au sens de l'al. 11*d*) de la *Charte*. On peut dire la même chose, selon moi, de tous les juges de la cour puisque la modification apportée en 1983 au par. 5(4) de la *Loi sur les cours provinciales* a fait disparaître l'objection à la nature de la charge par suite d'une nomination après l'âge de la retraite ou du maintien en poste.

answer the constitutional question as follows: A judge of the Provincial Court (Criminal Division) of Ontario is an independent tribunal within the meaning of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

Appeal dismissed.

Solicitor for the appellant: Noel Bates, Burlington.

Solicitor for the respondent: Attorney General for Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: R. Tassé, Ottawa.

Solicitors for the intervener the Attorney General of Quebec: Réal A. Forest and Angeline Thibault, Ste-Foy.

Solicitor for the intervener the Attorney General for Saskatchewan: Richard Gosse, Regina.

Solicitor for the interveners The Provincial Court Judges Association (Criminal Division) and Ontario Family Court Judges Association: Morris Manning, Toronto.

En conséquence, je suis d'avis de rejeter le pourvoi et de répondre ainsi à la question constitutionnelle: Un juge de la Cour provinciale (Division criminelle) de l'Ontario constitue un tribunal indépendant au sens de l'al. 11*d*) de la *Charte canadienne des droits et libertés*.

Pourvoi rejeté.

Procureur de l'appelant: Noel Bates, Burlington.

Procureur de l'intimée: Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Canada: R. Tassé, Ottawa.

Procureurs de l'intervenant le procureur général du Québec: Réal A. Forest et Angeline Thibault, Ste-Foy.

Procureur de l'intervenant le procureur général de la Saskatchewan: Richard Gosse, Regina.

Procureur des intervenants l'Association des juges des Cours provinciales (Division criminelle) et Ontario Family Court Judges Association: Morris Manning, Toronto.

THE RISE OF SELF-REPRESENTATION IN CANADA'S FAMILY COURTS: THE COMPLEX PICTURE REVEALED IN SURVEYS OF JUDGES, LAWYERS AND LITIGANTS

Rachel Birnbaum,* Nicholas Bala** and Lorne Bertrand***

This article reports on four interrelated studies on self-representation by family litigants: a study of family litigants in Ontario; a survey of perceptions of lawyers in Ontario and Alberta; and a study of Canadian judges. There has clearly been an increase in self-representation in family cases. Lack of financial resources is the most significant reason for self-representation, but a significant number of the self-represented do not believe that they will have worse outcomes without a lawyer. Lawyers and judges report significant concerns about lack of representation, including fewer settlements and a slower process, with corresponding increased expenses for a represented party.

L'article fait le compte-rendu de quatre études connexes portant sur des parties à un litige de droit familial qui se représentent elles-mêmes. Il analyse ainsi une étude sur des parties à un litige de droit familial en Ontario, un sondage sur les perceptions des avocats de l'Ontario et de l'Alberta et une étude sur les juges canadiens. Il ressort de ces analyses, une nette augmentation des parties qui se représentent elles-mêmes dans les affaires de nature familiale. Le manque de ressources financières est la raison la plus souvent invoquée par les parties dans leurs décisions de se représenter eux-mêmes. En revanche, un nombre significatif de personnes non représentées ne croient pas que l'issue des

---

* Childhood & Social Institutions (Interdisciplinary Programs) and Social Work, King's University College, Western University.

** Faculty of Law, Queen's University The authors Birnbaum and Bala acknowledge financial support from the Social Sciences and Humanities Research Council.

*** Canadian Research Institute for Law and the Family, Calgary. This author wishes to acknowledge funding from the Alberta Law Foundation. The views expressed here are those of the author and do not necessarily reflect the views of the Institute or the Foundation.

This paper is a revised version of papers presented at the 6th Annual Family Law Summit of the Law Society of Upper Canada, May 10, 2012, Toronto; and the "Judicial Assistance to Self-Represented Parties in Family Law Program," National Judicial Institute, July 13-14, 2012, Halifax. The authors wish to thank Joe Hornick of the Canadian Research Institute for Law and the Family for his advice and support for this collaborative project, as well as Alexis Rischke, Wilfrid Laurier University, for her assistance with data entry and analysis, and Ian Peddle, Queen's University, for his editorial assistance.

procédures sera plus désavantageuse sans un avocat. Pour leur part, les avocats et les juges manifestent d'importantes préoccupations relativement au manque de représentation, notamment la diminution de règlements à l'amiable et un processus judiciaire plus lent. Tout ceci entraîne comme conséquence des coûts plus élevés pour les parties représentées par un avocat.

---

1. The Context of Rising Family Self-Representation

Lack of access to family justice and self-representation in family proceedings are growing concerns in many countries, including Canada. There has been much discussion among lawyers, judges, researchers and policy makers about the causes for an increasing number of family litigants who do not have lawyers and the effects of this lack of legal representation particularly in family court, but there has been little empirical research about these questions. Research studies about these problems in a number of countries have focused on the impacts of legal aid cutbacks,[1] the growing number of services to assist the self-represented,[2] the challenges

---

[1] Rosemary Hunter, Jeff Giddings and April Chrzanowski, "Legal Aid and Self Representation in the Family Court of Australia," online: (2003) Socio-Legal Research Centre Griffith University <http://www.nla.aust.net.au/res/File/PDFs/NLA_selfrep_FCA.pdf>; Richard W Painter, "Pro se Litigation in Times of Financial Hardship: A Legal Crisis and its Solutions" (2011) 45 Fam LQ 45; Kim Williams, *Litigants in-person: A Literature Review* (United Kingdom: Ministry of Justice, 2011); The Law Reform Commission of Western Australia, "Review of the Criminal and Civil Justice System in Western Australia," online: (1999) The Law Reform Commission of Western Australia 92 <http://www.lrc.justice.wa.gov.au/092-tor.html>;Alberta, Law Reform Institute, *Alberta Rules of Court Project: Self-Represented Litigants* (Edmonton: Alberta Law Reform Institute, 2005); Hazel G Genn and Alan Paterson, *Paths to Justice Scotland* (Oxford: Hart Publishing, 2001); D A Rollie Thompson and Lynn Reierson, "A Practising Lawyer's Field Guide to the Self-Represented" (2002) 19 Can Fam LQ 529. The only national study on unrepresented litigants in Canada to date is a study of adults accused in nine provincial criminal courts, undertaken by the Research and Statistics Division of Justice Canada: Canada, Department of Justice, *Court Site Study of Adult Unrepresented in the Provincial Criminal Courts, Part 1 & 2* (Ottawa: Department of Justice, 2002); see also Ab Currie, "A Burden on the Court? Self-Representing Accused in Canadian Criminal Courts," (2004) 11Just Research, online: <http://www.justice.gc.ca/eng/pi/rs/jr.html>.

[2] John Malcolmson and Gayla Reid, "BC Supreme Court Self Help Information Centre Final Evaluation Report," online: (2006) BC Supreme Court Self Help Information Centre <http://justiceeducation.ca/themes/framework/documents/SHC_Final_Evaluation_Sept2006.pdf>; Richard Zorza, "The Self Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers," online: (2002) National Centre for State Courts <http://www.zorza.net/Res_ProSe_SelfHelpCtPub.pdf>; Jim Hilbert, "Educational Workshops on Settlement and Dispute Resolution: Another Tool for Self Represented Litigants in Family Court" (2009) 43 Fam LQ 545.

which they encounter as a result of not having a lawyer,[3] and costs to the justice system of the lack of representation and the costs of improving access to justice.[4] Legal scholars and practitioners have written about the challenges of increasing access to justice and the structural changes needed to improve dispute resolution,[5] and suggested ways for judges and court managers to work more effectively with the self-represented.[6] However, there has been very little empirical research on these issues in Canada, and

---

See also Barbara Landau *et al*, *Submission To Attorney General Chris Bentley: Creating A Family Law Process That Works Final Report And Recommendations From The Home Court Advantage Summit* (Toronto: Ontario Bar Association, ADR Institute of Ontario and Ontario Association for Family Mediation, 2009); Law Commission of Ontario, *Towards a More Efficient and Responsive Family Law System: Interm Report,* online: (2012) Law Commission of Ontario <http://www.lco-cdo.org/en/family-law-reform-interim-report>.

3 Rachel Birnbaum and Nicholas Bala, "Views of Ontario Lawyers on Family Litigants without Representation" (2012) 63 UNBLJ 99; Michael M Pettersen *et al*, "Representation Disparities and Impartiality: An Empirical Analysis of Party Perception of Fear, Preparation, and Satisfaction in Divorce Mediation When Only One Party has Counsel" (2010) 48 Fam Ct Rev 663.

4 The Canadian Judicial Council undertook a number of studies on self-representation including the costs to the justice system; see Canadian Forum on Civil Justice, "Designing a 'Cost of Justice' Project," online: Canadian Forum on Civil Justice <http://cfcj-fcjc.org/research/costs-en.php>; Noel Semple, "Cost-Benefit Analysis of Family Service Delivery: Disease, Prevention, and Treatment," online: (2010) Law Commission of Ontario www.lco-cdo.org/family-law-process-call-for-papers-semple.pdf. In the USA see John Greacen, "The Benefits and Costs of Programs to Assist Self-Represented Litigants," online: (2003) Judicial Counsel of California <http://www.courts.ca.gov/partners/documents/greacen_report.pdf>. In Australia see Deborah Worthington and Joanne Baker, *The Costs of Civil Litigation: Current Charging Practices, New South Wales and Victoria* (Sydney: Civil Justice Research Centre, 1993).

5 Deborah L Rhode, *Access to Justice* (New York: Oxford University Press, 2004).

6 Jona Goldschmidt *et al*, *Meeting the Challenge of Pro se Litigation: A Report and Guidebook for Judges and Court Manage*rs (Chicago: American Judicature Society, 1998); Elizabeth Richardson, *Self-represented Parties: A Trial Management Guide for the Judiciary* (Melbourne: County Court of Victoria, 2004). See also various bench books for judges across the globe; see e.g. Judicial Studies Board, *Equal Treatment Bench Book* (London: Judiciary of England and Wales, 1999) at ch 1 and 3, online: <http://www.judiciary.gov.uk/publications-and-reports/judicial-college/Pre+2011/equal-treatment-bench-book> (England); Judicial Commission of New South Wales, "Equality Before the Law Bench Book," online: (2006) <http://www.judcom.nsw.gov.au/publications/benchbks/equality/section10.pdf> (New South Wales); Supreme Court of Queensland, *Equal Treatment Benchbook* (Brisbane: Supreme Court of Queensland Library, 2005) at ch 12, online: Queensland Courts <http://www.courts.qld.gov.au/__data/assets/pdf_file/0004/94054/s-etbb.pdf> (Queensland); Judicial Counsel of California Administrative Office of the Courts, *Handling Cases Involving Self Represented Litigants: a Benchguide for Judicial Officers* (San Francisco: Judicial Counsel of California, 2007), online: National

very little empirical research from anywhere that has reported on the perspectives of family litigants about the reasons for and effects of lack representation.[7]

This article reports on the results from a research project involving four interrelated Canadian studies on self-representation in the family justice process[8] and on services intended to address their problems. The groups surveyed were:

(1) family law lawyers in Ontario and Alberta;
(2) Canadian judges; and
(3) litigants in Ontario's family justice system, both with and without lawyers.

Part 2 explains the methodologies of the different studies; the balance of the article discusses the results of this research, comparing perceptions and experiences of the different groups surveyed. Part 3 examines perceptions

---

Legal Aid & Public Defender <http://www.nlada.org/DMS/Documents/1176151729.08/CA%20pro%20se%20Benchbook.pdf> (United States).

7 See Jona Goldschmidt and Loretta Stalans, "Lawyers' Perceptions of the Fairness of Judicial Assistance to Self-represented Litigants" (2012) 30 Windsor YB Access Just 139, who surveyed Alberta family lawyers' perceptions of the impartiality and fairness of judges using case scenarios.

8 This paper uses the term "self-represented litigant" to refer to a person who does not have a lawyer, for whatever reason or reasons. Some authors and agencies, including Ontario's Law Society, make a distinction between "self-represented litigants" and "unrepresented litigants." The position of the Law Society of Upper Canada, for example, is that:

> It is important to distinguish between *an unrepresented party* and *a self-represented party*. An *unrepresented party* is often acting on his or her own behalf because they have no choice-the party does not qualify for Legal Aid and cannot afford a lawyer. Even if the party did have a lawyer at one time, they find that they are now representing themselves as they no longer have the funds to continue paying for representation.
>
> *Self -represented* parties represent themselves because they want to – they have an agenda that they wish to follow and believe that they are able to represent themselves. Although this [L.S.U.C.] paper generally refers to self-represented parties, some of the remarks are equally applicable to unrepresented parties.

Law Society of Upper Canada, "How to Avoid the Complaint – Dealing with Unrepresented and Self-represented Parties in Family Law," online: (2008) <http://rc.lsuc.on.ca/pdf/kt/avoidComplaintFamily.pdf>.

As discussed in this article, this distinction, while helpful for some analytical purposes, is in practice often impossible to make, and accordingly we follow the more common practice, and use the term "self-represented" for those without a lawyer for any reason. In this text we do make some distinctions based on the reason that a person is self-represented, but we do not employ different terms for these situations.

of professionals about changes in the extent of self-representation over time, and the reports of all respondent groups about the reasons for self-representation, including the extent to which respondents believe that not having a lawyer will affect the family justice process. Part 4 considers perceptions of the treatment of self-represented litigants in the family justice system. Part 5 explores the perceived effects on outcomes of being self-represented. Part 6 concludes with a discussion of implications of this research for Canadian policy and practice, identifying issues to be addressed by the judiciary, governments, bar associations and individual practitioners, as well providing some suggestions for future research.

Our research indicates there has been a significant increase in the number of self-represented family litigants over the past few years as reported by the different groups surveyed; suggesting that over half of the family cases in Canada's courts now have one or both parties without a lawyer; this is consistent with the limited government data available, which also reports an increase in self-representation in family cases. An inability to afford a lawyer is a major factor in the lack of representation, but litigants' motivations for not having a lawyer are often complex, including the rise of "do it yourself" social attitudes and a perception of some self-represented litigants that having a lawyer will not result in a significantly better outcome. Governments and others have responded to the lack of representation by increasing information and services for these litigants, which is in turn resulting in an increase in self-representation. It seems that a "tipping point" has been reached. It seems inevitable that there will continue to be large and perhaps even growing numbers of self-represented family litigants, especially among lower and middle income litigants. While some of those without lawyers achieve reasonably fair outcomes, the continuing high rates of self-representation will pose significant challenges for the justice system, and will result in frustration and concerns for litigants, both those with and without lawyers. These developments raise concerns about "two-tier" justice, with those who are wealthier tending to resolve disputes with lawyers outside the court system, and those with more limited means tending to resolve family disputes in a stressed family justice system, often without adequate legal advice or assistance.

2. Methodology of Our Research Project

While a number of research studies have been undertaken on issues related to self-representation in the family justice system,[9] this is one of the very

---

[9] See e.g. Leslie D MacRae *et al*, "An Evaluation of Alberta's Family Law Act," online: 2009 <http://people.ucalgary.ca/~crilf/publications/FLA_Final_Report_May_2009.pdf >; the authors interviewed 33 self-represented litigants in the courts of Alberta

few projects that directly explores and integrates the experiences and perceptions of very different groups about the issues of self-representation and access to family justice, and the only comprehensive study on self-representation in the family justice system completed in North America.[10] Our research project involved four related surveys of lawyers, judges and family litigants.[11]

The study of the perceptions and experiences of family lawyers was conducted using a web-based survey of attendees at the June 2011 Ontario Annual Family Law Summit, the largest family law continuing legal

---

during the evaluation of the Alberta *Family Law Act,* 2005. See also Judith G McMullen and Debra Oswald, "Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases" (2010) 12 JL & Fam Stud 57, who analyzed a random sample of 567 family court files from 2005 in a suburb of Milwaukee, Wisconsin; Hunter, Giddings and Chranowski, *supra* note 4, also explored the question of the availability of legal aid funds for family law disputes using in-person interviews with family law litigants in Australia. See also Sande L Buhai, "Access to Justice for Unrepresented Litigants: A Comparative Perspective" (2009) 42 Loy LA L Rev 979. Julie McFarlane of the University of Windsor is presently conducting qualitative interviews with self-represented litigants in BC, Alberta and Ontario to hear their views and experiences of being self-represented in family law disputes; see Julie McFarlane, "Representing Yourself in a Legal Process," online: <www.representing-yourself.com>.

10 John Dewar, Barry W Smith and Cate Banks, "Litigants in Person in the Family Court of Australia: Research Report No. 20," online (2000) <http://mail.familylawcourts.gov.au/wps/wcm/resources/file/ebb87e04879610d/report20.pdf>. This is a report on interviews, surveys, and focus groups with litigants only, judges, lawyers and court registry staff.

11 These three surveys on access to justice and self-representation involved many collaborators to whom the authors are grateful.

For the survey of Ontario lawyers, we express thanks to Shari Slonim, Continuing Professional Development, Law Society of Upper Canada.

The survey of Ontario family litigants was conducted by law students recruited by Pro Bono Students Canada at Osgoode Hall Law School, Queen's University, the University of Toronto, Western University, Ontario and the University of Windsor. We are grateful to Nikki Gershbain, National Director, Pro Bono Students Canada (PBSC), and the PBSC Program Managers, Navneet Johal and Krystyna Drywa. Emily Hubling, program coordinator at the University of Toronto Law School was instrumental in facilitating the process with the other schools. We are also most grateful to Melissa MacRae, third year law student at Queen's University, and her supervisor Leanne Wight, Senior Duty Counsel, Kingston Family Court, for their work on helping to develop and pilot test the survey instrument.

We are also most grateful to Mr Justice Jim Williams, Supreme Court of Nova Scotia (Family Division) and Mary Ahearn from the National Judicial Institute for their support for the judges' survey. Thanks also to Marie Gordon of Gordon Zwaenepoel, for her assistance with the survey of Alberta lawyers.

Last, but certainly not least, we wish to thank all the participants who gave their time to complete our surveys and share their experiences and opinions about the family

education program in Canada, held in Toronto each year. There were 335 lawyer respondents, a response rate of about 42% of the program attendees. The Alberta survey was sent to 174 lawyers who were believed to practice family law; there were 71 respondents, a response rate of 41%.[12]

The study of Canadian judges was a web-based survey of judges attending national family law judicial education programs held in Toronto (February 2012) and Halifax (July 2012). This survey was completed by 54 judges: a response rate of just under 50% of program attendees; the judges were from all regions in Canada and were almost all trial judges.[13] The response rates were high for a survey administered to professional groups, reflecting the interest and concern of these professionals about this issue.

The study of Ontario family law litigants, both self-represented and represented, was undertaken from October 2011 to March 2012, with volunteer law students approaching litigants at six court sites in four Ontario cities, and asking them to participate in the study.[14] The survey

---

justice system; we hope that they find some satisfaction in knowing that their perspectives are being shared widely with a broad readership of family justice professionals, policy makers and scholars.

[12] The list was compiled by the Canadian Research Institute for Law and the Family.

[13] Some demographic information was collected about judges, but to preserve anonymity, none of the judicial responses are reported by gender or jurisdiction.

[14] The survey of family litigants was initially piloted in Kingston, Ontario to determine the flow of the questions and the length of time the survey took that led to minor revisions. The authors sent an email to all the local administrative judges in the courts that were being surveyed to advise them that the study was taking place in their courthouse. The authors also advised the Ministry of Attorney General and both Chief Justices of the Ontario Court and Superior Court that the study was being conducted in the courthouses with the assistance of Pro Bono Students Canada. The self-represented and represented litigants were surveyed in the: Superior Court of Justice in Toronto; two Ontario Court of Justice courts in Toronto; Superior Court of Justice (Family) in Kingston; Superior Court of Justice (Family) in London; and Ontario Court of Justice in Windsor, Ontario. Thus, the survey was completed by litigants at all three family trial courts, and included litigants from the largest metropolitan area in Canada and smaller urban centres. All the Pro Bono students in Toronto, London, Kingston and Windsor were trained by Professors Birnbaum and Bala. The training addressed how to approach and interview the participants, given the stressful nature of the family court process, the inclusion/exclusion criteria for the study, and how to administer the survey. We express our sincere gratitude to these students: Dianne Verano and Jackie Strybos (University of Windsor Law School); Lina Nasir, Jessica Lipton, and Terrah Smith (Western UniversityLaw School); Jonathan Cheng, Hayley Ha, Megan Cheema, and Katherine Georgious (University of Toronto Law School); Alexandra Kocherga (Osgoode Hall Law School); and Naila Ruba, Belinda Chui, and Natasha Engineer (Queen's Law School).

consisted of a 34-item questionnaire, administered by the students. The surveys were completed by 275 litigants, about 60% without lawyers and 40% with lawyers, [15] and roughly equal numbers of men and women.

All of these studies focus on experiences in the litigation process in the family courts. This is an important limitation to all of these studies, both in terms of methodology and policy implications. As revealed in these studies, when there is a lack of representation, there is a greater difficulty in settling a case. If both parties have lawyers, there may be a greater likelihood of settlement of a case, often without court proceedings even being commenced, perhaps through a process like collaborative family law, or there may be resolution by private arbitration. The experiences of litigants and the professionals who resolve their cases outside the court system were not the focus of these studies.

3. Self-Representation – Perceptions of Incidence, Causes and Effects

Commentators in a number of countries have observed that there has been a significant increase in the number of self-represented litigants in the family courts in recent years.[16] While there is no national data on self-representation in Canada's family courts, in our surveys, the vast majority of lawyers and judges reported that over the past five years they perceived significant increases in the number of self-represented family litigants. Figure 1 illustrates the perceptions of Ontario and Alberta family lawyers and Canadian judges about the number of self-represented family litigants over the previous five years.[17]

---

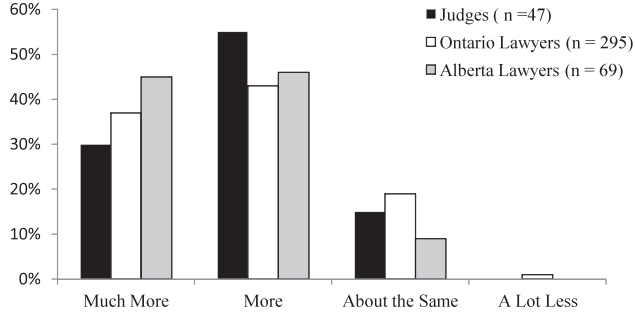
[15] The proportion of self-represented litigants in our study appears to be slightly higher than was reported by the Ontario government, based on data collected at the time of original filing of a domestic application. Between 1998 and 2003, an average of 46% of litigants in the Ontario Family Courts were not represented by a lawyer at time of original commencement of court proceedings, rising to 62% in 2006-2007, before falling somewhat to 54% in 2009-2010, the last year for which there is data available from the Ontario Ministry of Attorney General; this is based on applications under the *Family Law Act,* RSO 19909, c F3, the *Children's Law Reform Act*, RSO 1990, c F12 and the *Divorce Act* , RSC 1985, c 3 (2d Supp) filed in the Ontario Court of Justice, the Family Court and the Ontario Superior Court.

[16] Rosemary Hunter *et al*, *The Changing Face of Litigation: Unrepresented Litigants in Family Court of Australia* (Sydney: Law and Justice Foundation of New South Wales, 2002); Richard Zorza, "An Overview of Self Represented Litigation Innovation, its Impact, and Approach for the Future: An Invitation to Dialogue" (2009) 43 Fam LQ 519 [Zorza, "Overview"].

[17] The majority of lawyers had an average of 19 years of practice experience and the judges had an average of 9 years of experience as a judge.

Figure 1

Change in the number of self-represented over past 5 years?



In their survey, judges reported that in an average of 35% (range 10%-75%) of their family cases, only 1 party had a lawyer, and in an average of 24% (range 2%-70%) of their family cases neither party had a lawyer. In the survey of Ontario lawyers, respondents reported that an average of 22% of their family cases over the previous year had no lawyer at all on the other side. Another 26% of the cases had no lawyer on the other side for part of the case. Only 4% of the Ontario lawyers reported no experience in the past year with family cases without a lawyer for the other party. The lawyers' survey does not reflect cases where neither party had a lawyer at any point in the process. In Alberta, the lawyers reported that 13% of their family law cases did not have a lawyer on the other side for the entire case and 19% reported that they had a self-represented litigant on the other side for part of the case.

Taken together, the results of the surveys of judges and lawyers clearly suggest that there has been a significant increase in the amount of self-representation over the past five years, and in over half of the cases in the family court system, one or both of the parties do not have a lawyer for all of the proceeding.

It is often difficult to determine the reason why an individual does not have a lawyer. The most obvious way is simply to ask self-represented individuals why they do not have a lawyer, but, assuming that they are being candid, they may not have carefully reflected on their own decision-making, or there may be a complex combination of reasons that may change over time. Further, some respondents may have a "pro-social" bias in their responses. For example, it may seem more acceptable to report to an interviewer that one cannot afford a lawyer than to say that one looks forward to humiliating a former partner through in-person cross-examination. Recognizing the complexity of determining motivations, we

asked each respondent group about the reasons for self-representation. While there was significant convergence in responses, there was also some interesting variation.

As the discussion below indicates, financial reasons and ineligibility for legal aid are the most significant explanatory factors for lack of representation. For many middle income individuals, however, the decision not to retain a lawyer is often at least in part based on their assessment that, given their income and asset level, the value of having a lawyer would not justify the cost. In other words, they have absolute ability to pay, but given the costs of legal services and their perceptions of its limited value for them, they have chosen to spend their money on other priorities.[18] For some family litigants, the decision to self-represent reflects a confidence in their own knowledge and ability to navigate the system, a distrust of lawyers or a desire to deal directly with their former partner.

Figure 2 shows that all respondent groups rated lack of finances and ineligibility for legal aid as the primary reason for family litigants being self-represented. However, interestingly, while judges and lawyers generally share similar views about the overwhelming importance of financial reasons, the self-represented litigants actually rated lack of financial resources as a less significant factor and provided a more comprehensive picture of why they did not have lawyers.

Less than half of those (45%) without representation reported that their primary reason for not having a lawyer was that they did not have enough money and did not have legal aid. A number (8%) were waiting to see if the other party would have a lawyer, suggesting that lack of representation sometimes feeds on itself. Another 8% expressed a concern that having a lawyer would increase the delay, cost or conflict involved. There were 5% who gave as their primary reason for not having a lawyer the desire to deal directly with a former partner; these are individuals who are likely to have higher conflict proceedings, as they seek to continue to engage with, or even confront their former partner.

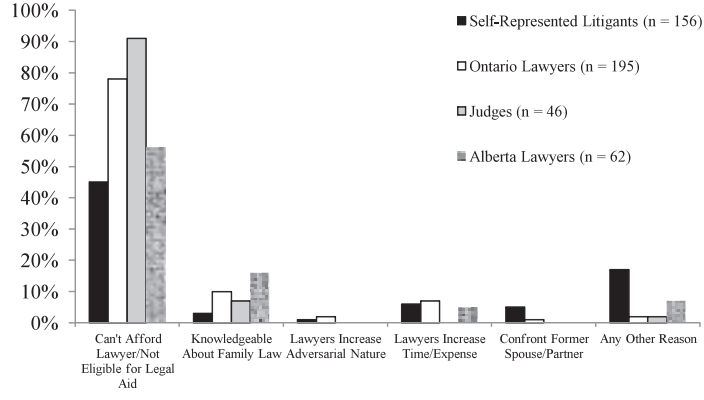
While it is clear that financial concerns are a major issue for lack of representation, some of the comments from judges about the reasons for

---

[18] The Australian Law Reform Commission, *Review of the Federal Civil Justice System Discussion Paper 62* (Sydney: Australian Law Reform Commission, 1999), did not find empirical evidence to connect the support in cuts to legal aid funding and an increase in the number of self-represented in the civil courts. However, Dewar, *supra* note 13, found that there was an identifiable link between the unavailability of legal aid and self-representation in the Family Courts.

Figure 2

Why Family Law Litigants are Self-Represented: A Comparison of Reasons (Reasons Ranked #1)



self-representation suggest that the decision of family litigants not to have a lawyer is influenced by many factors:

> "Mental health issues; some have been through 2 or 3 incompetent lawyers; some know it's costing the other side and their time is free."
> "Some are obsessed with conflict."
> "They are unwilling to listen to the advice they receive from counsel."
> "There has been a cultural change where people want to participate directly in matters affecting them, where they are not afraid to speak up, where they believe they have the right to do so in a transparent arena that will treat them fairly and quickly."

While there was a range of reasons for being self-represented, litigants who had lawyers were almost all satisfied with their decision to have representation. The vast majority of litigants *with* lawyers stated that they planned to continue with their lawyer, and reported that their lawyer was very helpful (62%) or moderately helpful (19%); only 2% said their lawyer was not helpful. Most of those with lawyers (73%) expected that they would obtain a better outcome as a result of having a lawyer, and more than a third expected that the process would take less time having a lawyer. The most common primary reason for having a lawyer (41%) was the expectation of a "better outcome," while 26% of litigants with lawyers gave lack of knowledge of the legal process as their primary reason for representation, and 5% reported not wanting to directly deal with the other party as their primary reason.

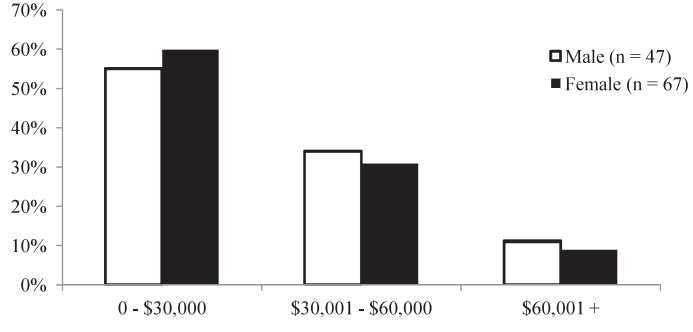
As illustrated in Figure 3, among the respondents to the litigant survey, lack of representation was clearly associated with financial circumstance.

For both men and women, those with higher incomes were significantly more likely to have a lawyer than those in lower income groups.[19]

Figure 3 also shows that some litigants in higher income groups do not have a lawyer, although there was no statistical significance between genders. While there were significant differences between those that are 30 years of age or less and those that are over 30 years of age, with significantly more individuals 30 years of age and older likely to have a lawyer as compared to younger litigants,[20] there were no statistically significant gender or age differences once the generally higher incomes of older litigants is taken into account.

Figure 3

% of Self-Represented Litigants by Gender and Income



While a narrow majority of lawyers and judges did not report observing systemic differences between the reasons that men and women are self-represented, a substantial minority of justice system professionals believe that there are gender differences in the reasons for lack of representation. A common perception of these professional groups is that women are more likely to be self-represented due to an inability to afford a lawyer, while men may be more likely to be self-represented due to a desire to deal directly with their former partner or because of confidence in their ability to represent themselves. Comments from lawyers and judges included:[21]

---

19 Among males, those with higher incomes are significantly more likely to have a lawyer, ($x^2(2) = 24.24$, $p<.001$). A similar pattern was observed for females; females with higher incomes were significantly more likely to have a lawyer ($x^2(2) = 11.51$, $p<.01$).

20 ($x^2(1) = 4.25$, $p<.05$).

21 Qualitative narratives provide context and texture to the quantitative data that was collected from all the studies.

> "For women, it is finances; men think they do as well as a lawyer but without the expense."[lawyer]
> "Sometimes abusive men want to be able to have direct contact with their partner." [lawyer]
> "Men more often believe they don't need a lawyer. Women do not have the money." [judge]

The responses of litigants also reveal some interesting gender differences in explaining their reasons for lack of representation. While 7% of men without lawyers said that their desire to deal directly with the other party was their primary reason for being unrepresented, only 3% of unrepresented women gave this response. Almost 10% of self- represented men believed that they would experience *worse* outcomes for economic issues if they had a lawyer and their case is to be resolved by a judge, while only 2% of women believed that they would have a *worse* outcome in court with a lawyer. Only 32% of self-represented males versus 60% of represented males believe that litigants have worse outcomes for economic issues if a judge decides a case because they do not have a lawyer.[22] In other words, a majority of self- represented men do not expect a worse outcome because they do not have a lawyer, though a majority of represented men would expect a worse outcome if they do not have a lawyer. By way of contrast, among females, perceptions of the value of having a lawyer for economic issues are very similar for those with and without a lawyer, with most expecting better outcomes on economic issues resolved by a judge for those with lawyers. These responses generally suggest that men have less concern about being self-represented than women, and that men's lack of representation is more likely to be a result of the desire to directly engage with their former partner.

In both Ontario and Alberta, the vast majority of lawyers (84% and 89% respectively) report that the self-represented always or usually have unrealistically high expectations for the outcome of their cases. Ontario and Alberta lawyers (78% and 88% respectively) also report that self-represented litigants are less likely or much less likely to settle. Lawyers also express concern that self-represented litigants always or usually look for advice to the lawyer for the represented party (47% in Ontario and 68% in Alberta), though of course there are very significant ethical and professional constraints in what a lawyer for one party can or should do to assist an unrepresented party. Table 1 sets out data on the views of Ontario and Alberta lawyers on some aspects of dealing with self-represented litigants.

---

22 There is, of course, the possibility that some people who cannot afford lawyers are engaging in *ex post* rationalizing and reporting that it will not make a difference, and that men are more likely than women to engage in this type of rationalization.

Table 1: Lawyer reports on self-represented litigants		
Self-represented have unrealistically high outcome expectations		
	Ontario	**Alberta**
Always	28%	26%
Usually	56%	63%
Sometimes	15%	11%
Rarely	1%	0%
Self-represented look to lawyer or other party for advice		
	Ontario	**Alberta**
Always	9%	17%
Usually	38%	51%
Sometimes	45%	27%
Rarely	10%	5%

Lawyers almost universally (Ontario: 91%; Alberta: 97%) report that the fact that the other side is unrepresented adds to the costs of their clients to resolve a case. Most lawyers also reported that they always (Ontario: 75%; Alberta: 86%) document communication with the self-represented more carefully than when dealing with opposing counsel, which contributes to the increased costs to their clients. It is not surprising that the lawyers reported that their clients are always or usually upset (Ontario: 76%; Alberta: 86%) about their increased costs due to the other side being self- represented. Some comments expressed from lawyers on behalf of their clients were:

> "… thousands of dollars because generally self-represented parties do not respond [to]reasonable to requests for adjournments, information, etc … self-represented want to be 'in front of the judge' which increases the costs substantially." [Ontario lawyer]
> "… at trial, it always takes about a day longer while the judge tries to extract meaningful information. Also self-reps don't follow the rules, so there is additional time expended exploring remedies for their failure to follow the rules [disclosure, giving notice, etc]." [Ontario lawyer]
> "The Court imposes on the solicitor to do what the self rep can't/won't do and the cost is borne by the represented party. Even costs, when awarded are lower than the norm. If anything, they should be higher." [Alberta lawyer]
> "Everything with a self-rep is difficult, must be in writing, and ends up costing my client. Presently I have several male self-reps on the other side who could easily afford a lawyer but have chosen to make life difficult for their spouses. No adjournment requests are agreed to, nothing by consent, everything ends up in chambers, and judges never award costs as 'he didn't know the process.' Each unnecessary appearance costs my client." [Alberta lawyer]

A majority of lawyers report that in their experience, if the other side is self-represented, settlement is less likely (Ontario: 54%; Alberta: 46%) or much less likely (Ontario: 24%; Alberta: 43%). Similarly a majority of judges reported that if one side is self-represented, settlement is less likely (54%) or much less likely (15%) than if both litigants have a lawyer. Judges also report that if one (90%) or both sides (86%) are self-represented, the length of time to resolve or manage the case significantly increases. These results indicate that professionals clearly believe that lack of representation makes settlement less likely, takes longer, and therefore; implicitly increases the costs to the represented party as well as to the publicly funded justice system.

Judges reported that they deal with a case differently if one or both sides are self-represented, than if both sides have counsel.[23] Judges' comments on this issue included:

> "I am always more cognizant of the perceived 'imbalance' that exists when only one party has a lawyer."
> "There are obligations to assist an unrepresented party without being an advocate—the judge must be very careful to explain the process and evidentiary or procedural issues to self-represented parties—the judge must be especially alert to fairness issues."

4. Perceptions of Treatment of Self-represented Litigants by the Courts

Lawyers generally have somewhat different views from litigants about how well the self-represented are treated by the judges, though interestingly both represented and self-represented litigants have similar views. As illustrated in Figure 4, most lawyers (57% in Ontario and 77%

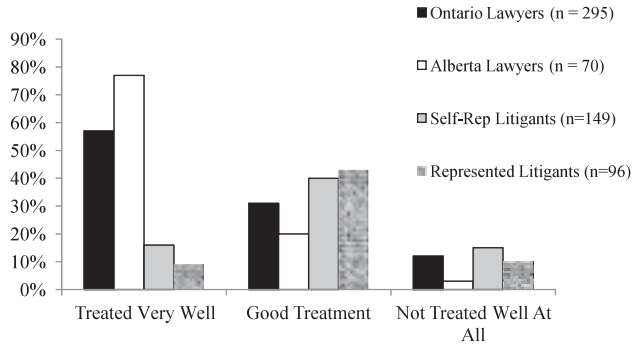
---

[23] The Canadian Judicial Council in 2006 adopted a Statement of Principles on self-represented litigants and accused persons. While only advisory in nature, this statement and appellate case law in Canada makes clear that judges have a duty to assist and accommodate self-represented litigants, though this must be delicately balanced with a the need to maintain impartiality and avoid "becoming an advocate" for an unrepresented party. See Joan Goldschmidt, "Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience" (2009) 17 Mich St J Int'l L 60; *Hurley v Hurley*, 2012 NSCA 32, 314 NSR (2d) 346. See also e.g. *Robson v Albazi*, 2012 ONCJ 194, 213 ACWS (3d) 410, where Spence J of the Ontario Court of Justice had a trial with two self-represented litigants and stated at para 3, "Both parties were self-represented in this proceeding. Both gave evidence at trial and each had the opportunity to cross-examine the other. Because of the parties' unfamiliarity with court procedures, I assisted both of them by explaining how to give their evidence, as well as asking questions of each of them in an effort to tease out the evidence which I believed would be of assistance to me in making an informed decision".

in Alberta) believe that self-represented litigants are treated "very well" by the judiciary, while only 14% of the self-represented and 9% of the represented litigants believe that the self-represented are very well treated. On the other hand, only a relatively small percent of each group feel that self-represented are "not well treated at all" by judges.[24]

Figure 4

Do Self-Represented Litigants Get Fair Treatment From Judiciary?



Many lawyers (Ontario: 47%; Alberta: 47%) reported that their clients usually get upset about the judge appearing to favor the self-represented in court.

Some of the comments from those who were self-represented litigants and who expressed concerns about treatment by judges as a result of not having a lawyer included:

> "Judges can be very disrespectful to litigants who do not have lawyers. For example, they raise their voice and use rude names. I was so surprised that a Judge was allowed to call me a name." [male]
>
> "I hope they [judges] do [treat us fairly] but I don't know. … they [judges] treat them [self-represented] differently cause don't all lawyers know each other and the judges?" [male]
>
> "It seems to depend on the judge. Some judges are friends with some lawyers, and if they are friends with that lawyer, they'll be gentler with their client." [male]
>
> "It's about the judge's character, not about you. That's what I learned early on, to not take things personally cause otherwise you will go crazy." [female]

---

[24] Figure 4 does not include data on "don't knows." Understandably, questions about how self-represented litigants are treated by the courts were answered by almost all lawyers, but there were high rates of "don't know" by litigants, especially those with lawyers.

Some comments from represented litigants reflected similar perceptions about the treatment of the self-represented by judges, which may have influenced their decisions to seek representation:

> "… probably not treated too well. My friend was in court before and she didn't have [a] lawyer and she's the one who told me to get one, so maybe she felt disadvantaged." [female]
> "Previous experiences as self-rep, judge did not listen to me." [female]

In fairness to the judiciary, it is not possible to assess the validity of these reported concerns and perceptions of litigants about their treatment by judges. While some judges might be impatient or even rude with self-represented litigants, it is notable that in our survey, lawyers, who are regularly in court and knowledgeable observers, report that judges generally treat self-represented litigants with patience and courtesy. Some self-represented litigants, however, are very difficult for judges or opposing counsel to deal with and may require firm direction about appropriate conduct in court; others may be overwhelmed and misunderstand what has happened or report accurately on how they have been treated.

A majority of self-represented litigants, almost an even number of male and female self-represented litigants, reported that navigating the court system was difficult or very difficult (67%: gender combined); many of them believed that the lack of a lawyer made the process slower or much slower (49%: gender combined), though a significant portion (31%: gender combined) reported that they felt that lack of representation did not slow down resolution. Many believed that lawyers usually made problems for the self-represented in court worse than they need to be (53%: gender combined). Some of the negative comments of self-represented litigants about lawyers included:

> "Lawyers add fuel to the flame. I wish there was more mediation." [female]
> "Number of lawyers who are simply 'cash for kids'; objectives are not in the best interests of family, it's about the cash that they can make through litigation …"[male]

These comments should not be taken as necessarily accurate reports about the conduct of lawyers. While some lawyers may exacerbate conflict and not seek to effectively resolve cases, there are real ethical constraints on how they can deal with or negotiate with self-represented parties; it is notable that judges in our survey report that the absence of legal representation actually hinders settlement. Further, self-represented family litigants make a large number of complaints about the lawyers for their

former spouses that are rejected by law societies as unfounded in a disproportionately large number of cases.[25]

From the perspective of the represented litigant, a majority report that they expect (72%: gender combined) a much better outcome as a result of having a lawyer, and many expect that the court process takes less time with a lawyer (35%: gender combined) than if they had been unrepresented. Comments from the represented litigants about the court process and the value of having a lawyer included:

> "There is a lot of information available for people to learn about the court system but reading all of that information is just too much. I might as well go to law school to learn all of these things. I am happy that I decided to get a lawyer." [female]
> "Custody of my children is an important matter and I would not trust myself if I had to be self-represented. My lawyer handles things for me and explains the system to me which is definitely easier." [female]

A recurring theme in the comments of male litigants, both those with lawyers and self-represented is a perception that the family court system is biased against men, reflected in statements such as:

> "You need a lawyer to have any chance of getting a favorable decision. This applies especially if you are male since family court judge favors women. Having a lawyer forces the judge to be more fair to the male party."
> "Courts have a bias in favor of the mother/woman. Having to come to court and pay a lawyer thousands of dollars just to get access to a child when there is no claim of abuse or other issues is wrong …"
> "Court system is biased against men—it is harder 'we have to do all the running around' Kids tend to go to the mother, not the father—because we leave the family home to maintain stability for the kids and then have to go to court to fight for the right to see them."

Women, on the other hand, tended to raise financial and safety concerns for themselves and their children, as well as concerns about lack of access to justice. Comments made by women included:

> "… the court entertains whatever my husband brings up to the court as entertainable claims which cause a huge amount of expense. To deal with my 2010 income I had to provide photocopies of accounts for the past 5 years and this was over 500 pages of photocopying and this is very expensive …"

---

[25] Law Society of Upper Canada, *supra* note 11; See also Gwen Goebel, "Emerging Issues Related to Ethics and the Practice of Family Law (a.k.a. Why Are They Picking on Us?)", online: (2002) <http://redengine.lawsociety.sk.ca/inmagicgenie/documentfolder/UCA1.pdf> .

> "I can't get legal aid because I make too much money, even though I am the victim. Whereas my husband, as the aggressor, is going to get legal aid, because he's unemployed … difference between physical and mental ailments, I'm not being looked after. My concerns are not being heard."

4. Ontario Court Services

In 2011 Ontario followed the lead of several other jurisdictions[26] to establish a number of services to assist and better inform family litigants, especially those who are without lawyers, about the court process. One program is the Mandatory Information Program (MIP), which all family litigants, whether represented or not, must attend. A two-hour presentation is given by a lawyer and a social worker, providing basic information about the legal process and different methods of dispute resolution, with some emphasis on the value of settlement and non-adversarial dispute resolution, as well as some information about the emotional effects of separation on children. In addition, the Ministry of the Attorney General has established Family Law Information Centres (FLIC)[27] at the courts with brochures, forms and other materials about the family justice process. There are scheduled times when litigants can seek summary advice from Advice Counsel at the FLICs; these are lawyers paid by Ontario Legal Aid who will provide summary legal advice to individuals who meet financial eligibility criteria. There are also Duty Counsel lawyers paid by Legal Aid who can provide summary assistance for unrepresented litigants on the day of a court appearance. The Ministry also has a website with family law information and court forms. Of the 31% of family litigants who attended the two hour MIP session, 42% reported that it was very helpful or somewhat helpful for learning about the family justice process. Another 47% believed the sessions were very helpful or somewhat helpful about learning more about alternatives other than court, and 29% reported that the session was very helpful or somewhat helpful about learning the effects of separation on children.

---

26 For a review of programs in Alberta, see Joanne J Paetsch *et al*, *High Conflict Intervention Programs in Alberta: A Review and Recommendations* (Alberta: Canadian Research Institute for Law and the Family, Alberta Justice, 2007). Some provinces offer a six-hour course (British Columbia, the Alberta Court of Queen's Bench, and the Family Division of the Supreme Court of Nova Scotia) and most, if not all provinces and territories, now offer mandatory two-hour sessions for separating and divorcing parents prior to receiving a court order.

27 In addition, the Law Society of Upper Canada, Ontario has recently launched a website, <http://yourontariolaw.com>, that provides parents with free information and access to resources on the emotional, financial, legal and social considerations relating to child custody, access and child support.

All respondents were also asked if they used the Ministry of Attorney General (MAG) website. Less than half (37%) reported that they had used the website; of those who had, 21% reported that it was very helpful and another 47% reported that it was somewhat helpful. Respondents were also asked about the brochures and materials at the FLICs at court houses. Of the 40% who reported that they used these materials, 18% reported that they were very helpful, 46% reported somewhat helpful, and 23% reported they were moderately helpful.

While the responses to the surveys indicate that there is considerable value to these services, clearly there are limitations. Many family litigants do not have the education and literacy skills[28] to benefit from these materials, and some have visual impairments or other disabilities making them inaccessible, as reflected in some comments in the survey of litigants:

> "… There are many people with disabilities and people cannot understand. I have a reading disability and it is hard for me to understand all the issues. If you don't understand you can get denied legal aid and lose your kids. People do not have time to sit all day and wait to talk to someone, since so many people have jobs. It is a lot of money to come to downtown to court …" [female]
>
> "Things in the information materials need to be much clearer. The forms are too complicated and should be simplified for people who don't have lawyers." [female]
>
> "The information provided is practically in another language. You can't understand it. It's in court legalese, and nobody understands it. They can't break it down in laymen's terms and a hell of a lot of these people are not upper class. They probably don't understand 85% of what is written down and handed to them …" [female]

Perhaps understandably, those litigants who actually spoke to a lawyer about their family law issues, even relatively briefly, were generally more positive about this source of assistance than those who only received information from the internet or by print materials, as there was greater

---

[28] Brownstone J of the Ontario Court of Justice stated: "If I point out a paragraph in an affidavit that I think is important and I ask for a response and they are silent, or say they've left their reading glasses at home, that is a clue that they can't read it. Then, I read the paragraph out loud myself. I try to make sure that the party who is having difficulty understanding is made aware of the evidence so they can respond;" see Valarie Mutton, "Frozen Moment of Judicial Passion," online: (2011) 31:26 Lawyers Weekly <www.lawyersweekly.ca>. Mutton goes on to add, "The growing number of self-represented litigants in family court is alarming. But even more alarming is the fact that a significant percentage of self-represented people lack the basic literacy skills to properly understand their proceedings. Canada-wide, 15 per cent of adults have serious problems dealing with any written materials and a further 27 per cent struggle with anything beyond simple reading tasks. That's a staggering 42 per cent of the adult population who have literacy issues – and this statistic plays out in potentially tragic ways each day in our courts."

opportunity for specific information and interaction. Of the 31% of respondents who had the opportunity to speak to Advice Counsel at a FLIC, 40% reported that it was very helpful and another 35% found it somewhat helpful; only 10% reported that it was not helpful at all. There was, however, a degree of frustration with the summary nature of the assistance that could be provided. As one respondent commented:

> "They told me they shouldn't be speaking to me and that I should get a lawyer. … The exact quote was, 'Your case is too complex. You need to hire a lawyer, I cannot help you.'"
> "Depends on who you get. Some are helpful and some you can tell are just doing their job, give you the basics and then move to the next person."
> "They don't get detailed, but they give you some information."

Of the 34% of respondents who consulted with Duty Counsel on the day of a Family Court appearance, 39% reported that it was very helpful and another 34% found it somewhat helpful; only 10% reported that it was not helpful at all.

5. Expected Effects of Self-Representation on Outcomes

A) Economic and Child-Related Issues

As regards custody and access arrangements for children, lawyers tend to believe that self-represented litigants have worse outcomes than those who have lawyers, whether a case is settled by negotiation (Ontario 57%; Alberta 37%) or resolved by a judge in court proceedings (Ontario 57%; Alberta 42%). Judges were also concerned about the effect of lack of representation on child-related outcomes, with 46% believing that self-represented litigants generally have worse outcomes with respect to children. Some of the judges' comments reflect concerns about lack of representation on arrangements for children:

> "Even if they reach agreement it is often based on what they consider to be 'fair' as opposed to a child's best interests."
> "Generally worse because all possible scenarios are generally not explored."
> "Unrepresented litigants have far more chance of a less favourable outcome, because they are unable to articulate their case."
> "They [unrepresented] fail to address those issues that are probative. Their evidence/submissions are often overwhelmed by their emotions."

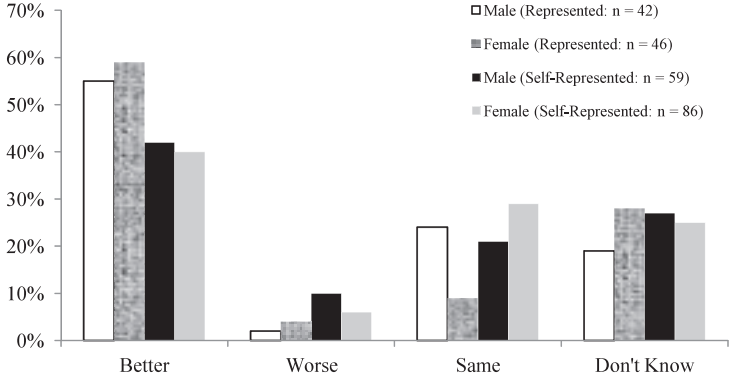
As regards the economic issues of property and support, judges expressed greater concern about the effect of lack of representation, with 65%

reporting that self-represented litigants generally have worse outcomes as a result of lack of representation.

Family litigants were also asked whether they believed that having a lawyer would make a difference with respect to outcomes for child related and financial matters, taking account of whether they settle their case or it is decided by a judge. Figure 5 presents results for the effect that litigants expect from a lack of representation on arrangements for the care of children, if a case is decided by a judge (as opposed to settled by negotiation).

Figure 5

When it comes to plans for your children, do you think that having a lawyer gives you a better, worse, or the same outcome if judge makes decision?



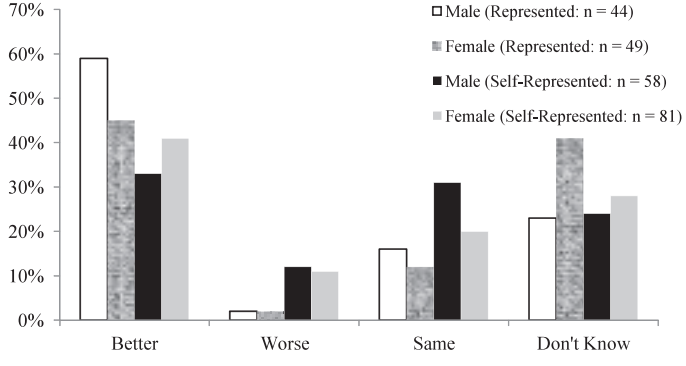
The general expectation of litigants is that they will have better outcomes with lawyers. Those with lawyers, however, generally have a greater belief than the self-represented that representation will result in a better outcome. Represented men (54%) were more likely than self-represented men (41%) to believe that having a lawyer would result in a better outcome, and similarly represented women (57%) were more likely than self-represented women (40%) to believe that they would have a better outcome with a lawyer if a judge makes a decision about their children. Interestingly, almost 10% of self-represented men believed that for cases resolved by a judge, they would experience *worse outcomes if they had a lawyer.* These results suggest that a significant portion of those without lawyers do not expect it to have an effect on the outcome of their case, and some even expect to have a better outcome without a lawyer.

Figure 6 shows that only 32% of self-represented males versus 60% of represented males believe that if a judge decides a case litigants without lawyers have worse outcomes. In other words, a majority of unrepresented

men do not expect a worse outcome because they do not have a lawyer, but a majority of represented men expect that they would have a worse outcome if they did not have a lawyer. By way of contrast, among women, perceptions of the value of having a lawyer for economic issues resolved by a judge are very similar for litigants with and without a lawyer, with most women expecting better outcomes on economic issues resolved by a judge for those with lawyers.

Figure 6

When it comes to money and property issues do you think that having a lawyer gives you a better, worse, or the same outcome if the judge makes the decision?



B) Domestic Violence Issues

Both Ontario and Alberta lawyers were asked if they thought the self-represented who are victims of domestic violence get adequate protection. A majority of Ontario lawyers (Ontario: 56%) and a little less than half of the Alberta lawyers (41%) believe that self-represented litigants who are victims of domestic violence (usually women) do *not* get adequate protection if their case is *settled.* However, a majority of Ontario and Alberta lawyers (71%; 91%, respectively) believe that self-represented litigants who are victims get adequate protection if the case is resolved by a judge. Lawyers have concerns about self-represented victims of violence being coerced in negotiations into accepting settlements that may not adequately protect them, but seem to have more confidence that judges who learn of the domestic violence will take adequate steps to protect victims.

However, judges clearly have concerns about the effect of lack of representation on cases that they decide where there is domestic violence, as reflected in the following comments:

> "There is always the fear that this category of self rep is not truly or accurately articulating their position because of fear or intimidation."
> "Domestic violence and the definition of a victim (subjective and objective) of violence is a very, very complicated dynamic. Some 'victims' will suffer a disadvantage because they accommodate and avoid conflict. Others may achieve better outcomes because they are empowered by the 'victim' perspective. Some 'victims' may choose a lawyer who further victimizes him or her, with a terrible outcome. Those who see themselves as victims—but who objectively are not—may instruct counsel to act aggressively towards the other party, and may overreach …"

The litigants were all asked if domestic violence concerns were a part of their case. 26% of males and 31% of females who were self-represented reported that domestic violence was part of the dispute, while 18% of men and 27% of females with lawyers reported that domestic violence was an issue. Although this study did not deal with "matched pairs" of litigants, the somewhat higher rates of reporting that domestic violence is an issue by women may reflect differences in the perception of this issue, with women more likely to see this as a concern.[29]

All respondents were also asked their views about the effect of lack of representation on both victims of domestic violence and those accused of domestic violence in family court. As might be expected, many respondents answered that they were unable to express an opinion on the question of whether self-represented litigants get fair treatment on domestic violence issues in the family courts. Of males who were self-represented, 35% reported that they disagreed or strongly disagreed with the statement that self-represented litigants *accused* of domestic violence get fair treatment in the family courts. Of females who were self-represented, 11% reported that they strongly agreed with the statement that self-represented litigants who are *victims* of domestic violence do not get adequate protection from the family justice system.

Interestingly, while litigants with lawyers generally expected better outcomes as regards children and financial matters because they had lawyers, they generally expected that legal representation made less difference in regard to domestic violence issues; for example 23% of the women with lawyers had expressed concern about the lack of representation of protection for victims of family violence, compared to

---

[29] The question did not differentiate different types of domestic violence (i.e., verbal, emotional, sexual, physical, financial). In future studies this may be an important differentiation as litigants may not be aware of the differences or even wish to discuss them. It should also be noted that the Information Sheet that each litigant received prior to consenting to the study clearly stated that any form of abuse that impacts children would be reported to the local child welfare authorities.

the 17% of women without representation who expressed this concern. These responses suggest concerns, especially by the self-represented, about the effect of lack of representation on the resolution of domestic violence issues in the family courts, though the general perception seems to be that lack of representation has less effect on this issue than in regard to economic or child-related issues, presumably because there is an expectation that judges will intervene more in domestic violence cases.

6. Conclusions: Adjusting the Justice System for Self-represented Litigants

This article presents results of surveys of the views and experiences of four different groups about the causes and effects of lack of representation in Canada's family justice system. It is apparent that that there has been a substantial increase in the number of self-represented family litigants over the past five years, with significant evidence that over half of the family cases in the courts now have one or both parties without a lawyer as reported by the different groups surveyed. As there is a range of causes and effects of self-representation, there needs to be a range of responses by different institutions, agencies and professionals to deal more effectively with self-representation in the family courts.

It is notable that the responses of each group surveyed reveal that each group has a somewhat different perception of the causes and consequences of self-representation, and understandably will have different views about how to address the challenges posed by self-representation. It seems likely that the number of self-represented family litigants will grow, or at least remain large, and the results of this research project reveal that they have unique perspectives and experiences; therefore, it is important that their voices and views be equally considered as legal organizations, the judiciary and government address issues related to access to justice and lack of representation.

The results of this project confirm results of earlier smaller studies in Canada as well as research from other countries[30] that have examined the causes of the increasing number of self-represented litigants: the most important reason for the lack of representation is the inability of family litigants to afford a lawyer, and the lack of eligibility for legal aid. It is also clear, however, that a significant number of litigants could manage to afford a lawyer but are deciding to be self-represented because they feel

---

30 Zorza, "Overview," *supra* note 19; Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2005) 30 Queen's LJ 825 at 826-827; Painter, *supra* note 4; Williams, *supra* note 4; Law Reform Commission of Western Australia, *supra* note 4.

that it is not worthwhile to retain a lawyer, and some, especially some men, actually believe that they will have a better outcome without a lawyer or wish to represent themselves to have the opportunity to directly engage with their former partners.

Many of those without lawyers are being helped by an expanding range of services provided by government or otherwise available, for example on the internet, and some litigants feel reasonably comfortable dealing with the family justice process without retaining a lawyer. For example, in the Alberta Court of Queen's Bench in Calgary, there is a courtroom set aside for cases where both parties are self-represented litigants, with special support staff arrangements in place. In Ontario, the Superior Court of Justice provides self-represented litigants who are taking their case to trial with a 10-page *Memorandum For Trial,* outlining the court's expectations of how to conduct a trial, the procedure for a introducing evidence, and general conduct during a trial. It seems that a "tipping point" has been reached. With the growing range of services available for the self-represented and changing social attitudes and knowledge, expectations of those who are going through separation or divorce have changed. There is an understanding and expectation that having a family lawyer is one option, but self-representation is also an option, especially for those who have limited means. Reforms to substantive family law in Canada, especially the introduction of guidelines for spousal and child support, and reforms to property legislation, have also tended to make the law more comprehensible and clearer, especially for those with limited incomes and assets, suggesting that there is less need for a lawyer for individuals with less wealth if economic matters are at issue. For those with a low conflict separation, adequate education and literacy skills, and relatively simple financial affairs, lack of legal representation may not present a serious problem, at least for the self-represented litigants. Given the cost of legal services and the availability of "free" or subsidized government services, for some individuals the decision not to retain counsel to resolve family matters may well be a rational economic decision (though these self-represented litigants may be imposing added costs on the justice system and government, and often on the other party).

There is, however, also a very significant portion of self-represented family litigants who are unable to afford a lawyer in cases where there are serious concerns about the effect of lack of representation on outcomes for litigants and their children. Our results indicate that for about one half of self-represented litigants, the primary reason for not having a lawyer was that they did not have enough money to pay the costs of retaining a lawyer and were not eligible for legal aid. Many of those without lawyers expect

worse outcomes and less protection because they are without counsel. As one unrepresented female litigant commented:

> "Either lawyers should charge less, or there should be more legal aid. Something's gotta give, or they can't say it's really justice, right?"

As in other countries, governments and the judiciary in Canada are trying to deal with this growing problem by providing more information and through a range of "free" services. The information and brief advice provided by these services to the self-represented litigant cannot, however, replace the detailed advice, analysis and advocacy provided by a lawyer who is trained and knowledgeable in family law, particularly when children or domestic violence are matters of concern. More needs to be done for the vulnerable self-represented litigant. Legal aid schemes clearly have an important role, though they are under increasing financial strain. There also needs to be an expansion of services provided by limited scope retainers by lawyers and increased efforts to reduce the cost of legal services. Clearly there are cases in which lawyers in family cases are not making efficient use of the legal system,[31] and all family lawyers need to be aware of the importance of making use of cost effective and proportionate legal responses.

This project also reveals that there is a group of "do-it-yourselfers" who are able to afford representation but who choose to represent themselves. Some of them, especially some men, believe that they will

---

[31] See e.g. Phil Epstein "Epstein This Week in Family Law" *Family Law Newsletters* 47 (November 2011) (WL Can) where he discusses *Gogas v. Gogas*, 2011 ONSC 5368, [2012] WDFL 597: "This is a ruling by Justice Healey of the Ontario Superior Court of Justice with respect to costs as a result of a motion to change. This case is a good illustration of why we continue to see more self-represented parties, why access to the courts is being limited to those who either have no money and get legal aid or have relatively unlimited bank accounts. The costs awarded on this motion to change were $75,000. It appears that there were 13 affidavits and four financial statements filed by the applicant and 10 affidavits and three financial statements filed by the respondent. The respondent's net worth was about $700,000. I am not sure of the applicant's net worth but the costs are out of all proportion to the likely means of the parties and in any event the costs only represent a fraction of what the parties must have paid in total to their respective lawyers. There is something wrong with the family law judicial system that allows the filing of 23 affidavits and seven financial statements in the same case. It demonstrates a complete lack of adequate lawyer management and case management and judicial intervention in an attempt to find a resolution. If everyone is permitted to file 23 affidavits in each case and then expect that judges will spend time reviewing them all, then the family law justice system is truly doomed. I find this case very depressing. It says a great deal about what is wrong with our family justice system and surely it cries out for a better way of dealing with the problems."

actually have *better* outcomes if they represent themselves, and some may relish the prospect of personally confronting their former partners. There is also some indication that this group of litigants may prefer to have a judge resolve their cases rather than to have a settlement. While individuals have the right to represent themselves and take their disputes to court, there need to be continuing efforts by governments, judges and law societies to educate family litigants about the value of obtaining sound legal advice and settling disputes outside the court system. Further, in appropriate cases, those who choose to represent themselves and thereby impose costs on the other party, in particular due to procedural errors, delays, unnecessary prolongation of trials or rejection of reasonable settlement offers, should be ordered to pay a substantial portion of the costs imposed on the other party,[32] and should be warned by judges at settlement conferences and other occasions that they may incur cost sanctions.

The high rates of self-representation in family cases will pose ongoing challenges for judges and lawyers, and will continue to result in frustration and concerns for litigants, both those with and without lawyers. At the same time, the vast majority of those with greater resources will continue to have legal representation, though often resolving their cases outside of the court system. This raises concerns about "two-tier" justice, with those who are wealthier tending to resolve disputes with lawyers outside the court system, and those with more limited means being unrepresented and resolving family disputes in an increasingly stressed family court system.

There have been many calls for major reforms to the family justice system from policy makers, judges, lawyers and the mental health community, as well as by those most affected by the family justice system, litigants.[33] Yet, there remains little empirical research that helps with

---

[32] For examples of cases where judges took account of the fact that a self-represented litigant increased the legal expenses incurred by the represented party, see *JC v AK,* 2010 ONCJ 455, [2011] WDFL 953(costs of case conferences for which he was poorly prepared imposed on self-represented party); *AGL v KBD,* [2009] OJ 2371, 73 RFL (6th) 218 (Ont Sup Ct), where McWatt J awarded $251,000 against a partially self-represented mother in an alienation case, commenting: "I can only characterize the costs incurred by the father as a litigant's worst nightmare." In an unreported 2009 Ontario Family Court decision, Thomson J awarded $10,000 in costs against a father who had never lived with a child but sought custody, observing: "prosecuting unmeritorious claims is never reasonable, regardless of whether a party is represented or not;" see *Luckham v Molleson* (unreported August 26, 2009, Kingston, Ontario).

[33] See e.g. Landau*, supra* note 5; Law Commission of Ontario, *supra* note 5; Nicholas Bala, "Reforming Family Dispute Resolution in Ontario: Systemic Changes & Cultural Shifts," in Michael Trebilcock, Anthony Duggan and Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 271.

understanding about what works effectively and what does not. Too frequently services have been put into the family justice system without proper evaluation and a proper understanding of the impacts. There is very little empirical research, in Canada or elsewhere, that follows litigants and their children through the different stages of the litigation process and that assesses the effect on outcomes of different methods of dispute resolution. Policy and structural reforms remain scattered and limited, despite the increasing number of self-represented litigants in the family courts and the concerns that outcomes, especially for children, vulnerable women and victims of domestic violence may be negatively affected by the lack of advice and representation. Moreover, knowing that some of the self-represented and represented litigants are satisfied with outcomes or services does *not* address issues related to costs to the justice system – to courts, lawyers, litigants – of self-representation, nor does it answer questions about the effect of lack of representation on outcomes for children of separated and divorced families.

There is a need for government, professional groups and scholars to undertake interdisciplinary collaborative research to better understand the costs and benefits of various policy and program initiatives but also what is working well and what is not working well across the globe. This type of research is essential if appropriate use is to be made of the resources and programs or further reforms are to be undertaken. Children and victims of domestic violence, in particular should expect nothing less from the family justice system.

JUSTICE SYSTEM JOURNAL, *36*(4), 323–340, 2015

ISSN: 0098-261X print / 2327-7556 online
DOI: 10.1080/0098261X.2015.1021496

Routledge
Taylor & Francis Group

The Implications of Salary for the Quality of Nominations to the Federal District Courts, 1964–2012

Philip Habel
School of Social and Political Sciences, University of Glasgow, Glasgow, United Kingdom

Daniel Bennett
Department of Government, Eastern Kentucky University, Richmond, Kentucky

Shane A. Gleason
Department of Political Science, Idaho State University, Pocatello, Idaho

Scott A. Comparato
Department of Political Science, Southern Illinois University, Carbondale, Illinois

Many have expressed concern over the working conditions of federal district court judges who face comparatively low salaries in contrast to those in peer professions. As a means of enticing new judges of the highest quality, Chief Justices Rehnquist and Roberts have urged Congress and the president to increase judicial pay. However, scholars have not conducted a systematic, empirical investigation of whether higher salaries do, in fact, attract better prospective judges. We turn our attention to this issue. We first develop an exhaustive dataset of ABA ratings for over 1,800 nominees to the federal district courts from 1964 to 2012. We next model the effects of salary on the quality of nominations and confirmations. We find that salary is an important determinant of both the quality of candidates nominated and those confirmed to the federal bench. Our findings have critical implications for public policy, as our results confirm the need for better pay for federal judges.

KEYWORDS: judicial appointment, district courts, trial courts, judicial selection

A common theme in recent year-end reports on the state of the judiciary is the dire need to implement cost of living adjustments for federal judges.[1] In his 2005 report, Chief Justice Roberts argued, "Our system of justice suffers as the real salary of judges continues to decline... Every time a judge leaves the bench for a higher paying job, the independence fostered by life tenure is weakened. Every time a potential nominee refuses to be considered, the pool of candidates from which judges are selected narrows" (5). Moreover, Roberts has urged Congress to act quickly to confirm nominees, as these vacancies have "created acute difficulties" (2010 Report,

Address correspondence to Shane A. Gleason, Department of Political Science, Idaho State University, 921 South 8th Ave., Pocatello ID, 83204-8073. E-mail: gleashan@isu.edu

[1]For example, see discussions in the 2010, 2008, 2007, and 2006 reports, to name a few.

8). The increasing number of vacancies on the federal courts—exacerbated by delays in Senate confirmations—has resulted in greater pressure on the remaining judges to handle larger dockets. In this perspective, judges are underpaid and overburdened, which could have ramifications for careerism, enticing judges to leave the bench or dissuading prospective ones from seeking nominations.

Roberts has not been alone in his advocacy for better compensation. In his 2002 report, Chief Justice Rehnquist reiterated a common theme from prior year-end reports by noting, "In 1989, in testimony before Congress, I described the inadequacy of judicial salaries as 'the single greatest problem facing the Judicial Branch'... It remains the most pressing issue today" (p. 2). Then-Judge Breyer in 1992 also opined on the increased likelihood "that those who seek judicial office will see that office as a temporary assignment, leaving it after a time for better paid work in the private sector" (Breyer 1992, 7). Beyond the justices, several notable organizations have petitioned Congress for better remuneration. The American Bar Association (ABA) stated that "...inadequate judicial pay undermines commitment to lifetime tenure by deterring candidates from seeking appointment to the bench and discouraging judges from remaining on the bench" (ABA 2010).[2] Similar concerns have been expressed by the American College of Trial Lawyers[3] and deans of numerous law schools.[4] In like manner to Chief Justice Roberts, the ABA has argued that the independence of the federal judiciary is threatened as judicial salaries fail to keep pace with peer professions.[5]

As the preceding discussion suggests, low compensation has several implications for the careerism of judges: one, that judges are leaving office early to pursue more lucrative opportunities; two, that the quality of judges' work has been affected; and three, that those who would otherwise consider a federal judgeship have "refused to be considered" and sought careers elsewhere. Of these three policy consequences, considerable attention has been paid to the first. Most studies have found little evidence that salary matters for retirement decisions, both for federal district court and court of appeals judges. Instead, the vast majority of judges retain their positions until they are eligible for a pension, and they then either serve in a part-time capacity as senior status judges or retire (Yoon 2003, 2005, 2006; Vining 2009). However, for the judges who resign from the bench prior to pension eligibility, recent evidence shows that salary could be a factor in their decision calculus (Hansford, Savchak, and Songer 2010; Choi, Gulati, and Posner 2013). In a comprehensive study of district court judges' careerism, Burbank, Plager, and Ablavsky (2012) find evidence that comports with the Hansford et al. (2010) findings. Based on surveys of federal court judges, Burbank et al. note that resignations over the past four decades were motivated most commonly by "...return to private practice, appointment to other office, and inadequate salary" (12). Moreover, a number of those returning to private practice do so for reasons of better compensation.

[2]See the *Independence of the Judiciary: Judicial Salaries* report published in 2010, available online at http://www.abanet.org/poladv/priorities/judicial_pay.

[3]See, for example, their 2007 report titled "Judicial Compensation: Our Federal Judges Must Be Fairly Paid."

[4]See the 2007 statement to Senator Patrick Leahy, http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/judicial_pay/deansletter.authcheckdam.pdf

[5]See the *Independence of the Judiciary: Judicial Salaries* report published in 2007, available online at http://www.abanet.org/poladv/priorities/judicial_pay/pospaper2007.pdf.

Regarding the second consequence, several scholars have examined whether productivity has been affected by low salaries. Choi, Gulati, and Posner (2009) offer little support for the claim that higher salaries increase the quality of opinions judges produce. This is consistent with Baker (2008), who finds that the sole effect of salary is that judges dissent less often in controversial cases. That is, Baker (2008) finds no discernible effect for whether judges of varying political parties write similarly strong opinions, whether they voice policy preferences in a similar ideological direction, or whether they take longer to decide cases. According to the author, "Given the available data, the effect of low judicial pay is non-existent" (112).[6] Some more recent scholarship finds workload considerations can influence the quality of judicial opinions on the Supreme Court (Black and Owens 2013) and the sources justices rely on in drafting opinions (Szmer and Ginn 2014). These latter findings are mirrored at the state supreme court level, where salary, as a component of judicial professionalism, predicts judicial prestige (Squire 2008).

However, researchers have not devoted attention to the third concern—that qualified candidates have been deterred from seeking positions in the judiciary as a result of low salaries. A 2010 cross-national study of European systems by Cross and Donelson (2010) finds higher salaries increase judicial quality. Concerning the United States, Yoon (2006) states, "any adverse effect of salary is likely occurring to an individual's willingness to join the bench, not to remain once confirmed" (176). We address this claim empirically. We turn our attention to the implications of salary for those nominated to the federal bench over time. We focus our analysis at the level of the district courts, the typical entry point to the federal judiciary—and conveniently for our analysis, the level also offering the highest number of cases. As the entry point, it is here where the adverse effects of salary should be most pronounced, as candidates for the district courts who are deterred by low wages will not enter the pool of potential nominees.[7] Our study covers a broad period of time, 1964 through 2012, which affords considerable variance in compensation and includes a prodigious number of nominees, over 1,800 in total. As we show, salary has meaningful consequences for the quality of candidates nominated to the federal courts. In a period when social science research has, at times, faced external criticism for a failure of policy relevance, our results have significance for public policy, as they speak to the need for better remuneration for judges if the federal courts are to attract the best and brightest candidates.

THE EFFECT OF SALARY ON THE POOL OF PROSPECTIVE FEDERAL JUDGES

In order to understand the theoretical effects of salary on behavior, we begin by considering the process of selecting judges. In his seminal work, *Picking Federal Judges*, Goldman (1997) argued that presidents can pursue multiple goals when choosing nominees, including selecting candidates for ideological reasons or rewarding political allies for their patronage. More recently,

[6]Baker's (2008) findings generated a series of reactions in a subsequent volume of the *Boston University Law Review* (Zorn, Henderson, and Czarnezki 2008; Cross 2008; Marks 2008).

[7]As those serving on higher levels of the federal judiciary have often served previously as district court judges, then those judges and justices will have already accepted a "lower salary."

much has been written on the role of political and institutional forces acting on the president during the appointment process, with focus on the role of senatorial courtesy, polarization, and the ideological distance separating the president and key member of the Senate (see, for example, Epstein and Segal 2005, Shipan and Shannon 2003, and Binder and Maltzman 2009). Our work does not discount the political and institutional factors that shape the nomination process. Rather, we suggest that less desirable working conditions act as an additional constraint on the selection process—that when salaries are low, the pool of candidates seeking nomination attenuates.

We assume that, on average, presidents would prefer to select candidates of quality. If a president wishes to nominate candidates who are like-minded, the president will desire that such ideological appointees also be highly qualified. Presidents who nominate poorly qualified candidates could face criticism from the media and pundits. Moreover, evidence from the lower federal courts suggests that highly qualified prospective judges are less likely to face delays in confirmation (Martinek, Kemper, and VanWinkle 2002; Solowiej, Martinek, and Brunnell 2005; Shipan and Shannon 2003; Stratmann and Garner 2004; Holmes, Shamode and Hartley 2012), particularly when the president and the Senate are ideologically distant from each other (Sen and Spaniel 2015).[8] Presidents may strive to make political appointments or reward friends, but we argue that at times when salaries are lower, presidents are forced to select such nominees from a truncated pool of candidates.

If the claims of Chief Justices Rehnquist and Roberts and several other notable followers of the courts are valid, then better qualified candidates are dissuaded from considering a career in the federal courts when compensation is low, and thereby they opt out of the pool of nominees. Thus nominations made from this truncated pool will be of lesser quality in years with lower salaries. By extension, we should also expect that judges confirmed from among the pool of nominees will also be of lesser quality. Even as potential salaries in peer institutions have increased and outside opportunities can appear financially rewarding, we argue that pay remains an important driver of interest in serving in the federal judiciary.

DATA FOR NOMINEES TO THE FEDERAL DISTRICT COURTS

Due to severe data constraints, one cannot reliably locate the set of candidates who are in or out of the pool over time. Even what is meant by "the pool" is difficult to conceptualize, as it is unclear who should be included or excluded. Even for recent periods, reliable data are not available concerning, for example, who was interested in the federal courts, who pursued nomination, who senators and other proposed, who the president considered, and who declined an invitation.[9] Moreover, finding reliable data across districts over the past several decades, which is necessary to have sufficient variance in salary and in the quality of judges, is not possible. What scholars can observe, however, are those candidates nominated by the president and considered by the Senate Judiciary Committee. There are two reasons that we can have confidence in observing the effects of salary on these prospective judges. First, estimates of the effects of salary on ratings of quality

[8]Binder and Maltzman (2009) find that those with higher ABA ratings are not less likely to face delays. See Table 4.3, p. 96, of their work.

[9]The closest exception is the data located on nominations by Eisenhower and Ford, as published in Rottinghaus and Bergen (2011) and Rottinghaus and Nicholson (2010).

will be, if anything, biased conservatively. According to King, Keohane, and Verba (1994), "any selection rule correlated with the dependent variable attenuates estimates of the causal effects on average" (130). Thus the effects of salary on quality will likely be even more pronounced than what we can observe in our research design. Second, although scholars may have some concern over the quality of those who are (or are not) in the pool, in the end, nominations and confirmations are what matter for the performance of the federal judiciary. These are the candidates who, upon successful confirmation, will serve on the federal bench. If we observe then, on average, better qualified nominees and confirmed judges in years of better pay, then we have evidence that higher salaries entice better candidates.

MEASURING QUALITY

To assess the *quality* of nominees in the face of varying salaries, we rely on the ratings of the American Bar Association, an interest group that has, over a long period of time, compiled detailed information on nominees' past experiences and temperaments. ABA ratings have been interpreted as meaningful signals of the quality of nominees and confirmed judges by numerous scholars, and they have been an important indicator of quality for most presidents and senators (Slotnick 1983a, 1983b; Goldman 1997; Haire 2001; Nixon and Goss, 2001; Binder and Maltzman 2002; Martinek, Kemper and VanWinkle 2002; Shipan and Shannon 2003; Epstein and Segal 2005; Binder and Maltzman, 2009; Sen 2014). Valid and reliable alternative measures of quality, such as the Choi and Gulati ratings, are not available for the district courts over as broad of a time period as what we examine, thereby limiting both the variance on salary and the size of the pool of nominees. We do acknowledge that ABA ratings have not been without their critics. Navarro Smelcer, Steigerwalt, and Vining (2011) find evidence of political bias in the scores, revisiting a much disputed question (Lott 2001; Lindgren 2001; Saks and Vidmar 2001). Work has found that women (Slotnick 1983a, 1983b) and minorities (Haire 2001) tend to receive lower ratings from the ABA, findings most recently confirmed by Sen (2014). Further, President George W. Bush discounted ABA scores when making nominations, and his nominees were rated later in the process (Goldman 2007; Goldman, Schiavoni and Slotnick 2009; Binder and Maltzman 2009). Fourth, our results suggest that the quality of nominees has increased over time. And while it is beyond the scope of this study to delve into this finding more systematically, there are potential avenues that future work can explore. One is that there are more highly qualified candidates due to increased opportunities for work experience that the ABA values in rating candidates. Our period of analysis begins during a time when even college was available to a select few, much less law school. In that vein, there are more entrants into law schools in recent decades than previous ones, and the number of law schools perceived as quality institutions has grown. Add to those trends greater opportunities for judicial clerkships and a higher availability of state judgeships, and the finding that quality has increased appears much more intuitive—despite evidence that the gap between salaries in the federal courts and those of peer professions has increased. Indeed, our results on increasing quality over time suggest that such an income gap is less alarming than others have claimed.

Fortunately, for several reasons, these concerns can be mitigated. First, although salaries for district court judges reached their apex in the late 1960s, there is considerable variance even from year to year, such that even within a single presidential administration, salaries can rise and

fall considerably. Consider, for example, the Carter administration. As we show in a subsequent figure, salaries (in 2012 dollar values to facilitate comparison) were nearly 29,000 dollars higher in 1977 than in 1976, but then, due to inflation, salaries fell approximately 14,500 dollars from 1977 to 1978, rose 2,500 dollars in 1979, and then fell over 7,500 dollars in 1980. Thus even if political bias exists in the ABA ratings, such that candidates nominated by presidents of a certain political party are advantaged, it remains true that the ebbs and flows in salary should have implications for quality even within a given administration. Second, our statistical models can add controls for both race and gender to help account for such bias in the ratings, and thus we included measures of whether the nominee or confirmed judge was African-American and/or female. Third, ABA rankings are a sign of quality at the time of nomination, which is the point of time most consequential for our analysis. The scores signal quality, regardless of whether presidents make use of them in their nomination decision. We are able to interpret the rating as meaningful, even if certain presidents ostensibly discounted them (e.g., Nixon, George W. Bush), or even if the ABA score for a given judge did not comport with his or her subsequent performance on the bench. As for the ABA eliminating the exceptionally well-qualified rating, the actual number of prospective judges receiving this rating was very small—only 2.2 percent of all nominees. Previous work using ABA ratings over time has pooled these nominations with the well-qualified ones (Binder and Maltzman 2009), as do we. Finally, it is important to recognize that despite the ratings' shortcomings, the ABA ratings are the most valid and reliable indicator of the quality of nominations available over the entire period of analysis. They represent the best effort to consistently measure quality using multiple dimensions incorporating the professional and educational backgrounds of the nominees.

An important first step, and notable data contribution, is to compile ABA ratings for 1,836 nominees to the district court beginning with the start of the Lyndon Johnson administration through the first term of the Obama administration. The period covers a substantial number of judges and affords considerable variance in salary. Our data collection represents the most comprehensive recording of nominee data to date, and we now briefly describe the process for locating the nominees and their respective ABA ratings, a multi-step process. We collected data on quality, salary, and other variables at the time of the first initial nomination. For those judges ultimately confirmed, we also collected the same measures at the date of the successful nomination that led to the confirmation. We located the time of first nomination and, if relevant, the successful nomination through either print and online publications of the *Journal of the Executive Proceedings of the Senate of the United States of America*. The process for procuring ABA data depended on the type of nomination: whether the nominee was confirmed without need for renomination; whether a candidate was renominated and ultimately confirmed; or whether the nominee was never confirmed, as we describe below. For all nominees, due to the limits of data availability over our entire period of analysis, we rely on the rating of the majority of the ABA committee.[10]

For the first type—nominees confirmed without the need for renomination—ABA ratings were accessed through through the Federal Judicial Center's (FJC) online directory, "Biographical Directory of Federal Judges." Of our 1,836 nominations, 1,515 (82.5 percent) were nominated

[10]Information on the minority ratings would be valuable when candidates did not receive a unanimous rating, but these data are missing for much of the early portion of our period of analysis, the same period when salaries reached their zenith. We were not able to locate information on split ratings.

and confirmed. For the second type, if the subsequent renomination that led to confirmation was temporally close to the first nomination (occurred less than one year apart), then we again relied on the FJC for the rating. Here, though, we ensured that there was no change in the résumé of the candidate within the one year that could have altered their ABA rating. For the third and fourth types—those candidates whose first nomination occurred much earlier than their subsequent successful nomination; and those candidates who were not ultimately confirmed—we compiled ABA scores from several sources.[11] For nominees in years 1989 through 2012, we relied on data available electronically through the ABA's website. Prior to 1989, for a number of nominees, ABA ratings could be located in the archives of *ProQuest Congressional*, which offered access to transcripts of the Senate Judiciary Committee's hearings. These transcripts included either documentation of the ABA rating or direct references to the rating by senators. A second source included information compiled by faculty and research assistants for *Picking Federal Judges* (1997), which offered ABA scores for many of the failed nominees in the George H. W. Bush and Clinton administrations.[12] A third source included archival newspaper records available through *Lexis Nexis Academic Universe*, which occasionally made reference to a nominee's ABA rating. When these resources were exhausted, in a few instances, we were able to locate ABA ratings through Internet searches using the name of the failed nominee and the state of the court to which she or he had been nominated. With all of these methods combined, we were able to uncover ABA ratings for all but 9 of 1,836 nominees.[13] Thus our dataset offers nominee data and ABA ratings for 1,827 candidates nominated to the federal district courts between 1964 and 2012, the most exhaustive ABA data compilation to date. It represents an important data contribution for future scholars to exploit.[14]

To offer perspective on ABA scores for nominees over time, we present both a table and an accompanying figure. To ease interpretation, in both the table and figure, we focus on ABA nominee data by presidential administration. In looking at the first column of Table 1, one can see that the ABA included the rating of *exceptionally well-qualified* for the period of 1964 through 1988. Only 40 of our 1,836 nominees qualified for this rating. Moving to the second column, a total of 973 candidates were rated as *well-qualified*, which comprises the majority rating (53.3 percent) for all nominations. Nominees rated *qualified* number 792 over the period of analysis. Lastly, one can see that the *not qualified* rating is the exception—only 1.2 percent of all nominees received this rating. A number of presidential administrations had 0 nominees who were rated as not qualified. The final column lists the total number of nominees by administration. We can see here that Carter was able to nominate the largest number of prospective judges, while Nixon's shortened second administration and Ford's administration accounted for the lowest numbers. Concerning the most recent administration, the number of first-term Obama nominations is on par with that of George W. Bush's first term.

[11]For some candidates, the window of time between their first nomination and the nomination that was ultimately successful was considerable. As an example, Sue Myerscough was first nominated by Clinton on October 11, 1995. She was later nominated by Obama on January 5, 2011, and confirmed.

[12]We thank the author for making these data available to us.

[13]One missing nominee is Len Paletta, who died shortly after his nomination in early 1978. A second is Michael O'Neill, who was nominated in 2008 but was not rated by the ABA.

[14]All nominee data will be made publicly available upon article publication.

TABLE 1
ABA Ratings for Nominees by Presidential Administration, 1964–2012

	Exceptionally Well-Qualified	*Well Qualified*	*Qualified*	*Not Qualified*	*Missing Rating*	*Total*
Johnson, 1964–1968	10	54	59	5	0	128
Nixon, 1969–1972	8	56	80	0	0	144
Nixon, 1973–1974	1	14	19	0	0	34
Ford, 1974–1976	0	21	29	1	6	57
Carter, 1977–1980	8	100	98	5	2	213
Reagan, 1981–1984	11	57	67	0	0	135
Reagan, 1985–1988	2	83	68	0	0	153
Bush, 1989–1992	.	106	84	0	0	190
Clinton, 1993–1996	.	116	70	4	0	190
Clinton, 1997–2000	.	74	76	0	0	150
Bush, 2001–2004	.	114	51	4	0	169
Bush, 2005–2008	.	73	29	3	1	106
Obama, 2009–2012	.	105	62	0	0	167
Total	40	973	792	22	9	1836
	(2.2)	(53.0)	(43.1)	(1.2)	(0.5)	

Note. For the final row, percentages are in parentheses.

In order to better visualize the difference in well-qualified versus qualified nominations over time, we offer a bar chart of the percent of well-qualified and qualified nominees by administration. In like manner to other studies using ABA ratings over time, both here and in our subsequent statistical analyses, we pool the 40 candidates (2.2 percent of all nominees) rated exceptionally well-qualified with those rated well-qualified (Binder and Maltzman, 2009). Figure 1 shows that certain presidential administrations, namely both of the George W. Bush terms and the first Clinton term, were characterized for being remarkably successful at recruiting well-qualified candidates. For George W. Bush, well-qualified nominees more than doubled those rated qualified. The figure also shows that well-qualified candidates have become more common over time. In all but Clinton's second administration, since 1985, well-qualified nominees have exceeded qualified ones. This finding is interesting, as the past thirty years also represents the period when salaries in the private sector have outpaced those of the federal judiciary (Rutkus 2008). Despite the growing disparities in pay, the federal courts are still able to attract a substantial number of well-qualified nominees.

MEASURES

We now turn to a discussion of the measures used in the subsequent statistical models to shed light on the relationship among salary and the quality of nominees. For our models, the dependent variable is a dichotomous indicator of the ABA rating, where 1 equals well-qualified (and exceptionally well-qualified) and 0 equals qualified. Again because the ABA dropped the exceptionally well-qualified rating, and only a small percentage of district court nominees received this rating,

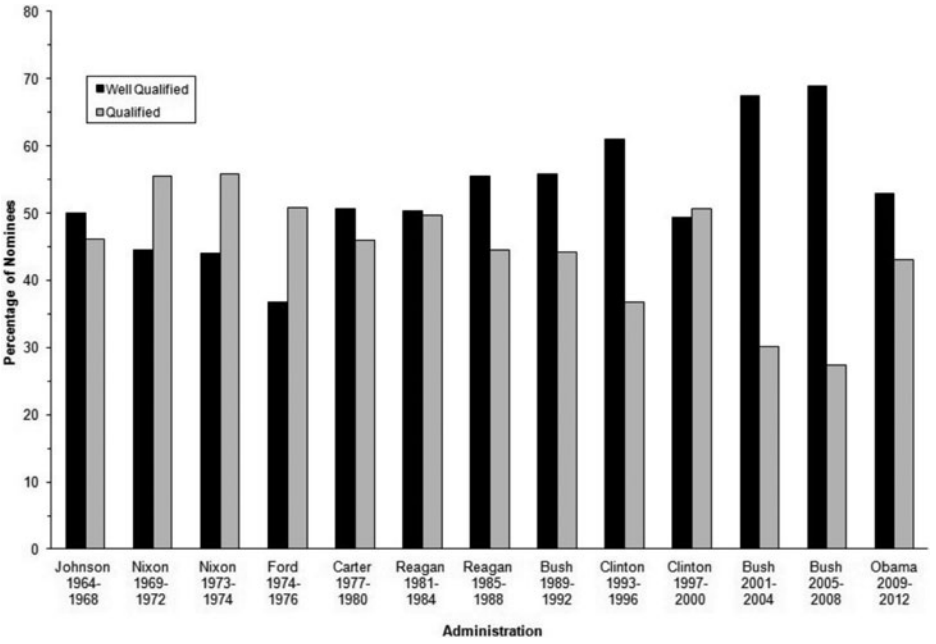


FIGURE 1 Percent of well-qualified and qualified nominations by presidential administration, 1964–2012.

we pool these prospective judges into the well-qualified category, coded 1. (See Binder and Maltzmann 2009 for a similar approach.)[15] We also drop the 22 nominees rated as not qualified from our analysis (1.2 percent of all nominees), because these prospective judges may be categorically distinct from other nominees, given that the rating was used so infrequently.[16] Thus our model captures the effect of increases in salary on the likelihood of receiving a high rating from the ABA.

Our principal explanatory variable concerns the annual salary of district court judges. *Salary* is the annual measure of an extant judges' compensation at the time of nomination.[17] All salary measures are adjusted for inflation, to 2012 dollar values, so that comparisons can be made over time.[18] To offer some sense of the variance in compensation over time, we present both nominal

[15]If we do not pool these potential judges, we are temporally limited in making inferences about the effect of salary. That is, the analysis must end with the end of the Reagan administration.

[16]We estimated models with unqualified candidates included where non-qualified and qualified nominees are coded 0 and well-qualified and exceptionally well-qualified candidates are coded 1. In these models, the results are substantively the same as the models presented below. We do not include non-qualified nominees in the models presented below because their low number (22) and the stark differences between a qualified and non-qualified candidate. However, the non-qualified models are available in the Appendix in Table A1.

[17]Of course, another consideration would be the future salaries of judges, but nominees have little information to forecast when the next salary increase will arrive, nor are they able to judge the effect of future inflation on their remuneration.

[18]Salary data were accessed from the Federal Judicial Center at the following link: http://www.fjc.gov/history/home.nsf/page/js_3.html. We adjust nominal dollar values for inflation using the online tool of the Bureau of Labor Statistics

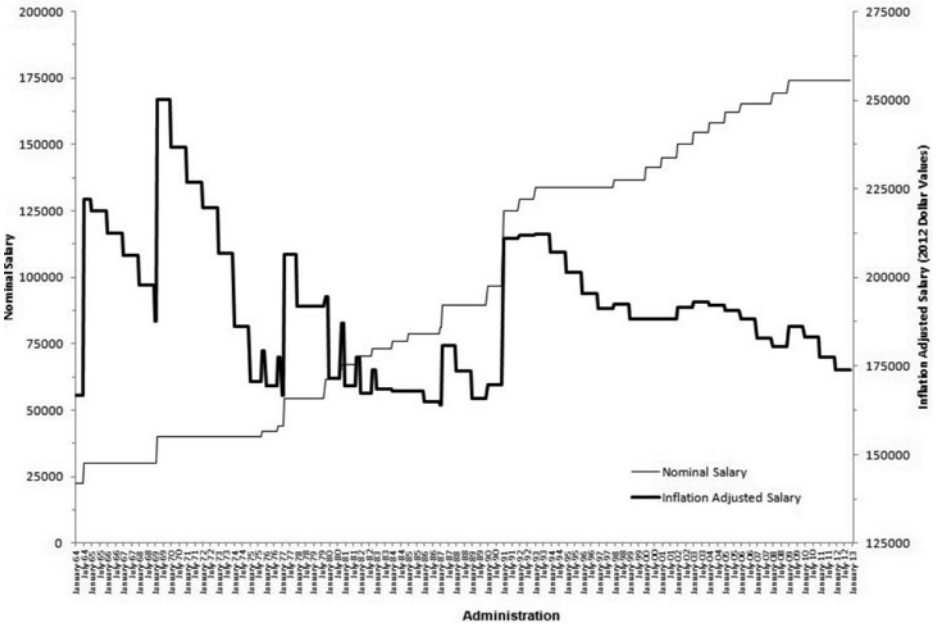


FIGURE 2 Nominal and inflation adjusted salaries of federal district court judges, 1964–2012. Nominal salary data were obtained from the Federal Judicial Center. Salaries were adjusted for inflation to 2012 dollars through the Bureau of Labor Statistics's online tool.

and inflation adjusted salary data in Figure 2. Nominal data are represented by a thin line, with the corresponding y-axis on the left. Inflation-adjusted data are represented by a bolded line, with the corresponding y-axis on the right. Because salaries often changed midyear in the earlier period of analysis, the data are recorded in months. For ease of interpretation, the x-axis includes tick marks for January and July of each year. As one can see, earnings were highest from March to December of 1969, with district court judges receiving over 250,000 dollars in 2012 values. In contrast, judges, salaries fell to under 165,000 dollars from January to December of 1986. The figure demonstrates that salaries have fluctuated considerably over our period of analysis, and even within a given presidential administration, as we earlier discussed.[19]

Our other independent variables include a measure of the size of the court and the workload of judges. We include the number of *Authorized Judgeships* for the court to which the prospective judge was nominated at the time of his or her nomination. Larger courts are associated with areas with more dense populations—areas that tend to include more firms, law schools, and other private-sector opportunities. As a result, we should expect that the pool of nominees in these areas

(http://www.bls.gov/data/inflation_calculator.htm). In our subsequent statistical models, salary is recorded in thousands of dollars. Although it would be helpful to have salary information available by district, we cannot locate reliable inflation-adjusted data for each district going back annually to 1964. Earlier models also included an annual *Change in Inflation-Adjusted Salary* measure, which was not statistically significant, and thus dropped from this analysis.

[19]For a helpful overview of recent policies related to the changes in federal judicial salaries, see Schwemle (2011).

will be, on average, more qualified.[20] We also control for the workload of extant judges on the court to which the nominee is appointed. Some evidence suggests that higher caseload responsibilities drive judges to leave office early (Spriggs and Wahlbeck, 1995; Hansford, Savchak, and Songer, 2010), and thus higher caseloads could deter potential qualified nominees. We record *Weighted Case Filings*, published annually for each district court by the Administrative Office of the U.S. Courts. Among the measures of caseload introduced in Habel and Scott (2014), *Weighted Case Filings* best captures the perception nominees would have of the workload of the district courts, as the measure adjusts filings according to the work required to oversee them. For each nominee, we record the most recently published data according to their time of the nomination.[21] Our expectation is that the sign of the coefficient for this variable will be negative, as higher caseloads should deter better qualified nominees.

Finally, we include two measures capturing the race and gender of the candidates, and a third measure for the *Nomination Year* of the nominee.[22] Concerning the demographic variables, because earlier studies have demonstrated that women and African-American candidates tend to receive lower ABA ratings (Slotnick 1983a, 1983b; Haire 2001; Sen 2014), we control for these effects by the inclusion of dichotomous indicators for both. Because the claims of Chief Justice Roberts would have us believe that the quality of those being nominated at the present time has decreased from that of an earlier period because the disparity between salaries in the public and private sectors has grown, we include a final variable capturing the year of nomination.[23] We should expect that the sign of the coefficient for this variable is negative; however, our descriptive statistics above suggest quality has actually increased over time.[24]

MODELS OF QUALITY FOR NOMINEES

Our theoretical expectation is that we will observe better-qualified nominations and confirmations in periods when salary is high. We now turn to our statistical analysis to test these claims. As our dependent variable is dichotomous, we estimate a series of logit models. Because all those who are nominated in a given year experience the same salary, we report robust standard errors, with

[20]We could not locate reliable measures of annual population by district from 1964 to 2012.

[21]We recorded weighted case filings in hundreds of cases. We use the filings data published for a given court immediately prior to the date of nomination. For example, for a judge nominated to the District of Maine on November 1, 1983, we would record the weighted case filings for the District of Maine for the period July 1, 1982 to June 30, 1983.

[22]Additional models incorporated measures for political factors, including Judicial Common Space distance scores and an updated series of Goldman's (2003) obstruction and delay index. In these models, we found that our salary variable remained positive and statistically significant, as did *Nomination Year*. However, political factors are not significant. Both of these models are presented in the Appendix in Tables A2 and A3.

[23]This variable also serves to capture any trend occurring over time.

[24]We also estimate additional models that did not include this trend variable, but rather included dummy variables by administration, with the Obama administration as the excluded category. In these models, we found consistent substantive results concerning the effects of salary, and the signs and statistical significance of the dummies for administration showed that quality has increased over time.

TABLE 2
The Effects of Salary and Caseload on the Quality of Nominees to the District Courts, 1964–2012

	Nominees	*Confirmed Judges*
Salary	0.005*	0.006*
	(0.002)	(0.003)
Weighted Case Filings	0.001	0.022
	(0.034)	(0.033)
Authorized Judgeships	0.017*	0.018*
	(0.008)	(0.009)
Year of Nomination	0.025*	0.026*
	(0.005)	(0.006)
Female	−0.468*	−0.458*
	(0.127)	(0.150)
African American	−1.028*	−0.964*
	(0.193)	(0.208)
Constant	−50.430*	−53.376*
	(10.177)	(10.938)
N	1784.0	1657.0

Note. We report logit coefficients with robust standard errors, clustered by nomination year, in parentheses. Two-tailed significance tests, where * $p < .05$. Salary and Change in Salary are per 1,000 dollars. Caseload is per 100 filings.

clustering by the year of nomination.[25] If the claims of the chief justices and others are valid, we should observe that salary predicts quality.

In Table 2, we present two models: the first for all nominees, and a second for those who were subsequently confirmed. For the nominee model, the ABA ratings, salary, and other explanatory variables are measured at the time of the candidate's first nomination to the federal courts, whether successful or unsuccessful. For the confirmed judges' model, the data are from the date of the nomination that led to a successful confirmation.[26] As one can see, the *N* for the confirmed model is lower, as these judges are a subset of all nominees.

In looking at the results, in both models, we find that salary is an important factor in accounting for the quality of candidates nominated to the district courts. The sign of the coefficient on *Salary* is positive and statistically significant across both specifications.[27] We also find that courts with more authorized judgeships attract better-qualified candidates. These areas correspond to a wider pool, including a greater number of private practice attorneys and state and lower court judges. We also see that the year of nomination is positive and significant, with more recent years featuring better-qualified candidates. Again, this finding runs counter to the claim that as the gap between

[25]The total number of nominees during our period of analysis is 1,836. Our *N* for our nominee model is 1,784, however. As we noted, we were missing ABA scores for 9 nominees. A remaining 18 potential judges were nominated in periods where caseload data is unavailable, particularly for the District of Columbia from 1964 through 1973.

[26]As we described earlier, for some judges, the time between their unsuccessful and subsequent successful nomination was short, oftentimes less than one year. But for other judges, the window was much longer.

[27]We estimated additional multi-level models and found the substantive results for salary to be robust. However, since Steenbergen and Jones (2002) note that clustered standard errors function akin to multi-level models while also mitigating concerns over specification error, we opt to not include the multi-level models in this article.

salaries in the private sector has grown, the quality of candidates nominated to the court has decreased. Lastly, we find that our demographic variables are statistically significant, with results consistent with the literature that shows that women and African-Americans are less likely to receive a well-qualified rating.

Concerning the magnitude of the effect of salary on the quality of judges, because we use logit models, the coefficients are difficult to interpret directly. Thus we estimate the effect on the likelihood of nominating (or confirming) a well-qualified candidate as salary changes from its lowest to highest values.[28] For the first model, we find that raising salary from its lowest value to its highest increases the probability of a well-qualified candidate by 0.085. For the confirmed judges model, we find that raising salary from the lowest to highest values increases the probability of confirming a well-qualified candidate by 0.099. Although these effects may not seem large, an 8.5 to 10 percent increase in the likelihood of nominating a well-qualified candidate simply by increasing pay should not be trivialized, given the importance of the office represented.

DISCUSSION

We have considered the effects of salary on the decision to join the federal judiciary. In doing so, we have developed an exhaustive dataset of nominees and their respective ABA ratings. The arguments from Chief Justice Roberts and others have claimed that low judicial pay can threaten the very integrity of the federal courts. Without talented and committed judges who perceive their position on the federal courts as the pinnacle of their careers, the courts would be unable to dispose effectively of the cases before it and fulfill its role in our system. Our findings suggest that salary has important consequences for the quality of nominees to the district courts. Our models demonstrate that well-qualified judges are more likely to be nominated when salaries are higher.

Our results should be considered in a broader context. First, concerning salary, it is notable that the mean level of compensation is less than 200,000 dollars during our period of analysis (in 2012 dollar values); that salary has risen above 225,000 dollars for only 34 months over our entire 53-year period; and that the maximum salary in mid-to late 1969 is just over 250,000 dollars in 2012 values. What we cannot observe, then, is the effect of salaries *substantially greater* than 250,000 dollars on attracting prospective judges. We already find salary to be an important incentive for better-qualified candidates, and one is left to wonder what the consequences of having salaries that keep pace with peer institutions would be. Moreover, higher pay might ensure that the federal district bench is more reflective of the nation writ large. Second, an increase in judicial pay could lead to a lower reliance on information provided by interest groups as amici, as higher-quality judges are better able to craft their own opinions without outside information (Szmer and Ginn 2014). Third, concerning our measure of quality, we have focused on the distinction between well-qualified candidates and qualified candidates, as rated by the ABA. It is important to note

[28]We use CLARIFY in Stata 12 (Tomz, Wittenberg, and King 2003) for both models, examining the first difference in the predicted probability for lowest and highest salaries. We set the size of the court to the median; caseload to the median; the nomination year to 2012; and the race and gender of the candidate to be the modal category, a Caucasian male.

that few nominees have been designated "not qualified," regardless of how low salaries had fallen. Thus it could be that followers of the federal courts will perceive our results as less than a mandate for better pay. If the level of competence and ability demonstrated by nominees rated qualified is satisfactory, then the need for increasing salaries is not as pressing a concern.

Fourth, our results suggest that the quality of nominees has increased over time. And while it is beyond the scope of this study to interpret this finding, there are many potential explanations. One is that the ABA's rating standards have simply changed over the years. Additionally, the increasingly polarized and scrutinized nature of judicial nominations may force contemporary presidents to nominate more qualified nominees than their predecessors.

We are left with several avenues for future research. We have examined the effect of salary on nominees, but one can turn greater attention to the various potential effects of salaries for those serving on the federal bench. Particularly since the workload of federal district court judges has increased in recent decades, future work might explore the relationship between productivity and salary. It could also be that lower salaries have consequences for the general morale of extant judges, an area insufficiently explored by scholars. Interviews with judges and more qualitatively orientated research could aid in addressing these important issues. Second, more work should investigate the puzzle of the rise in quality of nominees in the face of increasing salaries at peer institutions. Qualitative studies should investigate how presidents recruit candidates for the judiciary in the face of these trends. Third, our study could be carried out at the courts of appeals level to determine whether we observe similar consequences there as well. Already some work on state supreme courts suggests that low salaries are consequential for court productivity and prestige (Caldeira 1985; Squire 2008). Third, although issues with locating valid and reliable data arise, future work could consider additional measures of judicial quality beyond ABA scores, perhaps including other past experiences prior to nomination. Finally, and related, researchers could examine the implications for salary for the diversity of the federal bench—whether better salaries attract more women and minorities.

REFERENCES

Baker, Scott. 2008. "Should We Pay Federal Circuit Judges More?" *Boston University Law Review* 88: 63–112.

Binder, Sarah, and Forrest Maltzman. 2002. "Senatorial Delay in Confirming Federal Judges, 1947–1998." *American Journal of Political Science* 46(1): 190–99.

———. 2009. *Advice and Dissent: The Struggle to Shape the Federal Judiciary*. Washington DC: Brookings Institution Press.

Black, Ryan C., and Ryan J. Owens.,2013. "Bargaining and Legal Development in the United States Courts of Appeals." *American Politics Research* 41(6): 1071–101.

Breyer, Stephen. 1992. "Statement to the National Commission." http://www.supremecourt.gov/publicinfo/speeches/ncps_project.pdf (accessed December 15, 2010).

Burbank, Stephen B., S. Jay Plager, and Gregory Ablavsky 2012. "Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences those Choices, and their Consequences." *University of Pennsylvania Law Review* 161(1): 1–102.

Caldeira, Gregory A. 1985. "The Transmission of Legal Precedent: A Study of State Supreme Courts." *American Political Science Review* 79(1): 178–94.

Choi, Stephen J., G. Mitu Gulati, and Eric A. Posner. 2009. "Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate." *Journal of Legal Analysis* 1(1): 47–117.

———. 2013. "The Law and Policy of Judicial Retirement: An Emperical Study." *Journal of Legal Studies* 42(1): 111–50.

Cross, Frank B. 2008. "Perhaps We Should Pay Federal Circuit Judges More." *Boston University Law Review* 88: 815–27.

Cross, Frank B., and Dain C. Donelson. 2010. "Creating Quality Courts." *Journal of Empirical Legal Studies* 7(3): 490–510.

Epstein, Lee, Andrew D. Martin, Jeffrey A. Segal, and Chad Westerland. 2007. "The Judicial Common Space." *Journal of Law, Economics, & Organization* 23(2): 303–25.

Epstein, Lee, and Jeffrey A. Segal. 2005. *Advice and Consent: The Politics of Judicial Appointments*. New York: Oxford University Press.

Goldman, Sheldon. 1997. *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan*. New Haven: Yale University Press.

———. 2003. "Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay." *Judicature* 86: 251–8.

———. 2007. "Picking Judges in a Time of Turmoil: W. Bush's Judiciary During the 109th Congress." *Judicature* 90: 252–83.

Goldman, Sheldon, Sara Schiavoni, and Elliot E. Slotnick. 2009. "W. Bush's Judicial Legacy." *Judicature* 92: 258–88.

Habel, Philip, and Kevin Scott. 2014. "New Measures of Judges' Caseload for the Federal District Courts, 1964–2010." *Journal of Law and Courts* 2(1): 153–70.

Haire, Susan Brodie. 2001. "Rating the Ratings of the American Bar Association Standing Committee on Federal Judiciary." *Justice System Journal* 22(1): 1–17.

Hansford, Thomas G., Elisha Carol Savchak, and Donald R. Songer. 2010. "Politics, Careerism, and the Voluntary Departure of U.S. District Court Judges." *American Politics Research* 38(6): 986–1014.

Holmes, Lisa, Salmon A. Shamode, and Roger E. Hartley. 2012. "The Confirmation Obstacle Course: Signaling Opposition through Delay." *American Review of Politics* 33(1): 23–49.

King, Gary, Robert O. Keohane, and Sidney Verba. 1994. *Designing Social Inquiry*. Princeton: Princeton University Press.

Lindgren, James T. 2001. "Examining the American Bar Association's Ratings of Nominees to the Courts of Appeals for Political Bias, 1989–2000." *Journal of Law and Politics* 17(1): 1–30.

Lott, John R. 2001. "The American Bar Association, Judicial Ratings, and Political Bias." *Journal of Law and Politics* 17(1): 41–61.

Marks, Stephen 2008. "A Comment on the Relationship between Judicial Salary and Judicial Quality." *Boston University Law Review* 88: 843–53.

Martinek, Wendy, Mark Kemper, and Steven R. VanWinkle. 2002. "To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977–1998." *Journal of Politics* 64(2): 337–61.

Navarro Smelcer, Susan, Amy Steigerwalt, and Richard L. Vining. 2012. "Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees." *Political Research Quarterly* 65(4): 827–40.

Nixon, David, and David L. Goss. 2001. "Confirmation Delay for Vacancies on the Circuit Courts of Appeals." *American Politics Research* 29(3): 246–74.

Rehnquist, William. 2003. "2002 Year-End Report on the Federal Judiciary." http://www.supremecourt.gov/publicinfo/year-end/2002year-endreport.aspx (accessed December 15, 2010).

Roberts, John J. 2006. "2005 Year-End Report on the Federal Judiciary." http://www.supremecourt.gov/publicinfo/year-end/2005year-endreport.pdf (accessed December 15, 2010).

———. 2007. "2006 Year-End Report on the Federal Judiciary." http://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf (accessed December 15, 2010).

Rottinghaus, Brandon, and Chris Nicholson. 2010. "Counting Congress In: Patterns of Success in Judicial Nomination Requests by Members of Congress to Presidents Eisenhower and Ford." *American Politics Research* 38(4): 691–717.

Rottinghaus, Brandon, and Daniel E. Bergan. 2011. "The Politics of Requesting Appointments: Congressional Requests in the Appointment and Nomination Process." *Political Research Quarterly* 64(1): 31–44.

Rutkus, Denis Steven. 2008. "CRS Report for Congress—Judicial Salary: Current Issues and Options for Congress." Order Code RL34281, Updated September 16, 2008.

Saks, Michael J., and Neil Vidmar. 2001. "A Flawed Search for Bias in the American Bar Association's Ratings of Prospective Judicial Nominees: A Critique of the Lindgren Study." *Journal of Law and Politics* 17: 219–54.

Schwemle, Barbara L. 2011. "Legislative, Executive, and Judicial Officials: Process for Adjusting Pay and Current Salaries." http://www.senate.gov/CRSReports/crs-publish.cfm (accessed March 1, 2013).

Sen, Maya. 2014. "How Judicial Qualification Ratings May Disadvantage Minority and Female Candidates." *Journal of Law and Courts* 2(1): 33–65.

Sen, Maya, and William Spaniel. 2015. "How Uncertainty About Judicial Nominees Can Distort the Confirmation Process." *Journal of Theoretical Politics*, in press.

Shipan, Charles, and Megan L. Shannon. 2003. "Delaying Justice(s): A Duration Model of Supreme Court Confirmations." *American Journal of Political Science* 47(4): 654–68.

Slotnick, Elliot E. 1983a. "The ABA Standing Committee on the Federal Judiciary: A Contemporary Assessment, Part 1." *Judicature* 66: 348–62.

———. 1983b. "The ABA Standing Committee on the Federal Judiciary: A Contemporary Assessment, Part 2." *Judicature* 66: 385–93.

Solowiej, Lisa A., Wendy L. Martinek, and Thomas L. Brunnell. 2005. "Partisan Politics: The Impact of Party in the Confirmation of Minority and Female Federal Court Nominees." *Party Politics* 11(5): 557–77.

Spriggs, James F., and Paul J. Wahlbeck. 1995. "Calling it Quits: Strategic Retirements on the Federal Court of Appeals, 1893–1991." *Political Research Quarterly* 48(3): 573–97.

Squire, Peverill. 2008. "Measuring the Professionalism of State Courts of Last Resort." *State Politics and Policy Quarterly* 8(3): 223–38.

Steenbergen, Marco R., and Bradford S. Jones. 2002. "Modeling Multilevel Data Structures." *American Journal of Political Science* 46(1): 218–37.

Stratmann, Thomas, and Jared Garner. 2004. "Judicial Selection: Politics, Biases, and Constituency Demands." *Public Choice* 118(3–4): 251–70.

Szmer, John, and Martha Humphries Ginn. 2014. "Examining the Effects of Information, Attorney Capability, and Amicus Participation on U.S. Supreme Court Decision Making." *American Politics Research* 42(3): 441–71.

Tomz, Michael, Jason Wittenberg, and Gary King. 2003. CLARIFY: Software for Interpreting and Presenting Statistical Results in Journal of Statistical Software. Vol. 8., 2003. http://scholar.harvard.edu/gking/clarify. (accessed July 1 2012).

Vining, Richard L. 2009. "Politics, Pragmatism, and Departures from the U.S. Courts of Appeals, 1954–2004." *Social Science Quarterly* 90(4): 834–53.

Yoon, Albert. 2003. "Love's Labor's Lost? Judicial Tenure Among Federal Court Judges, 1945–2000." *California Law Review* 41: 1029–60.

———. 2005. "As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure." *Journal of Empirical Legal Studies* 2(3): 495–549.

———. 2006. "Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869–2002." *American Law and Economics Review* 8(1): 143–80.

Zorn, Christopher, William D. Henderson, and Jason J. Czarnezki. 2008. "Working Class Judges." *Boston University Law Review* 88: 829–42.

APPENDIX

Table A1 presents the results when non-qualified nominees are included. This model employs the same dependent variable, except non-qualified nominees are coded 0, along with qualified candidates. The results are substantively similar to those presented in Table 2.

Tables A2 and A3 present the same models as found in Table 2. However, in these models an additional control is included for Goldman's (2003) measure of obstruction, which we have updated through 2012, and a measure of the ideological distance between the president and the Senate from Epstein et al.'s (2007) Judicial Common Space. In both instances, the substantive results are the same and the additional variable fails to achieve statistical significance.[29]

[29]The Judicial Common Space only extends to 2007, thus the last five years of our data are excluded from Table A3.

TABLE A1
The Effects of Salary and Caseload on the Quality of Nominees to the District Courts, 1964–2012 (With Non-Qualified Judges)

	Nominees	*Confirmed Judges*
Salary	0.005∗	0.006∗
	(0.024)	(0.003)
Weighted Case Filings	0.010	0.016
	(0.032)	(0.033)
Authorized Judgeships	0.019∗	0.020∗
	(0.009)	(0.009)
Year of Nomination	0.025∗	0.026∗
	(0.005)	(0.006)
Female	−0.461∗	−0.443∗
	(0.129)	(0.149)
African American	−1.040∗	−0.969∗
	(0.193)	(0.205)
Constant	−50.012∗	−52.584∗
	(10.184)	(10.971)
N	1806.0	1672.0

Note. We report logit coefficients with robust standard errors, clustered by nomination year, in parentheses. Two-tailed significance tests, where * $p < .05$ Salary and Change in Salary are per 1,000 dollars. Caseload is per 100 Filings.

TABLE A2
The Effects of Salary and Caseload on the Quality of Nominees to the District Courts, 1964–2012 (With Goldman Measure of Obstruction)

	Nominees	*Confirmed Judges*
Salary	0.005∗	0.006∗
	(0.002)	(0.003)
Weighted Case Filings	0.009	0.018
	(0.033)	(0.032)
Authorized Judgeships	0.017∗	0.018∗
	(0.008)	(0.009)
Year of Nomination	0.030∗	0.030∗
	(0.007)	(0.007)
Female	−0.460∗	−0.452∗
	(0.125)	(0.149)
African American	−1.024∗	−0.965∗
	(0.196)	(0.213)
Goldman Obstruction	−0.277	−0.232
	(0.339)	(0.339)
Constant	−60.079∗	−61.110∗
	(13.877)	(14.847)
N	1784.0	1657.0

Note. We report logit coefficients with robust standard errors, clustered by nomination year, in parentheses. Two-tailed significance tests, where * $p < .05$ Salary and Change in Salary are per 1,000 dollars. Caseload is per 100 Filings.

TABLE A3
The Effects of Salary and Caseload on the Quality of Nominees to the District Courts, 1964–2012 (With JCS Measure of Instiututional Distance)

	Nominees	*Confirmed Judges*
Salary	0.005∗	0.006∗
	(0.002)	(0.003)
Weighted Case Filings	0.020	0.025
	(0.036)	(0.034)
Authorized Judgeships	0.023∗	0.025∗
	(0.006)	(0.010)
Year of Nomination	0.023∗	0.027∗
	(0.006)	(0.006)
Female	−0.492∗	−0.514∗
	(0.138)	(0.144)
African American	−1.259∗	−1.121∗
	(0.183)	(0.203)
JCS Distance	0.267	0.123
	(0.526)	(0.525)
Constant	−47.069∗	−55.115∗
	(11.366)	(12.260)
N	1620.0	1516.0

Note. We report logit coefficients with robust standard errors, clustered by nomination year, in parentheses. Two-tailed significance tests, where * $p < .05$ Salary and Change in Salary are per 1,000 dollars. Caseload is per 100 Filings. JCS measures only extend through 2007.

Un juge extraordinaire

Catherine Piché*

* Professeure agrégée, Faculté de droit, Université de Montréal.

« Aucune puissance humaine, ni le roi, ni le garde des sceaux, ni le premier ministre ne peuvent empiéter sur le pouvoir d'un juge d'instruction, rien ne l'arrête, rien ne lui commande. C'est un souverain soumis uniquement à sa conscience et à la loi. »

Splendeurs et Misères des courtisanes (1839-1847)

– Honoré de Balzac

Le juge imaginé par le législateur québécois sous le nouveau *Code de procédure civile* de 2016 est un juge extraordinaire[1]. Au-delà de ses qualités d'adjudicateur, il possède de vastes pouvoirs de gestion de l'instance et de conciliation, ainsi qu'un rôle multiforme qui prime celui des parties et leur maîtrise du dossier, propre au débat contradictoire. Ce nouveau rôle surprend, car il remet en question les assises et les fonctions classiques des tribunaux québécois. Le juge de droit privé québécois fut d'abord créateur de droit, juriste dans la pensée et interprète des textes de loi. Ensuite, au gré des réformes procédurales, l'idée du juge gestionnaire a germé, puis a pris une forme certaine avec la nouvelle culture judiciaire de 2003[2], pour enfin être consacrée avec le Code de 2016. C'est ainsi que le juge québécois est devenu premier gestionnaire d'une instance civile qui, depuis plusieurs décennies, était perçue par plusieurs comme étant inefficace, disproportionnée et inaccessible.

Le législateur souhaite, par le biais du nouveau *Code de procédure civile*, que le réel surhomme que se doit d'être le juge québécois puisse mieux encadrer cette instance civile dont l'efficience et l'efficacité lui échappent, qu'il puisse mieux anticiper et comprendre les enjeux de l'instance dès son commencement, qu'il sache évaluer la proportionnalité du protocole d'instance conclu par les parties et puisse savoir quand convoquer une conférence de gestion ou prendre

1. *Code de procédure civile*, RLRQ, c. C-25.01 (ci-après « C.p.c. »).
2. Voir : QUÉBEC, COMITÉ DE RÉVISION DE LA PROCÉDURE CIVILE, *La révision de la procédure civile. Une nouvelle culture judiciaire*, Sainte-Foy, ministère de la Justice, 2001, en ligne : <www.justice.gouv.qc.ca/francais/publications/rapports/pdf/crpc/crpc-rap2.pdf>, (ci-après « Nouvelle culture judiciaire »).

une mesure de gestion, le tout en vertu d'une série d'indices guidés par les principes directeurs du Code. Tout au long de l'instance, le juge devra apprécier la proportionnalité procédurale et probatoire et justifier chacune de ses décisions en fonction de ce principe transcendant. Le juge québécois agira, entre autres, comme créateur, interprète, gestionnaire, (souvent) psychologue, administrateur et conciliateur. Il s'agit de beaucoup de qualificatifs pour une seule femme ou un seul homme. Le juge québécois réussira-t-il à atteindre l'idéal de justice du nouveau Code ? Réussira-t-il à être extraordinaire ? De grands espoirs sont portés envers ce code d'accès à la justice, ce code de justice privée et de justice publique.

Dans cet article, nous traiterons du rôle des tribunaux et des sanctions judiciaires sous le nouveau Code. Nous aborderons d'abord le pluralisme processuel du nouveau Code dans l'étude de ces principales dispositions porteuses de changement. Ensuite, nous aborderons l'évolution du rôle et des pouvoirs du juge. Sera ensuite discuté en détail le rôle multiforme du juge québécois par le biais de trois pôles d'actions. S'ensuivra une discussion relative au paradoxe double lié au rôle du juge en système hybride. Nous conclurons l'article par un propos d'ouverture au pôle technologique exercé par le juge extraordinaire.

1. LE PLURALISME PROCESSUEL DU NOUVEAU CODE

Un nouveau *Code de procédure civile* est entré en vigueur le 1er janvier 2016. Ce Code offre une refonte complète du droit procédural et processuel québécois, une refonte audacieuse, prometteuse. Le Code aspire à transformer le cœur du système de justice civile québécois en accueillant en son sein un éventail de modes de résolution des différends, autant privés que publics. Il innove, de même, en un *Code de procédure civile* publique, certes, mais aussi *privée*. Ainsi, le législateur québécois a permis, par le biais du nouveau Code, de promouvoir une idéologie de pluralisme processuel voulant que l'adjudication des litiges ne soit pas – ou plus – l'unique manière de résoudre les différends[3]. Par le fait même, le législateur a permis d'ouvrir et d'étendre le terrain d'exercice et de résolution des différends.

3. Voir, sur le concept de pluralisme processuel : Carrie MENKEL-MEADOW, *Dispute Processing and Conflict Resolution. Theory, Practice, and Policy*, Aldershot, Dartmouth Publishing Co. Ltd., 2003, p. xiv.

Parmi les nouveautés les plus significatives, on pense immédiatement au principe de priorisation des modes privés de prévention et de règlement des différends[4], lequel prend une importance renouvelée avec l'obligation de considération de ces modes avant le recours à l'instance civile traditionnelle[5], la mission de conciliation des tribunaux[6] et un meilleur encadrement en général des modes privés par le biais des nouveaux articles 1 à 7 du Code ainsi qu'un titre spécifique sur la médiation[7]. On pense aussi à tous ces principes de la justice civile nouveaux ou révisés, soit le principe de coopération entre les parties[8], le principe de bonne foi[9], le principe de préservation de la preuve[10], le principe de contradiction[11], le principe de proportionnalité probatoire[12], le principe de favorisation des moyens technologiques appropriés[13], parmi d'autres. Il s'agit ainsi non seulement d'un remaniement complet des règles, mais d'ajouts substantiels de nouvelles règles et sanctions, de nouveaux principes et pouvoirs.

Le titre du présent article a été choisi avec attention et rigueur. Ainsi, ce n'est pas un hasard que l'on ait choisi de qualifier le juge d'extraordinaire. C'est que sous le nouveau Code, la gestion de l'instance et les pouvoirs des tribunaux sont accrus de telle manière que le rôle du juge s'intensifie et se complique. Il fait de celui qui l'exerce quelqu'un de vraisemblablement extraordinaire.

---

4. Voir, entre autres : C.p.c., Disposition préliminaire, art. 1, al. 3 et 25.
5. *Ibid.*, art. 1, al. 3.
6. *Ibid.*, art. 9, al. 2. Cette mission peut dorénavant s'exercer même sans autorisation des parties, ce qui est fondamental.
7. *Ibid.*, art. 605 et s.
8. Voir : *Ibid.*, Disposition préliminaire et art. 25.
9. *Ibid.*, art. 2 (pour les modes privés) et 19 (pour le mode public et l'instance civile traditionnelle).
10. *Ibid.*, art. 20. Ce principe implique que les parties doivent s'enquérir et s'informer des faits sur lesquels elles fondent leurs prétentions et des éléments de preuve qu'elles entendent produire. Voir le deuxième alinéa.
11. *Ibid.*, art. 17. Ce principe, inspiré du droit civil français et du principe du procès équitable, suppose une justice impartiale, neutre et équitable.
12. *Ibid.*, art. 18. Nous parlons ici uniquement de proportionnalité « probatoire » car la proportionnalité procédurale existait déjà au Code de 2002 depuis la nouvelle culture judiciaire. Voir : Catherine PICHÉ, « La proportionnalité procédurale : une perspective comparative », (2010) 40 *R.D.U.S.* 551, 571 et 572. Pour la professeure Piché, « [c]'est donc dire que la proportionnalité est concernée non seulement par l'utilisation des services judiciaires publics par les parties au litige, mais également par l'utilisation de ces services par la population entière. Elle sert ainsi à assurer un usage optimal et équitable des services judiciaires publics par tous les citoyens. » (p. 572)
13. C.p.c., art. 26. Ici, le tribunal pourra même ordonner ou utiliser un tel moyen d'office, notamment dans la gestion des instances, et ainsi, malgré la convention des parties. Ce changement est majeur.

D'abord, le législateur rééquilibre les pouvoirs en octroyant la priorité au juge dans la gestion de l'instance par rapport à la maîtrise du dossier par les parties[14]. Il donne, dans les faits, une plus grande autorité au juge dans la gestion de l'instance. Parmi les principes directeurs de la procédure, il investit les tribunaux de la « mission d'assurer la saine gestion des instances en accord avec les principes et les objectifs de la procédure » (art. 9, al. 2 C.p.c.). Il prévoit également que les parties « ont, sous réserve du devoir des tribunaux d'assurer la saine gestion des instances et de veiller à leur bon déroulement, la maîtrise du dossier » (art. 19, al. 1 C.p.c.). Par le fait même, on pourra se demander si le système dit « adversatif » ne s'en trouve pas menacé. Selon le professeur J. A. Jolowicz, le système adversatif repose sur les deux valeurs fondamentales et fondatrices suivantes : la responsabilisation des parties à l'instance dans la définition du sujet et de l'objet du litige, ainsi que la liberté accordée aux parties de décider quelle information le juge peut utiliser dans son adjudication[15]. Le choix de donner de plus grands pouvoirs aux tribunaux dans la gestion d'instance transforme-t-il le système québécois en système inquisitoire[16] ? Nous y reviendrons[17].

Ensuite, le nouveau Code force le juge à intervenir plus tôt dans l'instance, à l'étape du dépôt du protocole de l'instance, par le biais de son examen systématique de ce protocole (art. 150 C.p.c.). Un des juges de la chambre de gestion d'instance décidera si le dossier doit

14. *Ibid.*, art. 19, al. 1. Ainsi, par cet article, le législateur encadre mieux le devoir de maîtrise du dossier par les parties en l'associant au respect des règles de la procédure et des délais établis, ainsi qu'aux principes et objectifs de la procédure. Il précise, de même, que la mission des tribunaux d'assurer la saine gestion est faite nécessairement sous réserve de cette mission et de cette responsabilité. Sur le thème de la gestion d'instance, voir généralement : Pierre NOREAU et Mario NORMANDIN avec la collaboration des membres de l'Observatoire du droit à la justice, « L'autorité du juge au service de la saine gestion de l'instance », (2012) 71 *R. du B.* 207, 207-248 ; Yves-Marie MORISSETTE, « Gestion d'instance, proportionnalité et preuve civile : état provisoire des questions », (2009) 50 *C. de D.* 381 ; Pierre A. MICHAUD, « La gestion de l'instance : l'intégration des moyens de rechange », (1999) 40 *C. de D.* 113.
15. J. A. JOLOWICZ, « Adversarial and Inquisitorial Models of Civil Procedure », (2003) 52 *I.C.L.Q.* 281, 289.
16. Fabien GÉLINAS *et al.*, *Foundations of Civil Justice. Toward a Value-Based Framework for Reform*, Springer, 2015, p. 71. Lorsque nous parlons de procédure civiliste et de procédure de common law, nous n'entendons pas opposer un modèle inquisitoire à un modèle accusatoire, les modèles n'étant pas antinomiques. Voir Coralie AMBROISE-CASTÉROT, « Procédure accusatoire / Procédure inquisitoire », dans Loïc CADIET (dir.), *Dictionnaire de la justice*, Paris, P.U.F., 2004, p. 1058, 1058-1062.
17. *Infra*, Section 4 du présent texte.

faire l'objet d'une conférence de gestion, en fonction d'une liste d'indices inspirés des principes directeurs du Code, des principes directeurs de la procédure (art. 150 C.p.c.). En fait, le juge pourra même avoir à apprécier les démarches judiciaires[18] et préjudiciaires[19] des parties alors qu'il apprécie l'accomplissement de l'objectif de proportionnalité dans les procédures, la preuve et les démarches, en vertu de l'article 18 C.p.c.[20]. Le juge s'assurera que les parties ont veillé à ce que l'affaire soit limitée à « ce qui est nécessaire pour résoudre le litige » (art. 19, al. 2 C.p.c.). En fait, le législateur met à la disposition du juge et des tribunaux une grande variété de mesures que ces derniers peuvent prendre « d'office ou sur demande » et « à tout moment de l'instance »[21]. Ainsi, tout au long de l'instance, le juge pourra intervenir pour convoquer des conférences de gestion et pour prendre des mesures de gestion[22]. Il pourra exercer un certain nombre de pouvoirs d'office et sanctionner les parties notamment pour abus de procédure[23] ou pour manquements importants dans le déroulement de l'instance[24].

En somme, le législateur reconnaît par la réforme que le juge doit intervenir de manière active tout au long de l'instance, dès le dépôt de la demande introductive d'instance, en gardant un œil vigilant sur les procédures et sur le processus choisi par les parties, le tout dans l'optique de s'assurer que les procédés sont « adéquats, efficients, empreints d'esprit de justice », et que la justice est économique, accessible et proportionnée[25]. Mais il y a plus. Le législateur reconnaît aussi le principe de pluralisme processuel, en vertu duquel chaque procédé de résolution des différends, incluant le litige, a sa

18. L'article 18 C.p.c. change le droit antérieur en ajoutant que le principe de proportionnalité s'applique également aux démarches entreprises.
19. Nous osons présumer de cette couverture préjudiciaire de par l'ouverture, à l'article 2 C.p.c., à l'éventualité d'un protocole préjudiciaire et à la nouvelle obligation de considération des modes privés, au troisième aliéna de l'article premier du Code, qui implique que les parties aient discuté de l'éventualité et de la possibilité de tenter de régler le différend par les modes privés avant d'intenter l'action.
20. À cet égard, le juge assume le devoir de vérifier si les démarches et les actes des parties et de leurs procureurs, eu égard aux coûts et au temps qu'ils exigent, sont « proportionnés à la nature et à la complexité de l'affaire et à la finalité de la demande ».
21. C.p.c., art. 155.
22. *Ibid.*
23. *Ibid.*, art. 341.
24. *Ibid.*, art. 342.
25. *Ibid.*, Disposition préliminaire. Voir aussi Catherine PICHÉ, « La disposition préliminaire du *Code de procédure civile* », (2014) 73 *R. du B.* 135.

fonction et sa moralité propres[26]. Lorsque la fonctionnalité d'un procédé est identifiée, le meilleur lieu pour agir et régler le différend est choisi. Ainsi, si notamment l'objectif est d'éviter d'emmener un différend devant les tribunaux alors que l'aboutissement anticipé semble vouloir favoriser l'une des parties et que ces dernières ont l'ouverture et la volonté nécessaires pour négocier, on peut penser que le meilleur lieu pour résoudre le différend est la médiation devant un médiateur privé. Or, le choix d'un mode de résolution ou d'un autre aura un impact sur le résultat, sur l'aboutissement du litige pour les parties. Il en reste, néanmoins, que le seul fait de permettre aux parties de choisir leur mode de résolution laisse à présumer une plus grande équité dans les résultats.

2. L'ÉVOLUTION DU RÔLE[27] DU JUGE QUÉBÉCOIS : VARIATIONS SUR UN MÊME THÈME À TRAVERS LES ANNÉES

En se replongeant dans l'historique de la procédure civile québécoise, on remarque que le rôle du juge a évolué et s'est compliqué terriblement depuis les 15 dernières années. En fait, il faut bien souligner que sous le *Code civil du Bas Canada*, le juge québécois était un simple arbitre ou adjudicateur, un « liquidateur » de litiges, « selon une juste conception de la justice »[28]. À cette époque, les

26. C. MENKEL-MEADOW, préc., note 3, p. xiv. Voir aussi : Carrie MENKEL-MEADOW, « From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context », (2004) 54 *J. Leg. Educ.* 4, 10 : « While more choices of process might appear to improve substantive outcomes, especially with more party participation, each process produces its own morality (an insight we owe to legal philosopher and practitioner Lon Fuller) and structures its own solutions and outcomes ».

27. On aurait pu reprendre aussi l'expression « office du juge », choisie notamment par Antoine Garapon et très largement utilisée en procédure civile française. Voir : RÉPUBLIQUE FRANÇAISE, INSTITUT DES HAUTES ÉTUDES SUR LA JUSTICE, *La prudence et l'autorité. L'office du juge au XXIe siècle*, Paris, 2013, p. 15, en ligne, <www.ihej.org/wp-content/uploads/2013/07/rapport_office_du_juge_mai_2013.pdf>. Il y définit, l'« office » du juge comme étant « le foyer de sens de la fonction de juger », une notion englobant le rôle et les fonctions du juge, certes, mais aussi la légitimité et la discrétion requises. C'est bien ici le sens de notre pensée sur la question, mais nous choisissons volontairement de restreindre l'analyse au rôle du juge. Voir aussi : Loïc CADIET et Emmanuel JEULAND, *Droit judiciaire privé*, 7e éd., Paris, LGDJ, 2011, nos 75 et s.

28. *Lagacé* c. *Dion Construction ltée*, [1967] R.P. 30, cité dans Noël Jean MAZEN, « Le juge civil québécois (Approche comparative d'un système de droit mixte) », (1982) 34 *R.I.D.C.* 375, 390. Voir aussi Philippe FERLAND, « Le rôle du juge dans le Procès civil de la Province de Québec », (1962) *Revue de l'association québécoise pour l'étude comparative du droit* 183 et s.

parties avaient « la libre disposition et de la matière litigieuse et de l'administration du procès »[29]. Selon l'ancien juge Marceau, le législateur de 1966 a voulu dégager le juge des « restrictions que lui imposait la procédure de 1896 », laquelle « cherchait trop à lui imposer une passivité quasi-totale à l'intérieur d'un certain nombre de règles de jeu imposées aux litigants »[30]. À cette époque, le législateur autorise le tribunal à proroger des délais qui ne sont pas de rigueur, ou encore à redresser tout grief d'irrégularité sur lequel serait fondé un moyen préliminaire, étend le pouvoir discrétionnaire des tribunaux dans l'appréciation de l'intérêt requis pour agir, permet de redresser les impropriétés dans les conclusions, ou encore, la réouverture d'enquête[31]. Ainsi, comme l'indique habilement le juge Marceau,

> On a presque l'impression qu'on a voulu introduire le concept du juge-providence. L'arbitre d'autrefois s'humanise : il ne descend pas dans l'arène mais il est très loin du spectateur impassible qui aurait pour seule mission de compter les coups que se portent les adversaires sans avoir les moyens de les aider, même au nom de la justice.[32]

Avec le révolutionnaire Rapport Ferland, déposé le 28 août 2001 et intitulé *Une nouvelle culture judiciaire*[33], le Comité de révision de la procédure civile a souhaité établir une justice civile plus rapide, efficace et moins dispendieuse. Ainsi, la réforme devait améliorer l'accès à la justice et accroître la confiance du citoyen dans le système de justice civile[34]. La réforme du code qui a suivi en 2003 a permis de resserrer les délais accordés pour mettre une cause en état, de responsabiliser les parties au litige et d'accroître le rôle du juge dans la gestion de l'instance. Il était reconnu, à cette époque, que les parties et leurs avocats avaient la responsabilité de l'instance et que le rôle et l'implication du juge étaient secondaires. Or, tel que l'expliquera un peu plus tard le ministère de la Justice, « cette manière de percevoir le système de justice occult[e] la responsabilité de l'État dans l'organisation et le maintien du service public qu'est le système de justice, mais aussi la responsabilité des juges dans la gestion des instances et le bon déroulement des affaires »[35].

29. N. J. MAZEN, préc., note 28, p. 390.
30. Louis MARCEAU, « Le nouveau *Code de procédure civile* : ses principes et son esprit », (1967) *U.B.C.L. Rev.* 365, 373.
31. *Ibid.*, 374.
32. *Ibid.*
33. Nouvelle culture judiciaire, préc., note 2.
34. *Ibid.*
35. QUÉBEC, Ministère de la Justice, *Rapport d'évaluation de la Loi portant réforme du Code de procédure civile*, Québec, 2006, p. 9, en ligne : <www.justice.gouv.qc.ca/

Avec la nouvelle culture judiciaire, le législateur a permis d'accroître le périmètre d'intervention du juge dans le déroulement de l'instance et a reconnu sa mission additionnelle de conciliation des parties, tout en confirmant le rôle essentiel des avocats dans la constitution et la maîtrise des dossiers. Il a, de même, officiellement consacré la règle de la proportionnalité comme pierre angulaire de la réforme et comme justification à l'autorité et au pouvoir du juge. Dans son Rapport d'évaluation de 2006, le ministère de la Justice indiqua que l'intervention judiciaire n'était nécessaire « que pour s'assurer du bon déroulement de l'instance et du respect du délai de rigueur de 180 jours ou pour accorder une prolongation de délai, le cas échéant »[36]. L'implication du juge était ainsi de mise principalement à défaut d'entente entre les parties ou en cas de mésentente.

Avec le Code de 2016, une nouvelle impulsion est donnée ; le rôle et les pouvoirs du juge sont bonifiés. Le juge a aujourd'hui un devoir de faire respecter le délai d'échéance totale du litige, de mise en état du dossier, tout en s'assurant de faire respecter les objectifs de la justice civile et de sanctionner les mauvais comportements. Précisément, sous l'ancien Code[37], la présentation de la requête introductive d'instance (maintenant une « demande ») devait « constituer une première conférence de gestion pour toutes les demandes [...] [et] permettre une intervention hâtive du tribunal dans le dossier, la présentation [...] des moyens préliminaires, la prononciation de différentes ordonnances du juge pour simplifier et accélérer la procédure [...] [ou encore] l'audition de la demande sur-le-champ ou dans un délai rapproché »[38]. Cette présentation n'avait pas lieu si les parties convenaient d'une entente sur le déroulement de l'instance et la déposaient au dossier de la Cour avant la date de présentation[39].

Sous le nouveau Code, le législateur a voulu abolir cette mesure de « présentation » de la demande. Il l'a remplacée par un examen systématique de tous les protocoles, suivi d'une convocation à une conférence de gestion ou de l'application d'une présomption d'acceptation du protocole[40]. Ainsi, le législateur a modifié le droit en ajoutant

francais/publications/rapports/pdf/crpc/crcp-rap4.pdf> (ci-après « Rapport d'évaluation de 2006 »).

36. *Ibid.*, p. 30 et 31.
37. *Code de procédure civile*, RLRQ, c. C-25 (ci-après « a.C.p.c. »).
38. Rapport d'évaluation de 2006, préc., note 35, p. 33.
39. a.C.p.c., art. 151.4.
40. C.p.c., art. 148-150. Il faut toutefois souligner qu'en 2006, à l'étape d'évaluation de la réforme intitulée *Une nouvelle culture judiciaire*, implantée en 2003, il avait

une intervention systématique du juge et une appréciation réelle et systématique du processus et des échéances prévues, permettant du coup de mieux cerner les occasions d'intervention du juge en gestion d'instance, tout en compliquant davantage le rôle du magistrat qui doit prendre une décision importante dès le dépôt de la procédure introductive d'instance et du protocole. Ainsi, le juge doit apprécier le respect des principes directeurs de la procédure dans le protocole d'instance, et tout particulièrement, la considération portée par les parties à recourir aux modes privés et la raison pour laquelle les parties choisissent de ne pas procéder par expertise commune[41]. Cela est déjà une grande tâche, compte tenu du peu de familiarité du juge avec le dossier présenté !

Le juge québécois a vu son périmètre d'intervention évoluer et s'étendre au fil des réformes, et ce, conformément aux tendances procédurales à travers le monde. L'intervention du juge se fait alors de manière plus précoce dans le déroulement de l'instance, conformément aux tendances internationales, aux études, aux résultats de projets pilotes[42]. De fait, les règles des cours fédérales américaines, réformées au 1er décembre 2015[43], les règles anglaises ayant suivi la réforme de Lord Woolf[44] et les règles des autres provinces canadiennes[45], pour n'en nommer que quelques-unes, sont fondées sur

---

déjà été question de prévoir cet examen préalable de l'entente sur le déroulement – aujourd'hui appelée protocole de l'instance. Voir : Rapport d'évaluation de 2006, préc., note 35, p. 26 : « [i]l y a lieu de retenir la proposition avancée par le Barreau du Québec de codifier la règle 74 du *Règlement de procédure civile de la Cour supérieure* prévoyant que le juge peut convoquer les parties pour discuter de l'entente ».

41. Voir : C.p.c., art. 148, al. 1 et al. 2(4).
42. Voir, par exemple : OBSERVATOIRE DU DROIT À LA JUSTICE, *Les conférences de conciliation et de gestion judiciaire. Cour du Québec. Projet pilote de Longueuil 2009*, 2010, en ligne : <www.droit-justice.ca/files/sites/23/2015/03/Rapport-Longueuil-final.pdf>.
43. Voir : SUPREME COURT OF THE UNITED STATES, *Amendments to the Federal Rules of Civil Procedure*, 2015, en ligne : <www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf> ; Judith RESNIK, « Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging », (1997) 49 *Ala. L. Rev.* 133. Pour une copie annotée de ces règles américaines fédérales, voir : UNITED STATES COURTS, « Redline of Civil Procedure Rules Text and Committee Notes », en ligne : <www.uscourts.gov/rules-policies/current-rules-practice-procedure>, 1-2.
44. Voir : *The Civil Procedure Rules 1998*, S.I. 1998/3132.
45. Voir notamment : ONTARIO, MINISTRY OF THE ATTORNEY GENERAL, « Management of Cases », (1995) *Ontario Civil Justice Review*, en ligne : <www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/firstreport/management.php> ; BRITISH COLUMBIA JUSTICE REFORM WORKING GROUP, *Effective*

l'intervention des tribunaux tôt dans l'instance. Ainsi, l'intervention hâtive des juges dans l'instance est une suggestion fréquente et une mesure de réforme primée, dans tous les systèmes de droit, inquisitoires, ou encore adversatifs et contradictoires.

On cite souvent comme justification à l'intervention hâtive les résultats positifs d'une telle mesure sur l'administration à la justice, comme l'ont démontré certains projets pilotes[46]. Le professeur Pierre Noreau, de pair avec l'Observatoire du droit à la Justice, a dirigé un projet pilote dans le District de Longueuil il y a quelques années, lequel a démontré l'effet positif de cette mesure sur le sentiment de justice des parties et des avocats, son effet bénéfique sur la progression du dossier et enfin l'économie des coûts judiciaires réalisée[47]. Or, les études ne sont pas toutes concluantes à cet égard. Dans le Rapport d'évaluation de 2006, on notait que « [l]'intervention hâtive d'un juge est [...] très utile pour contribuer, sinon à un règlement du litige à peu de frais et rapidement, du moins pour limiter le cadre du procès »[48]. Par ailleurs, une étude à grand déploiement menée par le RAND Corporation's Institute for Civil Justice et visant à apprécier les effets du programme américain de *judicial management* et de modes alternatifs mandaté par les règles du *Civil Justice Reform Act 1990*[49] dans dix districts visés par le projet pilote conclut que le projet n'avait eu que des effets modestes sur le déroulement de l'instance. Selon l'auteur du rapport, le projet n'avait eu qu'un « little effect on time to disposition, litigation costs, and attorneys' satisfaction and views of the fairness of case management »[50]. De même, la professeure Judith Resnik reste sceptique relativement aux effets

and Affordable Civil Justice, 2006, en ligne : <www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/cjrwg_report_11_06.pdf>.

46. Voir notamment : OBSERVATOIRE DU DROIT À LA JUSTICE, préc., note 42, p. 28.
47. *Ibid.* Le professeur Noreau y conclut notamment que la CCGJ fait progresser le traitement du dossier judiciaire même en l'absence de règlement. Dans une proportion d'environ 75 %, les avocats consultés sont d'avis que l'intervention rapide du juge permet d'aplanir les difficultés, d'éviter la multiplication des procédures, de mieux cibler les enjeux du débat et de faciliter le traitement des questions interlocutoires ou préliminaires reliées à la cause.
48. Rapport d'évaluation de 2006, préc., note 35, p. 34.
49. *Civil Justice Reform Act 1990*, Pub. L. No. 101-650, 104 Stat. 5089.
50. RAND, *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, Institute for Civil Justice, p. 1, en ligne : <www.rand.org/content/dam/rand/pubs/monograph_reports/2007/MR800.pdf>. Ce rapport est cité par Marc GALANTER, « Dining at the Ritz: Visions of Justice for the Individual In the Changing Adversarial System », dans Helen STACY et

bénéfiques d'une intervention hâtive des juges dans son article-phare intitulé « Managerial Judges » :

> no one – neither judges, court administrators, nor legal commentators – has assessed whether relying on trial judges for informal dispute resolution and for case management, either before or after trial, is good, bad, or neutral. Little empirical evidence supports the claim that judicial management "works" either to settle cases or to provide cheaper, quicker, or fairer dispositions.[51]

Il en reste qu'à notre sens, l'intervention hâtive du tribunal permet, avant tout, non seulement de limiter le procès[52], mais aussi de mieux identifier le cadre du litige et ses questions pertinentes, ses forces et ses faiblesses. S'il est nécessaire de permettre, pour un changement aussi fondamental que celui préconisé par la réforme de 2006, une action sur les acteurs eux-mêmes ainsi que sur les incitatifs vécus par eux, il est tout aussi nécessaire de permettre au juge de discuter du dossier avec les parties dans l'espoir d'identifier les questions en litige, la preuve appuyant chacune de ces questions, l'appréciation préliminaire de la suffisance de cette preuve. Ultimement, il sera question d'identifier et de séparer les litiges qui valent la peine d'aller à procès, de ceux qui doivent être réglés. Il s'agira donc de parfaire l'art du diagnostic, soit l'art pour le juge d'apprécier rapidement le type et la forme du litige ainsi que sa potentialité d'apporter une solution juste, équitable et conforme aux principes de justice civile par le biais du procès ou plutôt du règlement à l'amiable.

Au final, bien que les réformes se succèdent et se ressemblent, sans études empiriques plus précises, il sera difficile de conclure d'une manière ou d'une autre relativement aux effets concrets et réels de telles mesures de réforme[53]. Le rôle contemporain du juge québécois reste complexe, car il implique d'être partout à la fois,

---

Michael LAVARCH (dir.), *Beyond the Adversarial System*, Sydney, The Federation Press, 1999, p. 118, à la page 128.

51. Judith RESNIK, « Managerial Judges », (1982) 96 *Harv. L. Rev.* 374, 380. Voir aussi Richard L. MARCUS, « Déjà Vu All Over Again? An American Reaction to the Woolf Report », dans A. A. S. ZUCKERMAN et Ross CRANSTON (dir.), *Reform of Civil Procedure: Essays on Access to Justice*, 1995, Clarendon Press, ch. 12.
52. Rapport d'évaluation de 2006, préc., note 35, p. 34.
53. Voir toutefois le projet *Accès au droit et accès à la justice*, mené par le professeur Noreau de l'Université de Montréal, débuté en avril 2016 et impliquant 20 chantiers liés à ce sujet, menés en collaboration avec des partenaires du milieu du droit, et impliquant une dimension empirique.

habile à anticiper, à écouter, à administrer. Ce rôle a trois pôles principaux, que nous aborderons tour à tour dans le présent article : un pôle processuel, un pôle conciliateur et un pôle administratif. Nous proposerons ici que ces pôles ne sont pas parfaitement conciliables, et qu'ils requièrent du juge des efforts quasiment surhumains de telle sorte à le rendre extraordinaire. À notre sens, c'est l'éclosion et la confirmation d'un pôle d'action *technologique* qui seront le gage de succès de la réforme de 2016. Parlons d'abord des trois pôles d'action du juge et de son rôle multiforme.

3. UN RÔLE MULTIFORME DU JUGE QUÉBÉCOIS ENCADRÉ PAR TROIS PÔLES D'ACTION

Le juge du nouveau *Code de procédure civile* est extraordinaire. Il est interprète et créateur de droit, responsable de l'évolution du droit positif, impliqué autant dans la sanction des droits que la conciliation des parties, responsable de l'administration et de la gestion de l'instance individuelle, assurant tel un chef d'orchestre le respect de la proportionnalité procédurale et probatoire. Ce nouveau rôle multiforme surprend, car il remet en question les assises et les fonctions classiques des tribunaux québécois. Trois pôles distincts l'encadrent et appuient les fonctions judiciaires.

Le premier pôle est *processuel* et implique d'apprécier les questions en litige et le conflit, pour ensuite trancher, en tout respect des principes fondamentaux de la procédure[54]. C'est le premier pôle en importance dans la fonction de juger. On peut aussi y référer, d'ailleurs, comme un pôle d'adjudication. Le Comité de révision de la procédure civile a décrit le rôle du juge comme suit :

> La responsabilité première de la juridiction étatique, une composante de l'État, est de rendre jugement en disant le droit au bénéfice des parties et dans l'intérêt général de la société. Il appartient en effet aux tribunaux d'affirmer, promouvoir et interpréter des valeurs collectives dont le droit est l'expression, notamment la primauté du droit, l'égalité juridique, les garanties procédurales, les droits fondamentaux à la liberté, à la sécurité, à la dignité et au respect de la vie privée. Ce faisant, ils rendent un service public, participent à la mission de l'État et contribuent au maintien de la paix sociale.

54. Voir une inspiration : RÉPUBLIQUE FRANÇAISE, INSTITUT DES HAUTES ÉTUDES SUR LA JUSTICE, préc., note 26, p. 65.

> Ainsi, en rendant un jugement, le tribunal non seulement règle le conflit en tranchant le litige opposant les parties qui l'en ont saisi, mais également, par la motivation qu'il en fait, dit le droit, en conformité avec les normes établies par la loi et les valeurs véhiculées par les Chartes et en tenant compte de la jurisprudence.[55]

Par le fait même, il incombe au juge de statuer sur tous les faits et toutes les demandes dont il est saisi, tel un chef d'orchestre. L'article 9, alinéa 1 C.p.c. dispose que les tribunaux « ont pour mission de trancher les litiges dont ils sont saisis en conformité avec les règles de droit qui leur sont applicables ». Le juge doit, de plus, statuer lorsque la loi soumet certaines questions à son contrôle. Ce pôle d'adjudication est bel et bien le rôle classique du juge québécois. Comme l'énonçait avec un brin d'humour Victor Hugo : « L'art du juge est de menuiser le code en jurisprudence »[56].

Mais il y a plus. Il n'est pas uniquement question de jurisprudence, il est aussi question d'un pouvoir culturel et social du juge de transmettre des messages aux justiciables[57]. Le pôle processuel implique, pour le juge québécois, une prise de décision relativement à la nécessité ou non de tenir une conférence de gestion, à l'examen du protocole d'instance, à l'occasion de l'exercice du pouvoir de gestion, à la détermination des questions d'expertise et de témoignage et à leur appréciation, parmi tant d'autres occasions de statuer, et ce, toujours en tout respect des principes directeurs du Code[58].

Ensuite, de pair avec ce pôle et les divers pouvoirs y afférents vient celui de sanctionner. La sanction, pour le juge québécois, est celle imposée dans le contexte d'abus de procédure, principalement, ou encore, relativement aux manquements importants dans le déroulement de l'instance[59]. Il faut aussi souligner que le pouvoir de sanctionner devient plus important, sous le nouveau Code, par le biais de l'article 342 C.p.c. Cet article permet au juge de sanctionner les manquements importants constatés dans le déroulement de l'instance en ordonnant à l'une des parties, après les avoir entendues, « à

55. QUÉBEC, COMITÉ DE RÉVISION DE LA PROCÉDURE CIVILE, *La révision de la procédure civile. Document de consultation*, Québec, Ministère de la Justice, 2000, p. 28, en ligne : <www.justice.gouv.qc.ca/francais/publications/rapports/pdf/crpc/crpc-rap1.pdf>.
56. Victor HUGO, *L'Homme qui rit* (1869).
57. Voir Catherine PICHÉ, *Droit judiciaire privé*, Montréal, Éditions Thémis, 2012, chap. I.
58. Voir notamment C.p.c., Disposition préliminaire, art. 1-7 et 18.
59. *Ibid.*, art. 51 et s., 341 et 342.

titre de frais de justice, de verser à une autre partie, selon ce qu'il estime juste et raisonnable, une compensation pour le paiement des honoraires professionnels de son avocat ou, si cette autre partie n'est pas représentée par avocat, une compensation pour le temps consacré à l'affaire et le travail effectué ».

Le second pôle est le pôle *conciliateur*, lequel est également codifié à l'article 9, alinéa 2 C.p.c. L'article 4.3 a.C.p.c. précisait déjà qu'il entrait dans la mission du juge de favoriser la conciliation des parties. Le législateur a, de plus, introduit la procédure de conférence de règlement à l'amiable dès la réforme de 2002, aux articles 151.14 à 151.23 a.C.p.c., laquelle permet aux personnes et aux entreprises impliquées dans une cause civile de la régler, à n'importe quelle étape de l'instance, sans avoir à tenir un procès. En fait, ces articles permettent au juge en chef, à la demande des parties, de désigner un juge pour présider une conférence de règlement à l'amiable dont le but est d'aider les parties à communiquer, à négocier, à identifier leurs intérêts, à évaluer leurs positions et à explorer des solutions mutuellement satisfaisantes. Avec le nouveau Code, la conciliation est possible même sans autorisation des parties, « si les circonstances s'y prêtent »[60]. Somme toute, le pôle conciliateur s'exerce à divers stades des procédures, qu'il s'agisse de l'examen du protocole et de la conférence de gestion, s'il y a lieu, ou encore, du pouvoir continuel des tribunaux de considérer la proportionnalité probatoire et processuelle, qui implique souvent des efforts ou suggestions de conciliation, dans un souci d'efficience et d'économie.

La conciliation s'intègre et s'interprète alors dans la nouvelle culture de priorisation des modes privés de prévention et de règlement des différends. Servira-t-elle toutefois à améliorer l'accès à la justice ? À notre avis, devant les réticences ouvertement communiquées des membres du Barreau à l'égard de la réforme et du principe de priorisation des modes privés, une fausse harmonie semble avoir été créée entre des parties véritablement (ou secrètement) opposées au règlement[61]. De plus, la priorisation des modes privés et l'encouragement des parties à régler (sinon la réelle pression exercée sur

60. *Ibid.*, art. 9, al. 2.

61. Selon Hazel GENN, « cases are more likely to settle at mediation if the parties enter the process voluntarily rather than being pressured into the process and increased pressure to mediate depresses settlement rates. Thus one broad conclusion of evaluation research has been that facilitation and encouragement together with selective and appropriate pressure are likely to be more effective and possibly efficient in producing settlements than blanket coercion to mediate ».

elles) fait peut-être fausse route en laissant présumer que la solution la plus juste est celle négociée, au détriment de l'adjudication, au cœur du système de justice civile traditionnel[62]. En fin de compte, sans études empiriques plus poussées permettant de déterminer si la croissance des modes privés permet un meilleur accès aux tribunaux judiciaires, la question reste théorique, mais réelle.

Le troisième pôle est le pôle *gestionnaire*. Tel que le dispose le deuxième alinéa de l'article 9 C.p.c., le juge aura pour mission de favoriser la conciliation des parties, ainsi que de s'assurer de la saine gestion de l'instance. Le juge québécois envisagé par le législateur sous le nouveau Code examine systématiquement un protocole de l'instance conclu par les parties qui suppose un haut degré de précision sur le déroulement anticipé de l'affaire, et décide de tenir – ou non – une conférence de gestion, à la suite de cet examen[63]. Dès les premiers moments, le juge apprécie la nature du litige ainsi que la coopération des parties et l'accomplissement de leur devoir de considérer le recours à un mode privé de règlement. Si la conférence de gestion est tenue, une série de mesures appropriées peut être prise et des engagements peuvent être requis des parties pour assurer la poursuite de l'instance ou assujettir les parties à certaines conditions[64]. Si aucune conférence n'est tenue, les parties présument que l'instance est bien gérée et semble proportionnée. Ensuite, tout au long de l'instance, la gestion d'instance s'effectue par le biais des échanges tenus entre le juge et les avocats, parfois même avec les parties, dans le but d'assurer le bon déroulement de l'instance et l'application du principe de proportionnalité. Ainsi, il pourra s'agir de conférences de gestion, certes, mais aussi des échanges et audiences tenus au tribunal, notamment pour régler des questions d'expertises, d'objections ou de témoignages. Au cours de ces échanges, le juge sera adjudicateur, souvent conciliateur aussi, favorisant le règlement du litige et espérant désamorcer le différend.

S'agit-il bien sous le nouveau Code de la même fonction de saine gestion qui était envisagée sous l'ancien ? Selon nous, la fonction de

---

Voir : Hazel GENN, « What Is Civil Justice For? Reform, ADR, and Access to Justice », (2012) 24 *Yale J.L. & Human* 397, 406.

62. *Ibid.*, 409 : « The formal promotion of mediation as a central element in the new civil justice system trivialised civil disputes that involve legal rights and entitlements and redefined judicial determination as a failure of the justice system rather than as its heart and essential purpose. »
63. C.p.c., art. 148-150.
64. *Ibid.*, art. 153.

gestion d'instance a évolué vers une fonction d'administration active de l'instance. Impliqué dans les coulisses du litige, dans le déroulement de l'instance et avant le procès, guidé dans ses décisions par le principe de proportionnalité, le juge québécois favorise le règlement et incite à la négociation et à la médiation de telle sorte à jouer un rôle critique d'influence sur le cours et l'aboutissement des litiges[65]. En fait, ce rôle tout à fait extraordinaire conduit à deux paradoxes dont nous traitons ci-après.

4. LES PARADOXES ASSOCIÉS AU RÔLE DU JUGE DANS UN SYSTÈME DE JUSTICE CIVILE QUÉBÉCOIS HYBRIDE

Si la justice est un bien public et l'accès à la justice un droit, il faut que tous puissent y avoir accès. La « crise » du système de justice civile québécois peut-elle être résolue par le biais de la seule réforme des règles du *Code de procédure civile* ? Si la question est légitime, la réponse, elle, est difficile. Cette crise annoncée par tous, mais ancienne comme le monde n'est-elle pas un faux prétexte pour poursuivre la réflexion sur la justice civile[66] ? Pourquoi parler encore et toujours d'un accès lent, coûteux et exclusif aux tribunaux alors que ces problèmes perdurent depuis des siècles sans toutefois trouver de solutions ? Comment le juge participe-t-il à la réforme ? Notre juge traditionnellement adversatif et contradictoire, tel que la common law lui a imposé de l'être, œuvre dans un monde polarisé. Il se retrouve aujourd'hui poussé à intervenir plus activement dans l'instance, à administrer, adjudiquer et concilier, à écouter et à statuer, à trancher... en toute neutralité. En fin de compte, on demande au juge d'être autre chose et beaucoup plus qu'un adjudicateur neutre et impartial, recherchant la vérité dans ce qui émane des parties devant lui ou elle.

La justice aujourd'hui n'est plus un combat ; elle est coopérative, collaborative, participative. Comme l'énonçait si remarquablement Abraham Lincoln dans l'un de ses discours, « [d]iscourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser

65. J. RESNIK, préc., note 51, 377. Voir aussi : Abram CHAYES, « The Role of the Judge in Public Law Litigation », (1976) 89 *Harv. L. Rev.* 1281.
66. Voir sur le sujet : Lawrence M. FRIEDMAN, « The Six Million Dollar Man: Litigation and Rights Consciousness in Modern America », (1980) 39 *Md. L. Rev.* 661, 661.

– in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man »[67]. Cette leçon de Lincoln reflète bien la nature de la réforme de 2016.

Le système de justice québécois est-il alors devenu inquisitoire ? Selon Jolowicz, le système adversatif a deux caractéristiques principales : 1) il donne le pouvoir aux parties de définir l'objet de leur litige et 2) s'assure que ces mêmes parties puissent décider de l'information dont le juge tiendra compte dans sa prise de décision[68]. Or, le nouveau Code, même s'il priorise dorénavant la saine gestion de l'instance par le juge sur la maîtrise du dossier par les parties[69], ne remet pas complètement en cause ces deux caractéristiques fondamentales du système adversatif. Ce sont les parties qui, encore aujourd'hui, doivent décider de la manière de présenter leur dossier, de leurs procédures et de leurs preuves. Ce sont les parties qui gardent le monopole de l'angle et du contenu stratégique de leur dossier devant le tribunal. Selon nous, le système québécois n'est donc ni parfaitement adversatif ni parfaitement inquisitoire[70]. Il est mixte dans sa preuve et sa procédure[71], hybride dans sa structure et le rôle de ses juges.

Ainsi, le système de justice québécois est affecté d'un paradoxe double, révélateur de conflits dans la fonction de juger : 1) celui du juge adjudicateur dont l'autorité est aujourd'hui conditionnée à des préoccupations administratives, et 2) celui du juge adjudicateur neutre et impartial ayant comme mission d'agir comme facilitateur de règlements et comme conciliateur occasionnel des parties. Il est vrai que l'autorité dite « morale » du juge est fondée en grande partie sur le statut de sa fonction de juge et sur les attributs d'indépendance et d'impartialité qui lui sont associés[72]. Comment alors concilier le désir et la nécessité de trancher et d'adjudiquer devant l'immense disproportion émanant d'un dossier, par exemple, ou devant l'émergence d'un terrain éventuel d'entente entre les parties ?

67. ABRAHAM LINCOLN ONLINE, « Abraham Lincoln's Notes for a Law Lecture », en ligne : <www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm>.
68. J. A. JOLOWICZ, préc., note 15, 289.
69. C.p.c., art. 19, al. 1.
70. F. GÉLINAS *et al.*, préc., note 16, p. 71.
71. *Lac d'Amiante du Québec ltée* c. *2858-0702 Québec inc.*, [2001] 2 R.C.S. 743.
72. P. NOREAU et M. NORMANDIN, préc., note 14, 230 ; Denis FERLAND, « La transformation de la justice civile : la "nouvelle culture judiciaire" du juge et des avocats », dans Louis LEBEL et Pierre VERGE (dir.), *L'oreille du juge : études à la mémoire de Me Robert P. Gagnon*, Montréal, Éditions Yvon Blais, 2007, p. 25, 42.

Les difficultés associées au deuxième paradoxe furent décrites par le professeur Ferland comme suit :

> Les différences existant entre le procès et la conciliation sont importantes et le rôle du juge, immanquablement, s'en trouve bouleversé. Toutefois, dans un cas comme dans l'autre, l'indépendance de l'institution judiciaire et l'impartialité du juge sont des exigences fondamentales. Ces deux valeurs, conjuguées avec les connaissances approfondies du droit et des conflits, ainsi que la mission traditionnelle de disposer des litiges et de rendre justice, sont les principales raisons qui procurent au juge conciliateur une grande autorité morale, voire la crédibilité nécessaire pour agir à ce titre.[73]

À notre sens, le juge se doit de préserver l'objectif d'adjudication comme étant prioritaire. L'article 9 C.p.c. dispose que la mission des tribunaux est de trancher les litiges dont ils sont saisis, selon le droit applicable. Ensuite, vient la mission de statuer, dans les matières contentieuses et non contentieuses. Ainsi, la fonction première du juge reste celle de trancher les litiges. Et c'est dans le cadre de ce rôle et ce pouvoir qu'il doit exercer son pouvoir de diagnostic. Le juge doit pouvoir rapidement identifier les litiges qui devraient être réglés à l'amiable de ceux qui n'ont de solution que celle adjudiquée au procès. Il s'agit donc d'un système dans lequel le juge diagnostique le litige en vertu d'une liste de facteurs fondés sur les principes de justice civile, d'une liste annoncée clairement et connue de tous, par un processus qui fait l'assentiment des parties et évite l'arbitraire. À cet égard, comme l'indique si habilement Antoine Garapon, l'autorité du juge doit recevoir l'appui des autres acteurs ; elle doit être définie et encadrée le plus possible à la loi pour être « profondément démocratique »[74].

5. CONCLUSION : LE PÔLE TECHNOLOGIQUE EXERCÉ PAR LE JUGE EXTRAORDINAIRE

On peut se demander comment le juge québécois pourra, de manière réaliste, devenir et rester *extraordinaire* devant l'ampleur de la tâche annoncée par le Code de 2016. Comment réussir à atteindre

73. D. FERLAND, préc., note 72, p. 42. Voir aussi : Louise OTIS et Eric H. REITER, « Mediation by Judges: A New Phenomenon in the Transformation of Justice », (2006) 6 *Pepp. Disp. Resol. L.J.* 351, 365 ; Louise OTIS, « La justice conciliationnelle : l'envers du lent droit », (2001) 3 *Éthique publique* 63, 66.
74. RÉPUBLIQUE FRANÇAISE, INSTITUT DES HAUTES ÉTUDES SUR LA JUSTICE, préc., note 27, p. 165.

les objectifs que le législateur a énoncés ? Dans sa caisse à outils, le juge extraordinaire aura, d'abord et toujours, un principe fondateur de proportionnalité lui permettant d'affirmer quasiment tous azimuts sa préoccupation pour la proportionnalité, sa proportiomanie ! Le principe de proportionnalité fascine, car il sert de justification fondamentale et populaire aux décisions des tribunaux québécois et parce que, devenu universel, il reste imparfaitement défini[75]. Il obsède les tribunaux qui peinent toutefois à l'appliquer de manière uniforme. Utilisée à toutes les sauces, la proportionnalité sert à limiter ou à permettre, selon le cas, les preuves et les procédures. Dans la caisse à outils se trouvent aussi la loi et la conscience du juge, bien sûr, pour faire un clin d'œil à Balzac, cité en exergue au présent article. La conscience du juge lui permet d'agir en toute équité, et ce, malgré la confusion et les conflits inhérents à son rôle multiforme.

Le juge extraordinaire devra au moins savoir agir avec l'assentiment des parties, de manière non arbitraire, en sachant sélectionner et diagnostiquer les dossiers qui requerront et recevront une attention plus particulière de sa part ; ceux qui lanceront des signaux invisibles de disproportion. Ce diagnostic judiciaire sera question de flair informé et justifié, somme toute, pour éviter que le justiciable (ou son procureur) ne préfère éviter le forum de justice civile public traditionnel. Ce risque d'évitement des tribunaux demeure réel et présent avec l'avènement du nouveau Code, la puissance du juge pouvant avoir l'effet d'effrayer les justiciables. Ensuite, il aurait été souhaitable qu'un seul et même juge puisse évaluer le protocole d'instance et suivre le dossier jusqu'à son procès, pour une meilleure compréhension et un suivi plus efficace du dossier. La réforme de 2016 n'a pas retenu cette possibilité, car elle ne peut être concrétisée dans l'état actuel des ressources administratives des tribunaux québécois.

Il en reste que, de pair avec le nouveau principe de priorisation des modes technologiques de l'article 26 C.p.c., vient un pôle *technologique* dans l'exercice du rôle et des pouvoirs du juge québécois. Ce pôle requiert que les tribunaux puissent encourager les divers intervenants à rechercher l'utilisation des modes technologiques et qu'ils mettent de côté la prudence préconisée par le Rapport d'évaluation de 2006[76] qui n'est tout simplement plus de mise. C'est par ce pôle

75. Catherine PICHÉ, « Figures, Spaces and Procedural Proportionality », (2012) 1 *Revue internationale de droit processuel* ; C. PICHÉ, « La proportionnalité procédurale », préc., note 12.
76. Rapport d'évaluation de 2006, préc., note 35, p. 67.

technologique que le juge réussira à mieux gérer l'instance, en effectuant notamment un tri informatisé des protocoles d'instance, dans certains cas[77]. C'est aussi en accueillant les technologies que les tribunaux pourront permettre plus ouvertement et systématiquement la preuve technologique, comme nous le verrons peut-être dans la pratique sous le nouveau Code ! On pourrait alors se laisser aller à suggérer que le pôle technologique puisse être le gage de succès de la réforme de 2016.

77. Voir le premier tri informatisé de la Cour du Québec : COUR DU QUÉBEC, CHAMBRE CIVILE, LAVAL-LAURENTIDES-LANAUDIÈRE-LABELLE, *Gestion d'instance. Cheminement des dossiers*, 2016, p. 2, en ligne : <www.tribunaux.qc.ca/c-quebec/CheminementDesDossiers_LLLL_29jan2016.pdf>.

Dalhousie Law Journal

Volume 45 | Issue 1 Article 6

6-14-2022

Creating a System for All Parents: Rethinking Procedural and Evidentiary Rules in Proceedings with Self-Represented Litigants

Cassandra Richards

Cassandra Richards*

Creating a System for All Parents: Rethinking Procedural and Evidentiary Rules in Proceedings with Self-Represented Litigants

Through qualitative interviews undertaken with ten judges at the Superior Court of Québec, this study considers the procedural and evidentiary challenges faced by self-represented litigants in family law matters. Subsequently, this paper offers solutions to the problems identified. The goal of this paper is to provide legal participants with concrete techniques to facilitate proceedings with SRLs that uphold their duty of impartiality and duty of assistance. While this article will likely be useful for judges who engage with SRLs daily, it will also be of interest to those working on issues relating to access to justice, SRLs, as well as procedural and evidentiary law reform. This paper urges its readers to think critically about our legal system. Who has our legal system been created for, yet who must actually use it?

Grâce à des d'entrevues qualitatives menées auprès de dix juges de la Cour supérieure du Québec, nous examinons dans le présent article les défis en matière de procédure et de preuve auxquels font face les justiciables qui ne sont pas représentés par un avocat dans les affaires de droit de la famille. Ensuite, nous proposons des solutions aux problèmes identifiés. L'objectif de cet article est de fournir aux intervenants juridiques des techniques concrètes pour faciliter les procédures avec les justiciables sans avocat tout en respectant leur devoir d'impartialité et leur devoir d'assistance. Bien que cet article soit susceptible d'être utile aux juges qui travaillent quotidiennement avec des justiciables non représentés par un avocat, il intéressera également ceux qui travaillent sur des questions liées à l'accès à la justice, aux justiciables sans avocat, ainsi qu'à la réforme du droit en matière de procédure et de preuve. Dans l'article, nous incitons les lecteurs à réfléchir de manière critique à notre système juridique. Pour qui notre système juridique a-t-il été créé, et qui doit réellement l'utiliser?

* Cassandra Richards is a lawyer in Quebec and Ontario. She is a graduate of McGill University's Faculty of Law, BCL/JD program. She holds an Honours degree in Conflict Studies and Human Rights from the University of Ottawa. She lectures at McGill University on self-represented litigants and researches access to justice. The author would like to thank the very helpful encouragement and feedback from Professor Rosalie Jukier, Professor Stefanie Carsley and the peer reviewers.

Introduction

It is no secret that our justice system is failing many of the people it purports to serve. Former Chief Justice Beverley McLachlin has been regularly cited for asserting that our "legal systems everywhere are experiencing an access to justice crisis that requires innovative solutions."[1] In particular, Self-Represented Litigants (SRLs) in family law matters are among those struggling, as they face significant procedural and evidentiary challenges

1. Chief Justice Beverley McLachlin, "Remarks of the Right Honourable Beverley McLachlin" (Speech delivered at the 2015 Canadian Bar Association Plenary, 14 August 2015) [unpublished].

in getting their cases through our legal system. Student-run legal clinics, pro bono offices, and numerous community programs work tirelessly to help Self Represented Litigants navigate complex legal proceedings. These efforts are extremely important. However, as a public service, it is time the legal system adapts to better reflect and serve its clientele, rather than the other way around.

The access to justice crisis greatly affects Canadian family matters.[2] The traditionally lawyer-dominated courtroom is being replaced by many litigants with little or no legal training. Canada's changing legal landscape requires all actors within the system to rethink their role and adapt, and the judiciary is no exception. In fact, the growing presence of SRLs has made the role of the judge more difficult and important. Judges must uphold impartiality, a fundamental tenet of our judicial system, while simultaneously fulfilling their duty of assistance to SRLs. Although procedural and evidentiary rules serve as a framework for judges, lawyers, and court staff, they often create substantial burdens on SRLs seeking justice.[3]

This article is based on qualitative interviews I conducted with ten judges at the Superior Court of Québec during the Fall of 2018.[4] It builds on previous scholarship that seeks to provide judges with concrete techniques to facilitate proceedings with SRLs while upholding their duty

---

2. See generally Christine E Cerniglia, "The Civil Self-Representation Crisis: The Need for More Data and Less Complacency" (2020) 27:3 Geo J on Poverty L & Pol'y 355 at 371; Rachel Birnbaum, Michael Saini & Nicholas Bala, "Growing Concerns About the Impact of Self-Representation in Family Court: Views of Ontario Judges, Children's Lawyers and Clinicians" (2018) 37:2 Can Fam LQ 121 at 127; Rachel Birnbaum, Nicholas Bala, & Lorne Bertrand, "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants" (2013) 91:1 Can Bar Rev 67 at 71.

3. See generally Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report" (2013) at 8, online (pdf): *The National Self-Represented Litigants Project* <representingyourselfcanada.com/wp-content/uploads/2015/07/nsrlp-srl-research-study-final-report.pdf> [perma.cc/FLQ4-VB7V]; Joanne J Paetsch, Lorne D Bertrand & John-Paul E Boyd, "An Evaluation of the Cost of Family Law Disputes: Measuring the Cost Implication of Various Dispute Resolution Methods" (2017) at 54-56, online (pdf): *Canadian Forum on Civil Justice* <www.cfcj-fcjc.org/sites/default/files//docs/Cost-Implication-of-Family-Law-Disputes.pdf> [perma.cc/6D6S-4739]; Brandon Fragomeni, Kaila Scarrow & Julie Macfarlane, "Tracking the Trends of the Self-Represented Litigant Phenomenon: Data from the Self-Represented Litigants Project, 2018/2019" (2020), online (pdf): *National Self-Represented Litigants Project* <representingyourselfcanada.com/wp-content/uploads/2020/01/Intake-Report-2019-Final.pdf> [perma.cc/EGR3-MCW7]; *Pintea v Johns*, 2017 SCC 23 [*Pintea*]; *Moore v Apollo & Beauty Care*, 2017 ONCA 383 at para 44; *Catholic Children's Aid Society of Toronto v EB*, 2018 ONCJ 333; *Girao v Cunningham*, 2020 ONCA 260 [*Girao*].

4. This paper uses the spelling "Superior Court of Québec" as used on its official website. See Jacques R Fournier, "Words of welcome" (2020), online: *Superior Court of Québec* <coursuperieureduquebec.ca/en/about/words-of-welcome> [perma.cc/CF69-D8QL].

of impartiality and duty of assistance.[5] While this article will be useful for judges who engage with SRLs daily, it will also be of interest to those working on issues relating to access to justice, SRLs, and procedural and evidentiary law reform. It is organized into four parts. Part I describes the research methodology utilized. Part II provides an overview of self-representation in Canadian family law matters. Part III considers the role of the judge in administering justice in proceedings involving SRLs in family law. It explores how judges balance judicial ethics as well as the duty of assistance in these proceedings. Part IV identifies salient procedural and evidentiary challenges faced by SRLs in family law proceedings. Subsequently, it provides judges with practical solutions to address these problems. The solutions I propose are informed by the interviews I conducted with judges, as well as current literature and jurisprudence. In February 2020, I presented these solutions at a judicial conference to 35 members of the judiciary of the Superior Court of Québec in Montreal.

Since SRLs turn to the judge before them for guidance, how judges conduct proceedings is crucial. The degree of assistance provided by the judge and the manner in which this assistance is delivered can influence the outcome of an SRL's case and, more importantly, their belief in having accessed meaningful justice. Ultimately, promoting access to justice for SRLs will require a momentous cultural shift, for which this paper is but one effort. Roderick A Macdonald insisted that "the law requires citizens to come to it, not the reverse."[6] This paper urges its readers to change the reality described by Macdonald by creating a legal system that works for all, including SRLs in family law matters.

I. *Research Methodology*

The findings of this study are based on data I compiled through qualitative interviews with 10 judges who regularly hear family law cases in the Montreal Division of the Superior Court of Québec.[7] As the court of original general jurisdiction, the Superior Court of Québec has jurisdiction

5. "Statement of Principles on Self-Represented Litigants and Accused Persons" (2006) at 7, online (pdf): Canadian Judicial Council <cjc-ccm.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf> [perma.cc/89DM-2XJF] [CJC, "Statement of Principles"]. Courts have also recognized that judges owe SRLs a duty of assistance. See e.g. *Pintea*, *supra* note 3; *A(JM) v Winnipeg Child & Family Services*, 2004 MBCA 184 at paras 19-20, 32 [*A(JM)*]; *New Brunswick Minister of Health v G(J)*, [1999] 3 SCR 46, 177 DLR (4th) 63 at para 85 [*G(J)*]; *Ménard c Gardner*, 2012 QCCA 1546 [*Ménard*].

6. Roderick A Macdonald, "Access to Justice in Canada Today: Scope, Scale, Ambitions" in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19 at 27.

7. A research ethics certificate was obtained prior to commencing these interviews.

in family law matters,[8] with the exception of adoption, which is the jurisdiction of the Court of Québec.[9] Unlike in other jurisdictions, Quebec does not have designated family law courts. However, in Montreal and Quebec City, legal matters are divided between internal administrative entities known as chambers, one of these being the Family Chamber.[10] The Family Chamber deals with cases involving applications for divorce, annulment of marriage, separation from bed and board and dissolution of civil unions. It also handles cases related to child support, the exercise of parental authority (custody and access rights), and applications concerning civil status.[11]

The Montréal Division of the Superior Court of Québec is served by 102 regular judges, 89 of which are assigned to the district Montreal.[12] While some judges of the Superior Court in Québec may sit exclusively in the Family Chamber, judges are not officially appointed to specific chambers. In fact, some judges may sit in a variety of chambers and hear different types of legal matters.[13] However, six of the ten judges I interviewed stated that they heard exclusively family law matters.[14]

Participants of this study were recruited through the Associate Chief Justice of the Superior Court of Québec. I contacted the Associate Chief Justice by e-mail explaining the objectives of my research and the interview process I intended to utilize. The Associate Chief Justice shared my research proposal and interview questions by e-mail to judges at the Superior Court of Québec in the Division of Montreal. This Division was chosen because it is the biggest Division in the Superior Court of Québec in terms of number of judges and case load.[15] Participation in this study was voluntary; judges decided themselves whether they would participate. The ten participants ranged in their experience as a judge from one year to 15 years on the bench. Six had worked in family law prior to being

8. Arts 33, 35 CCP (1965).
9. *Ibid*, art 37, see also art 35 and art 37(3) for more exceptions.
10. See Office of the Chief Justice of the Superior Court of Québec, "Superior Court of Québec: 2010-2014 Activity Report" (2015) at 7, online (pdf): *Superior Court of Québec* <coursuperieureduquebec.ca/fileadmin/coursuperieure/Pdf_Word_par_district/en/ActivityReport_July_2015.pdf> [perma.cc/57SJ-2VXH].
11. *Ibid* at 10.
12. See "Jurisdiction" (2020), online: *Superior Court of Québec* <coursuperieureduquebec.ca/en/about/jurisdiction> [perma.cc/W7DL-M5Y6] [Superior Court of Québec, "Jurisdiction"].
13. Interview, Judge 8, 5 November 2018.
14. Interview, Judge 1, 5 November 2018; Interview, Judge 2, 27 November 2018; Interview, Judge 4, 29 November 2018; Interview, Judge 5, 14 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 9, 17 December 2018; Interview, Judge 10, 6 November 2018.
15. Superior Court of Québec, "Jurisdiction," *supra* note 13.

appointed a judge. Nine of the participants identified as women and nine identified as white.

The data collection process consisted of semi-structured interviews conducted from October through December 2018. Each interview was conducted by phone or in-person and lasted between forty minutes and one hour and a half. Interviews were conducted in English or French according to the wishes of the participants. Participants were asked approximately twelve open-ended questions disclosed to them prior to the interview.[16] The first set of questions focused on how judges interact when one or more of the litigants are self-represented. Participants were asked about the degree to which they assist SRLs and the techniques they employ to facilitate proceedings. The second group of questions explored the perceptions of judges regarding the extent to which they believe SRLs access justice, if they had concerns, and what solutions they would suggest. While the interviews were based on the questions I prepared, participants were free to discuss any topic related to SRLs they found relevant or important. With the consent of each participant, each interview was audio-recorded and subsequently transcribed verbatim.

This study is constrained by certain methodological limitations. First, it would have been beneficial to interview a greater number of judges within the chosen population. Unfortunately, this was limited by judges' willingness to participate, as well as my own time and resources.[17] The study's sample size was small and not randomly selected; however, the qualitative interviews palliated the size by providing in-depth and detailed data into the everyday interactions of seasoned judges and SRLs. Further, at around the sixth interview I felt that many of the judges' answers were becoming repetitive. Despite my small sample size, the fact that my final interviews yielded little new information made me more confident in the value and reliability of the data I collected.

Second, the empirical research of this study is limited to the perspectives of judges in Montreal and its surrounding areas. Given that the majority of participants were white women in the judiciary, certain gender, racial and socio-economic biases may have influenced how participants understand the phenomenon of self-representation as well as how they perceive cases involving SRLs and SRLs themselves. While it was beyond the scope of this particular research, the experiences of SRLs are fundamental to efforts

16. See Appendix A.

17. While I anticipated that some judges were not willing to participate in the study, some may have also been worried about judicial impartiality and confidentiality. I make that conclusion based on the fact that eight of the ten judges asked numerous questions prior to the interview commencing about how I planned on keeping their participation and interviews confidential.

seeking to transform the legal process.[18] Future research should consider whether, from the perspectives of SRLs, the solutions offered in this paper do in fact improve access to justice.

II. *Self-representation in Canadian family law cases*

The judges I interviewed were unable to identify a precise number of SRLs that come before the courts. Nonetheless, many estimated that approximately 40 per cent of family law cases involve at least one SRL.[19] This percentage reflects current estimates found in the literature.[20] However, in Ontario, Macfarlane states that this number is likely an underestimation as many commence proceedings with legal representation, yet will discontinue to retain these services due to financial ressources.[21] Despite the lack of accurate data, all judges interviewed affirmed that SRLs are most prevalent in family law cases and their numbers are steadily rising.

This paper will not recap the literature which has extensively documented the demographics of SRLs and their reasons for self-representing.[22] Numerous studies have also identified the challenges faced by SRLs in accessing our legal system and presenting their case

---

18. For research on legal needs see Macfarlane, *supra* note 3; Fragomeni, Scarrow & Macfarlane, *supra* note 3; Paula Hannaford-Agor & Nicole Mott, "Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations" (2003) 24:2 Justice System J 163 at 178.

19. Interview, Judge 1, 5 November 2018; Interview, Judge 8, 5 November 2018; Interview, Judge 10, 6 November 2018. Interview, Judge 5, 14 November 2018: emphasized that approximately 1/8 of the cases they hear involve at least one SRL. This judge hears family cases in rural Quebec towns. Judge 5 stated that due to the different socioeconomic class, more litigants may be eligible for legal aid in those regions.

20. Birnbaum, Bala & Bertrand, *supra* note 2 at 71.

21. Macfarlane, *supra* note 3 at 33.

22. See generally Macfarlane, *supra* note 3; Fragomeni, Scarrow & Macfarlane, *supra* note 3; Birnbaum, Bala & Bertrand, *supra* note 2; Hannaford-Agor & Mott, *supra* note 18 at 163-181; Institute for the Advancement of the American Legal System, "Cases Without Counsel: Our Recommendations After Listening to the Litigants" (2016) at 9, 12-20, online (pdf): *Honoring Families Initiative* <iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_recommendations_report.pdf> [perma.cc/Q3K5-6K8K]; Mary Stratton, "Alberta Legal Services Mapping Project: An Overview of Findings from the Eleven Judicial Districts" (July 2011) at 13-15, 89-91, online (pdf): *Canadian Forum on Civil Justice* <www.cfcj-fcjc.org/sites/default/files/docs/2011/mapping-final-en.pdf> [perma.cc/4MMJ-4CLC]; INFRAS inc, "Rapport: Enquête sur le sentiment daccès et la perception de la justice au Québec" (2016) at 26, online (pdf): *Ministère de la Justice* <cdn-contenu.quebec.ca/cdn-contenu/adm/min/justice/publications-adm/rapports/RA_enquete_perception_2016_MJQ.pdf?1545334585> [perma.cc/3DUM-XF66]; National Self-Represented Litigants Project, "Avoiding Conflation: OPCAs and Self-Represented Litigants" (6 October 2012), online: *NSRLP Blog* <representingyourselfcanada.com/avoiding-conflation-opcas-and-self-represented-litigants/> [perma.cc/63HG-UUGE]; Julie Macfarlane, "Chasing Down the Data: How Doubtful Assertions about SRLs Sometimes Become 'Facts'" (12 March 2015), online (blog): *NSRLP Blog* <representingyourselfcanada.com/chasing-down-the-data-how-doubtful-assertions-about-srls-sometimes-become-facts/> [perma.cc/4V3H-S98Q]; Emmanuelle Bernheim & Richard-Alexandre Laniel, "Le droit à l'avocat, une histoire d'argent" (2015) 93:1 R du B can 251 [Bernheim & Laniel, "histoire d'argent"].

in court.[23] However, one recurring theme throughout these studies is that SRLs struggle to present their case in court due to the complexity and inaccessibility of procedural and evidentiary rules.[24] The National Self-Represented Litigants Project's 2020 study quoted SRLs who describe this struggle.[25] One SRL insisted, "I have not had trouble with legal arguments, I have had problems with process and procedures which are either obscure or informal which has left me at a disadvantage."[26] Another SRL explained, "[D]uring that process, I realized that what was holding me back was knowledge of process. I know my case, but I don't know how to counter the defendant's legal maneuvering in court."[27]

The majority of judges interviewed echoed these concerns, stating that procedural and evidentiary law remain the biggest obstacles for SRLs in family law cases. Generally, family law proceedings involving SRLs are not substantively complex. In referring to the sharing of assets within the family patrimony, one judge stated that SRLs usually grasp the substantive law applicable to their case once it has been explained: "It is rare that unrepresented parties have a lot of property to share. Often, parties with a lot to share can afford legal representation."[28] While substantive law is often inaccessible for those without legal education, one judge emphasized that SRLs are increasingly more knowledgeable about it. The judge indicated that often SRLs will have referred to online resources, such as Éducaloi,[29] prior to their proceedings. Thus, judges interviewed explained that most

23. See Macfarlane, *supra* note 3; INFRAS inc, *supra* note 22; "Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity" (2013) at 13-54, online (pdf): *Law Commission of Ontario* <www.lco-cdo.org/wp-content/uploads/2013/06/family-law-reform-final-report.pdf> [perma.cc/2S6P-X57Y]; Shane Simpson et al, "An Evaluation of Alberta's Family Law Act" (2009) at 95-119, online (pdf): *CanLII* <canlii.ca/t/286c> [perma.cc/N8DN-ETYE]; Jennifer A Leitch, "Lawyers and Self-Represented Litigants: An Ethical Change of Role?" (2017) 95:3 Can Bar Rev 669 [Leitch, "Ethical Change"] at 679-687; Ellen Degnan et al, "Trapped in Marriage" (2018) at 26-43 [unpublished, archived at Social Science Research Network], online (pdf): <papers.ssrn.com/sol3/papers.cfm?abstract_id=3277900> [perma.cc//3RUU-LJXZ].

24. Macfarlane, *supra* note 3 at 54; Fragomeni, Scarrow & Macfarlane, *supra* note 3 at 17-22; Action Committee on Access to Justice in Civil and Family Matters, "Access to Civil and Family Justice: A Roadmap for Change" (2013) at 2, 17-19, online (pdf): *Canadian Forum on Civil Justice* <cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf> [perma.cc/K7U4-6VQ6]; Hannaford-Agor & Mott, *supra* note 18 at 166; Paris R Baldacci, "Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court" (2006) 3:3 Cardozo Public L, Policy, & Ethics J 659.

25. Fragomeni, Scarrow & Macfarlane, *supra* note 3.

26. *Ibid* at 19.

27. *Ibid*.

28. Interview, Judge 3, 16 November 2018. This quotation was translated by the author. The original reads: "C'est rare que les parties non représentées ont beaucoup de biens à partager. Souvent les parties avec beaucoup à partager peuvent se permettre d'être représentées par un avocat."

29. Interview, Judge 5, 14 November 2018. Éducaloi is an online platform that provides legal information to Quebecers about their rights and responsibilities in a vulgarized manner.

court time is dedicated to explaining procedural and evidentiary rules as opposed to substantive law.[30] For SRLs, these rules remain "a sea of legal unknowns."[31]

An ongoing discussion about best practices surrounding judicial engagement is required given the growing number of SRLs in family law proceedings and the issues at the heart of these cases. This discussion must consider dismantling procedural and evidentiary obstacles faced by SRLs to create more accessible courtrooms for all. Hence, this study builds on previous research that seeks to dismantle these barriers.[32] It provides judges with concrete techniques to address procedural and evidentiary issues faced by SRLs in family law proceedings. The solutions I propose are neither exhaustive nor one-size-fits-all. Further research is needed to offer solutions that address systemic barriers faced by various demographics of

30. Interview, Judge 1, 5 November 2018; Interview, Judge 2, 27 November 2018; Interview, Judge 3, 16 November 2018; Interview, Judge 4, 29 November 2018; Interview, Judge 5, 14 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018; Interview, Judge 9, 17 December 2018; Interview, Judge 10, 6 November 2018.

31. Interview, Judge 5, 14 November 2018. This quotation was translated by the author. The original reads: "une mer juridique inconnue."

32. See e.g. Emmanuelle Bernheim & Richard-Alexandre Laniel, "Un Grain de Sable Dans l'engrenage Du Système Juridique: Les Justiciables Non Représentés: Problèmes Ou Symptômes?" (2013) 31:1 Windsor YB Access Just 45 [Bernheim & Laniel, "Problèmes Ou Symptômes?"]; Richard Zorza, "The Self-Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers" (2002) at 17, online(pdf): *The National Center for State Courts* <www.srln.org/system/files/attachments/Zorza%20SRL%20Friendly%20Court.pdf> [perma.cc/VTP5-BWRZ]; The Canadian Association of Provincial Court Judges, "Access to Justice: Self-Represented Litigants" (2009) 32:2 Prov Judges J 22; Michel Robert, "La magistrature a l'ère du jugement sur mesure" (2010), online (pdf): *Colloque Éducaloi* <www.yumpu.com/fr/document/view/27796883/la-magistrature-a-lare-du-jugement-sur-mesure-colloque-aducaloi> [perma.cc/4DDR-Q5J3]; Jona Goldschmidt, "Strategies for Dealing with Self-Represented Litigants" (2008) 30:2 NC Cent L Rev 130 at 139; Rebecca A Albrecht et al, "Judicial Techniques for Cases Involving Self-Represented Litigants" (2003) 42:1 Judges J 16; Birnbaum, Saini & Bala, *supra* note 2; John-Paul E Boyd & Lorne D Bertrand, "Comparing the Views of Judges and Lawyers Practicing in Alberta and in the Rest of Canada on Selected Issues in Family Law: Parenting, Self-Represented Litigants and Mediation" (2016), online (pdf): *CanLII* <canlii.ca/t/2865> [perma.cc/WJ9R-PQHD]; Ministry of Attorney General of British Columbia, "Family Justice Reform Working Group Report: A New Justice System for Families and Children" (2006), online (pdf): *Ministry of Attorney General* <www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/fjr_report_09_06.pdf> [perma.cc/7BMR-BYQS]; Canadian Judicial Council, "Access to Justice: Report on Selected Reform Initiatives in Canada" (2008), online (pdf): *Sub-committee on Access to Justice (Trial Courts) of the Administration of Justice Committee* <cjc-ccm.ca/cmslib/general/2008_SelectedReformInitiatives_Report_final_EN.pdf> [perma.cc/5SJC-YGCT]; Institute for the Advancement of the American Legal System, "Cases Without Counsel: Our Recommendations After Listening to the Litigants" (2016), online (pdf): *Honoring Families Initiative* <iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_recommendations_report.pdf> [perma.cc/W2QU-J4R5]; Shane Simpson et al, *supra* note 23; Anna E Carpenter, "Active Judging and Access to Justice" (2018) 93:2 Notre Dame L Rev 647; Birnbaum, Bala & Bertrand, *supra* note 2 at 71.

SRLs.[33] Nonetheless, these solutions are promising contributions which can make our courtrooms more accessible for many.

III. *The role of the judge*

This section begins by discussing judicial ethics, notably impartiality, fairness, and equality. Next, it considers the duty of assistance. Throughout, the views of judges interviewed are considered alongside current literature. I conclude this section by advocating for a shift in how the legal community has traditionally understood balancing the duty of impartiality and assistance to SRLs. I call for a modification of procedural and evidentiary rules in family law proceedings with SRLs when appropriate.

1. *Impartiality, equality, and fairness*

The Canadian judiciary is guided by the 2004 *Ethical Principles for Judges*.[34] These principles were recently revised in June 2021 and will be referred to throughout this paper.[35]

The *Ethical Principles* include the principles of impartiality, equality, and fairness.[36] The importance of these principles cannot be overstated; they are vital to the proper functioning of our courts and to ensuring that those who utilize them, regardless of who they are, will be able to access the legal system and feel heard. Despite their important presence in the legal system, SRLs were not mentioned once within the 2004 *Ethical Principles*. The 2004 *Ethical Principles* seemed to presume that all cases involve clients represented by legal counsel.[37] I found this particularly

33. Studies have shown that various social structures, such as an individual's gender, ethnicity, race, immigration status, Indigeneity, education, language, disability, age, and location, compound to mold the experiences of SRLs. See e.g. Fragomeni, Scarrow & Macfarlane, *supra* note 3; Sara Sternberg Greene, "Race, Class, and Access to Civil Justice" (2016) 101:4 Iowa L Rev 1263; Rebecca L Sandefur, "Access to Civil Justice and Race, Class, and Gender Inequality" (2008) 34 Annual Rev Sociology 339; Julie Macfarlane & Sandra Shushani, "When Judges See SRLs, Do They See Gender? Observations on Gendered Characterizations in Judgments" (2018), online (pdf): *University of Windsor, Faculty of Law* <scholar.uwindsor.ca/cgi/viewcontent.cgi?article=1082&context=lawpub> [perma.cc/6CJ5-S69H].

34. "Ethical Principles for Judges" (2004), online (pdf): *Canadian Judicial Council* <cjc-ccm.ca/sites/default/files/documents/2019/news_pub_judicialconduct_Principles_en.pdf> [perma.cc/5ZE3-8NR7].

35. "Ethical Principles for Judges" (2021), online (pdf): *Canadian Judicial Council* <cjc-ccm.ca/sites/default/files/documents/2021/CJC_20-301_Ethical-Principles_Bilingual%20FINAL.pdf> [perma.cc/8B7D-V8ZV] [CJC, "Ethical Principles 2021"].

36. *Ibid*. Impartiality is a fundamental precept guaranteeing the legitimacy of our legal system. Judges are not only required to be impartial, but equally emanate the appearance of impartiality. Furthermore, judges must ensure that proceedings are conducted in a manner that upholds equality according to the law. Finally, notions of impartiality and equality are deeply intertwined in a judge's responsibility to assure fair proceedings for all parties. The judge must not only act fairly, but appear to be acting fairly.

37. *Ibid.*

concerning given that principles of impartiality and fairness should be at the forefront of the minds of the judiciary when they are faced with cases involving SRLs. Judges interviewed explained that legal representation is an additional safeguard of judicial impartiality, as the judge can rely on counsel to assist their client. However, judges explained that impartiality becomes more vulnerable to erosion when a judge is tasked with assisting a SRL.[38] Thankfully, as will be later discussed, the revised 2021 *Ethical Principles* now make reference to SRLs.

The situation in Quebec mirrors that of other Canadian jurisdictions: judges worry about maintaining impartiality during proceedings for both SRLs and opposing represented parties.[39] Judges interviewed admitted heightened concerns when one party is represented and the other is not.[40] One judge stated, "there is a risk of being told that we lack impartiality when we have a self-represented party before us. We receive many complaints. Either we helped too much or not enough. It is very difficult."[41] However, interviews showed that maintaining impartiality during a proceeding is easier when both parties are self-represented. Two SRLs are perceived by judges as generally being on equal playing fields. However, judges explained that a case involving two SRLs requires much more time and work on behalf of the judge; one judge stated, "It's like preparing two files, it's too much work. At least when I have a lawyer, he manages his client."[42]

---

38. Interview, Judge 1, 5 November 2018; Interview, Judge 2, 27 November 2018; Interview, Judge 3, 16 November 2018; Interview, Judge 4, 29 November 2018; Interview, Judge 5, 14 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018; Interview, Judge 9, 17 December 2018; Interview, Judge 10, 6 November 2018.

39. See generally Bernheim & Laniel 2013, *supra* note 32; Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2005) 30:2 Queen's LJ 825-862; Jona Goldschmidt, "The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance" (2002) 40:1 Family Court Rev 36-62; Jona Goldschmidt, "Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience" (2008) 17:3 Mich State U College LJ Intl L 601-656; Cynthia Gray, "Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants" (2007) 27:1 J National Assoc Administrative L Judiciary 97-168; Micah Rankin, "Access to Justice and the Institutional Limits of Independent Courts" (2012) 30:1 Windsor YB Access to Justice 101-138; Richard Zorza, "The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations and Implications" (2004) 17:3 Geo J Leg Ethics 423-454; Michelle Flaherty, "Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law" (2015) 38:1 Dalhousie LJ 119 at 128.

40. *Ibid*.

41. Interview, Judge 10, 6 November 2018. This quotation was translated by the author. The original reads: "Il y a un risque de se faire dire que nous manquons d'impartialité lorsque nous avons une partie non représentée devant nous. Nous recevons beaucoup de plaintes. Soit nous avons trop assisté ou pas assez. C'est très difficile."

42. Interview, Judge 6, 21 November 2018. This quotation was translated by the author. The original reads*: "C'est comme préparer deux dossiers, c'est beaucoup trop lourd. Au moins quand j'ai un*

These findings suggest that dynamics and communications between the judiciary and litigants may differ based on the number of SRLs involved in the proceeding. Specifically, judges interviewed were more concerned about adequately balancing their duty of impartiality and assistance in proceedings involving one SRL and one person represented by counsel.

2. *The duty of assistance*

Jurisprudence has increasingly recognized that judges "should provide some assistance" to SRLs to ensure fair and equal proceedings.[43] In 2006, the Canadian Judicial Council (CJC) issued the *Statement of Principles on Self-Represented Litigants and Accused Persons* (*Principles on SRLs*). The *Principles on SRLs* highlight the "special challenges" faced by SRLs and list obligations of all actors within the legal system to ensure access to justice and equal treatment of all litigants.[44] Judges may modify or supplement court procedures when necessary, as "procedural and evidentiary rules [should not be] used to unjustly hinder the legal interests of self-represented persons."[45]

Over ten years later, the Supreme Court of Canada (SCC) endorsed the *Principles on SRLs* in *Pintea v Johns*.[46] Mr. Pintea had commenced an action to recover damages from a motor vehicle accident. He later became an SRL and failed to notify the court and the defendants of his change of address. Consequently, he did not attend case management meetings as he had never received the notices. The trial judge found Mr. Pintea in contempt of court, struck his claim, and awarded the defendants over $80,000 in costs. The Court of Appeal upheld the lower court decision, which was later appealed to the SCC.[47] In a mere five paragraphs, the SCC found that Mr. Pintea could not be held in contempt of court as he was unaware of the court orders. The SCC reinstated his action, removed the cost award, and endorsed the *Principles on SRLs.*[48] The SCC's endorsement of the *Principles on SRLs* is a significant milestone. However, a report released by the NSRLP has found that while lower courts are increasingly

---

avocat il gère son client."

43. *A(JM)*, *supra* note 5 at para 32. See generally *G(J)*, *supra* note 5 at para 85; *Ménard*, *supra* note 5; *Morwald-Benevides v Benevides*, 2019 ONCA 1023 at para 34; *Dewing v Kostiuk*, 2017 MBCA 22 at paras 17-20; *Davids v Davids* (1999), 92 ACWS (3d) 87 at para 36, 125 OAC 375 (Ont CA); *Janes v Deer Lake (Town)* (1993), 110 Nfld & PEIR 202 at paras 35-40, 42 ACWS (3d) 510 (Nfld CA).

44. CJC, "Statement of Principles," *supra* note 5 at 1.

45. *Ibid* at 7.

46. *Supra* note 3. The trial judge found Mr. Pintea in contempt of court, struck his claim and awarded the defendants over $80,000 in costs.

47. *Pintea v Johns,* 2016 ABCA 99 at para 20.

48. *Pintea*, *supra* note 3 at paras 1-5.

referencing the *Principles on SRLs*, there continues to be much variation in how judges fulfill their duty of assistance.[49]

Similar trends were observed during my interviews. All judges interviewed acknowledged their duty to assist SRLs. One judge insisted, "I owe a different duty to an unrepresented party, a duty which is minute when a person is represented by a lawyer. However, I'm not their lawyer."[50] While judges recognized their duty to assist SRLs, how they translated this assistance in the courtroom varied. Some judges took a broader approach to assisting SRLs and were able to identify specific techniques they use to facilitate courtroom interactions.[51] Others were unable to provide specific practices they employ, but insisted they take a different approach to dealing with SRLs.[52] Some insisted that nothing changes with respect to their interactions in the courtroom.[53]

In fact, the degree to which procedural and evidentiary rules are enforced in proceedings involving SRLs provides a useful example to demonstrate the differing degrees to which judges assist SRLs.[54] Generally, the level of enforcement can be categorized into two views. The first view is premised on a fairly strict application of procedure. Accordingly, these judges believed, "the procedure is what it is; it applies to everyone."[55]

---

49. Kaila Scarrow & Julie Macfarlane, "Pintea v Johns: 18 Months Later" (2018) at 12, online (pdf): University of Windsor, Faculty of Law <scholar.uwindsor.ca/cgi/viewcontent.cgi?article=1085&context=lawpub> [perma.cc/T4F9-2BTU]; Jennifer Leitch, "Lawyers and Self-Represented Litigants: Taking Pintea More Seriously" (31 July 2020), online: *Slaw* <www.slaw.ca/2020/07/31/lawyers-and-self-represented-litigants-taking-pintea-more-seriously/#_ftn2> [perma.cc/CZ6D-8YT3] [Leitch, "Taking Pintea More Seriously"]; Sean Sutherland & Cassie Richards, "Supreme Court of Canada Endorses A New Approach to Self-Represented Litigants" (1 November 2017), online: *LawNow* <www.lawnow.org/supreme-court-of-canada-endorses-a-new-approach-to-self-represented-litigants/> [perma.cc/TE4B-PGVV]; *Cabana v Newfoundland and Labrador*, 2018 NLCA 52 at paras 53-63 [*Cabana*]; *R v Tossounian*, 2017 ONCA 618 at paras 37-39; *Cole v British Columbia Nurses' Union*, 2014 BCCA 2 at para 38.

50. Judge 8. This quotation was translated by the author. The original reads: "J'ai un devoir différent envers une partie non représentée et ce devoir est beaucoup moindre quand une personne se fait représenter par avocat. Mais je ne suis pas son avocat."

51. Interview, Judge 4, 29 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 10, 6 November 2018.

52. Interview, Judge 2, 27 November 2018; Interview, Judge 5, 14 November 2018; Interview, Judge 9, 17 December 2018.

53. Interview, Judge 1, 5 November 2018; Interview, Judge 3, 16 November 2018; Interview, Judge 8, 5 November 2018.

54. A study completed in Jackson, Missouri demonstrated that 59 per cent of judges assist SRLs "always" or "frequently," 36 per cent "sometimes" or "infrequently," and 18 per cent "never": See Cynthia Cook, "Self-Represented Litigants in Family Cases in Jackson County, Missouri" (2007) at 56, online (pdf): *Institute for Court Management* <srln.org/system/files/attachments/Cook_SelfRepresentedLitigants%20Ct%20Exec%20Devel%20Project%20MO%202007.pdf> [perma.cc/N8PN-VFPN]. See also Birnbaum, Bala & Bertrand, *supra* note 2 at 81.

55. Interview, Judge 1, 5 November 2018. This quotation was translated by the author. The original reads: "la procédure est telle quelle. La procédure s'applique à tous. Rien ne change dans la procédure."

This approach suggests a mechanical, copy-and-paste application of procedure across all cases regardless of the needs of the person before the court. Article 23 of the *Code of Civil Procedure* (CCP) equally seems to support a strict application of procedure to all persons: "Natural persons may self-represent before the courts, but must comply with the procedure established by this Code and the regulations under this Code."[56] In fact, one judge emphasized that they read and reiterate this article to all SRLs that come before them that choose to proceed without a lawyer.[57]

The alternative view held by other interviewees was that procedure should be adaptable. These judges emphasized the need to simplify procedure and make accommodations based on the needs of the parties. One judge stated it is their duty to make proceedings as simple as possible, which often involves curtailing procedure. The adaptation of procedure was intimately linked to their understanding of their role as a judge and more importantly as a "public servant."[58] This camp of judges emphasized their duty to assist SRLs by modifying procedural and evidentiary rules when required. They also believed that procedural and evidentiary rules serve as frameworks, allowing all parties to a proceeding to understand their rights and obligations therein. However, they cannot be so heavily enforced that they impede a party from having their case heard. The CCP also attempts to create this balance. While article 23 CCP posits that procedure applies to everyone, it must be balanced by article 25 CCP, which states, "The rules of this Code are designed to facilitate the resolution of disputes and to bring out the substantive law and ensure that it is carried out."[59]

Throughout the interviews, it became apparent that not all judges share the same vision of how the duty of assistance should be carried out in the courtroom. Some believed assisting SRLs requires changing their usual mode of operation, others did not. Cynthia Gray has noted that "[t]rial courts possess 'a discretionary range of control over parties and proceedings' that allows reasonable accommodations to self-represented litigants."[60] The key point is that this control is *discretionary*, implying that the judiciary is not obliged to use it. In fact, my research has shown that a lack of concrete guidelines for the duty of assistance can lead to inconsistent assistance among judges and throughout cases. According to Nicholas Bala, balancing the rights of SRLs and judicial ethics "is one of

56. CCP, *supra* note 8, art 23.
57. Interview, Judge 10, 6 November 2018.
58. Interview, Judge 8, 5 November 2018.
59. CCP, *supra* note 8, arts 23, 25.
60. *Gray, supra* note 39 at 102.

the hardest things that we now expect judges to do."[61] However, SRLs have repeatedly voiced that our current way of operating disadvantages them in court.[62] As the legal landscape changes, how judges interact with SRLs needs to be re-examined. These traditional passive notions of impartiality create barriers to justice for SRLs and call for more active approaches.

3. *A way forward: rethinking judicial ethics and the needs of SRLs*

Within the adversarial system, maintaining impartiality while simultaneously assisting SRLs is a challenging task the judiciary must grapple with. When asked if they believe SRLs are disadvantaged in the courtroom, some judges replied that one's status as an SRL does not impact the outcome of the case: "In judging the merits of disputes, we make decisions based on the facts and the law. The main issue remains the same."[63] And yet, these same judges hesitated when providing a response and many others admitted it was a difficult question to answer.

While the substantive law applicable to one's case does not change based on legal representation or lack thereof, in many cases "an imbalance exists between the parties, and judges do not have a magic wand."[64] According to one judge, "though we can provide some information on how this works, we cannot make objections or present evidence for them. Of course, in some cases, self-represented parties would have benefited from legal advice."[65] Another judge acknowledged: "It's very possible. There are numerous subtle factors that can impact a case. It can simply come down to how SRLs present themselves. Lawyers often polish their clients, and you have to appreciate that many of these self-represented litigants have not been polished."[66] While some judges interviewed may not believe that a litigant's status as an SRL impacts their final decision, Macfarlane suggests that many SRLs do not share these sentiments.[67]

---

61. Aidan Macnab, "Balancing rights of self-reps and neutrality of the court" (28 November 2018), online: *Canadian Lawyer* <www.canadianlawyermag.com/legalfeeds/author/aidan-macnab/balancing-rights-of-self-reps-and-neutrality-of-the-court-16551/> [perma.cc/HB9P-G8DV].
62. Macfarlane, *supra* note 3.
63. Interview, Judge 2, 27 November 2018. This quotation was translated by the author. The original reads: "Sur le fond du litige, le juge prend la décision en fonction des faits et du droit. La question principale demeure la même."
64. Interview, Judge 10, 6 November 2018. This quotation was translated by the author. The original reads: "un déséquilibre existe entre les parties, et les juges n'ont pas de baguette magique."
65. Interview, Judge 9, 17 December 2018. This quotation was translated by the author. The original reads: "bien qu'on puisse leur donner certaines informations sur le fonctionnement, on ne peut pas faire les objections ni présenter la preuve pour eux. C'est sûr que dans certains cas, les parties non représentées auraient eu intérêt à avoir des conseils juridiques."
66. Interview, Judge 7, 17 December 2018.
67. Macfarlane, *supra* note 3 at 95-110.

The duty of assistance to SRLs seems often limited by judicial impartiality. For some judges, balancing these objectives is perceived as a constant contention between "competing imperatives."[68] However, I argue that these important objectives do not need to be perceived as zero-sum; it is possible to safeguard the fundamental ethical pillars of our judicial system while ensuring that SRLs are not disadvantaged by their lack of legal representation.[69] Michelle Flaherty explains that our understanding of impartiality is firmly rooted in a time and courtroom where most benefited from legal representation and passive adjudication was the norm:

> However, as self-representation becomes the new norm, the ongoing validity of this approach is called into question. To put it differently: if it is unfair to expect self-represented litigants to navigate the hearing process without adjudicative assistance and direction, it is also unfair to insist on a vision of impartiality that prevents adjudicators from intervening with direction or assistance.[70]

It is time to divorce our understanding of impartiality from passivity and encourage judges to undertake more active adjudication which modifies rules of procedure and evidence when appropriate.[71] Gray argues that active adjudication remains consistent with the role of the judge:

> The adversary system is not ensconced in the code of judicial conduct, nor is the primary purpose of the code to protect the formalities of the adversary system. While judges may be more comfortable in the role reflected in the rare situation in which all parties are represented by competent, diligent counsel, their discomfort in a more involved role does not necessarily suggest the role reflects partiality, and the traditional role of the judge is in fact as a guiding force at a trial, not just a ceremonial presence or silent monitor presiding over rituals understandable only by the initiated.[72]

---

68. *A(JM)*, *supra* note 5 at para 32.
69. Flaherty, *supra* note 39 at 128; Leitch, "Ethical Change," *supra* note 23 at 690-694; Jennifer Leitch, "Coming off the Bench: Self-Represented Litigants, Judges and the Adversarial Process" (2017) 47:3 Adv Q 309 at 319 [Leitch, "Coming off the Bench"]; Leitch, "Taking Pintea More Seriously," *supra* note 49; Anna E Carpenter, "Active Judging and Access to Justice" (2018) 93:2 Notre Dame L Rev 647 at 661-662; Rosemary Hunter, "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30:1 JL & Soc'y 156 at 170.
70. Flaherty, *supra* note 39 at 137.
71. See Leitch, "Coming off the Bench," *supra* note 69 at 315; Russell G Pearce, "Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help" (2004) 73:3 Fordham L Rev 969 at 970; Richard Moorhead, "The Passive Arbiter: Litigants in Person and the Challenge To Neutrality" (2007) 16:3 Soc & Leg Stud 405 at 406; Russell Engler, "Ethic in Transition: Unrepresented Litigants and the Changing Judicial Role" (2008) 22:2 Notre Dame JL Ethics & Pub Pol'y 367 at 385; Leitch, "Taking Pintea More Seriously," *supra* note 49; *Girao*, *supra* note 3 at para 76; *Dewing v Kostiuk*, 2017 MBCA 22 at para 17; *Cabana*, *supra* note 49 at para 46.
72. *Gray, supra* note 39 at 160.

The solutions I propose in this article align with the role of the judge and uphold important ethical principles, notably impartiality. They encourage judges to modify some of their in-court practices to address the real and diverse challenges faced by so many accessing our family court system. Flaherty explains, the judicial "model has begun to shift from a more traditional, passive approach to one in which decision-makers more actively adjudicate cases and direct the course of proceedings."[73] The revised 2021 *Ethical Principles* are an example of this.[74] As previously mentioned, the 2004 *Ethical Principles* made no reference to SRLs. Thankfully, in 2019 the CJC recognized this blind spot and asked the Judicial Independence Committee to begin consultations to update the *Ethical Principles*.[75] The new principles were released in June 2021 and now make reference to SRLs a handful of times, a welcome change from the previous edition. More importantly, the new principles call on the judiciary to re-evaluate their ethical duties: "Today, judges' work includes case management, settlement conferences, judicial mediation and frequent interaction with self-represented litigants. These responsibilities invite further consideration with respect to ethical guidance."[76]

One further addition to the revised *Ethical Principles* deserves consideration. Principle 2 on Integrity and Respect now includes a comment section entitled "Access to Justice and Self-Represented Litigants." Comment 2.D.2 reads:

> Passive neutrality and treating everyone in the same manner may not always be appropriate. Parties often appear before the court as self-represented litigants. Judges should provide information and reasonable assistance, proactively where appropriate, on procedural and evidentiary rules, while being alert not to compromise judicial impartiality and the fairness of the proceeding.[77]

The CJC's assertion that treating everyone equally does not necessarily lead to a fair hearing is a transformative remark. In fact, the CJC seems to be encouraging judges to assist SRLs by modifying procedural and evidentiary rules when necessary.[78] It is not possible to treat every litigant

---

73. Flaherty, *supra* note 39 at 121-122.
74. CJC, "Ethical Principles 2021," *supra* note 35.
75. *Ibid*. See the consultation report: "Consultation on Ethical Principles for Judges" (2019), online (pdf): *Canadian Judicial Council* <cjc-ccm.ca/sites/default/files/documents/2019/Ethical%20Principles%20for%20Judges%20Consultation%20V5%20-%20EN.pdf> [perma.cc/Z36C-Z7MT].
76. CJC, "Ethical Principles 2021," *supra* note 35 at 11. See also CJC, "Statement of Principles," *supra* note 5 at 5.
77. CJC, "Ethical Principles 2021," *supra* note 35 at 24.
78. CJC, "Statement of Principles," *supra* note 5 at 7.

absolutely the same, nor is it equal to uphold a passive principle of impartiality; doing so may actually undermine a fair hearing.[79]

The solutions I propose in the next part are consistent with the CJC's discourse. Truly advancing access to justice requires giving litigants what they need to present their case. Reasonably modifying in-court practices so that all individuals can be heard does not erode impartiality—rather it allows for a fair process. The following part will delve into the challenges faced by SRLs and propose techniques to judges in efforts to facilitate cases with SRLs.

IV. *Solutions for facilitating proceedings with SRLs*

This part outlines procedural and evidentiary problems that arise in family law proceedings involving SRLs as identified by judges I interviewed. Subsequently, I propose solutions to those problems that are informed by these interviews, as well as current literature, jurisprudence, and legislative interpretation. The solutions I propose are useful and promising, given that they are informed by judges for judges. The problems and accompanying solutions are in the following categories: (1) Visualizing the legal process; (2) Determining the legal issues; (3) Modifying examination & cross-examination; (4) Dealing with a lack of objections; and (5) Failure to ask for certain claims.[80] Facilitating proceedings with SRLs can be a difficult task, generally requiring greater work on the part of the judiciary within an already overburdened legal system. Therefore, these solutions not only seek to better the experiences of SRLs, but also those of the judiciary, opposing counsel, and the general administration of justice.

1. *Visualizing the legal process*

a. *Problem*

The interviews revealed that SRLs often do not understand the different steps involved in family law cases or the components of an actual trial. For example, judges explained that SRLs are usually unaware that family law cases involve a mandatory mediation information session, proceedings dealing with interim orders, and the trial. Further, SRLs do not typically

79. *Ibid*. See also *Cabana*, *supra* note 49 at paras 43-50; *Cabana v Newfoundland and Labrador*, 2020 NLCA 44 at para 127: "Delivering trial fairness requires an individualized approach in every case. What is said to a self-represented litigant must not become formalistic exercise. There is no standardized "script." It must be tailored to the circumstances of each case."

80. This paper presumes that the SRL is often the vulnerable party. This is not always the case. In fact, a growing phenomenon is that SRLs in family law cases choose to be self-represented in order to personally be able to examine the opposing party and control the case. This is often seen in the context of abusive relationships and most often the SRL is a man (as explained by Interview, Judge 8, 5 November 2018). Further research will need to address this issue.

know that the trial is organized into opening statements, the introduction of evidence, examinations, and closing statements.[81] One judge explained that SRLs may get assistance from legal clinics prior to coming to court. However, legal clinics focus on educating SRLs on the substantive law applicable to the case, rather than procedural and evidentiary rules.[82] Hence, processes inside the courtroom remain largely unknown to and complex for SRLs.

Some of the judges interviewed explained that they provide a general roadmap or framework to explain how the proceeding will unfold: "I explain the steps in the procedure and what the [CCP] requires. I tell them that I understand that it is impossible to remember everything now, but that I will tell them where we are at each stage."[83] Other judges seemed to go the extra mile, as one described that they not only explain the procedure to the SRL, they subsequently ask the SRL to identify what they understood from this explanation to identify any gaps in the SRL's understanding.[84] While judges explained that this is helpful, they admitted that many SRLs often forget what they have been told.[85] Other judges stated that these types of explanations are not part of their practice,[86] or they cannot undertake this due to a lack of time.[87]

b. *Solution*

SRLs must receive information regarding the different proceedings involved in the legal process as well as the different steps of a trial. The solution I propose is to provide SRLs with a visual representation of each of these processes once they come before a judge (See Graphic 1 and Graphic 2 as examples below).[88] Currently, the CJC asks judges to "refer

81. Interview, Judge 1, 5 November 2018; Interview, Judge 2, 27 November 2018; Interview, Judge 3, 16 November 2018; Interview, Judge 4, 29 November 2018; Interview, Judge 5, 14 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018; Interview, Judge 9, 17 December 2018; Interview, Judge 10, 6 November 2018.

82. Interview, Judge 6, 21 November 2018. See Bernheim & Laniel, "histoire d'argent," *supra* note 22 at 125.

83. Interview, Judge 9, 17 December 2018. This quotation was translated by the author. The original reads: "Je leur explique les étapes de la procédure et ce que le [CCP] exige. Je leur dis que je comprends qu'il est impossible de tout retenir maintenant, mais que je vais leur dire à quelle étape on est rendu à chaque fois."

84. Interview, Judge 8, 5 November 2018.

85. Interview, Judge 8, 5 November 2018; Interview, Judge 9, 17 December 2018.

86. Interview, Judge 1, 5 November 2018; Interview, Judge 3, 16 November 2018; Interview, Judge 5, 14 November 2018.

87. Interview, Judge 2, 27 November 2018; Interview, Judge 10, 6 November 2018.

88. These draft graphics were created by the author and inspired by other visual aids in Ontario and Quebec. They were presented at a judicial conference to judges at the Superior Court of Québec in Montreal. Judges expressed positive feedback regarding both their content and the proposed solution of having them available with court clerks. See e.g. Community Legal Education Ontario, "What

self-represented persons to other appropriate sources of information, education, advice and assistance."[89] What I propose goes one step further. Instead of referring an SRL to the pamphlets outside the courtroom, judges can use these pamphlets during their in-court explanations of legal processes to an SRL.

An abundance of public legal education resources have been created by courts and community organizations.[90] However, these are rarely used inside a courtroom.[91] I argue this information must become part of the regular court process undertaken by a judge assisting an SRL in the courtroom.[92] These visual aids could be held by court clerks and given to the SRL prior to commencing the proceeding. At this time, a judge can use the visual aid to explain the different steps involved in a family law case and/or trial. While a judge may explain this information orally, many SRLs would benefit from visual reminders given the stress of self-representing and SRLs' limited legal education.[93] Further, these aids can be used throughout the proceeding, as judges can refer to the graphic once they go from, for example, examination to cross-examination (Graphic 2).

The legalese in the graphics should be made into plain language to ensure they are understood by all.[94] They should also be offered in Braille

happens at a family law trial" (1 September 2021), online: *Steps to Justice: Your guide to law in Ontario* <stepstojustice.ca/questions/family-law/what-happens-family-law-trial/> [perma.cc/73XV-8ELW]. See also "Divorce: Main Steps in the Court Process" (last modified 30 March 2020), online: *Educaloi* <www.educaloi.qc.ca/en/capsules/divorce-main-steps-court-process> [perma.cc/43L5-GLZF]; Legal Info Nova Scotia, "Representing Yourself" (last modified 2017), online: *Legal Info* <www.legalinfo.org/representing-yourself/representing-yourself-intro> [perma.cc/D2GH-XDJJ]; Courthouse Libraries BC, "Teaching Materials" (last visited 24 February 2022), online: *Clicklaw* <www.clicklaw.bc.ca/learnteach/search?f=teaching+materials> [perma.cc/D2GH-XDJJ]; "Representing Yourself in Family Court" (last modified 2021), online (pdf): *Centre for Public Legal Education Alberta* <www.cplea.ca/wp-content/uploads/RepresentingYourselfinFamilyCourt.pdf> [perma.cc/P5D8-KJUT].

89. CJC, "Statement of Principles," *supra* note 5 at 2.

90. See e.g. "A propos d'Éducaloi" (last visited 24 February 2022), online: Éducaloi <educaloi.qc.ca/a-propos/> [perma.cc/X36X-Q48A]; "Organismes" (last visited 24 February 2022), online: *Centres de justice de proximité* <www.justicedeproximite.qc.ca/a-propos/organismes/> [perma.cc/5FXP-2FXM]; "Service d'information juridique a la Cour municipale de Montréal" (last visited 24 February 2022), online: *Jeune Barreau de Montréal* <ajbm.qc.ca/services-au-public/service-dinformation-juridique/> [perma.cc/DJ6M-FC4F].

91. Interview, Judge 8, 5 November 2018.

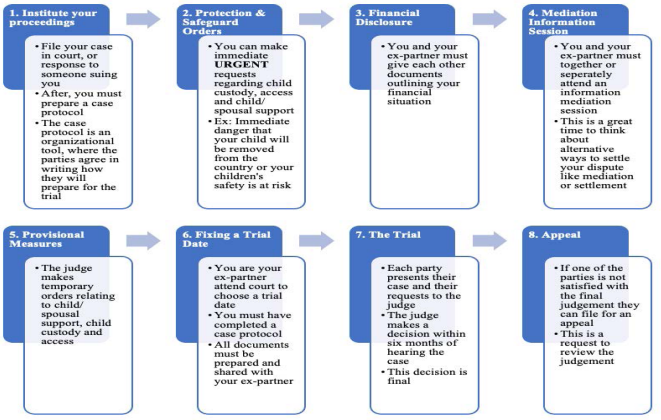
92. This suggestion aligns with numerous principles within the Statement of Principles on SRLs: CJC, "Statement of Principles," *supra* note 5 at 6-7: "Judges and court administrators should meet the needs of self-represented persons for information, referral, simplicity, and assistance. Judges and court administrators should develop forms, rules and procedures, which are understandable to and easily accessed by self-represented person […] In appropriate circumstances, judges should consider providing self-represented persons with information to assist them in understanding and asserting their rights, or to raise arguments before the court."

93. Fragomeni, Scarrow & Macfarlane, *supra* note 3 at 17-19.

94. This solution would not address the difficulties faced by SRLs who are illiterate. A solution to address this would be to transform the graphic into a video that could be watched prior to entering the

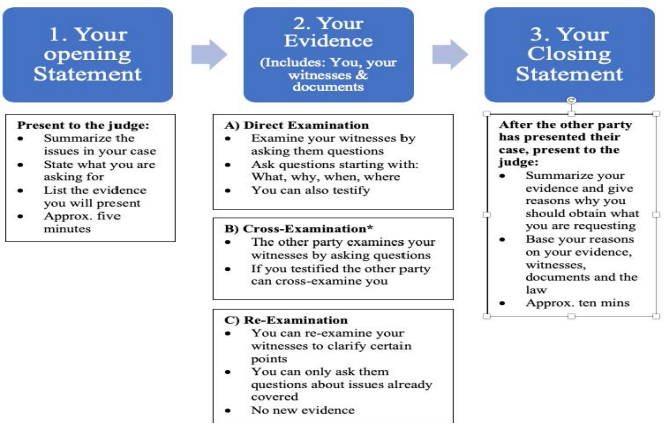
and translated into multiple languages to ensure that SRLs whose first language is neither French nor English can understand the process.[95] Ultimately, incorporating these visual aids into judges' routine explanations to SRLs would allow for greater understanding of the legal process.

Graphic 1: THE STEPS OF A FAMILY LAW FILE



Graph description: This graph provides an outline of the life of a family law file, including but not limited to the following steps: (1) Institute your proceedings; (2) Protection & safeguard orders; (3) Financial disclosure; (4) Mediation and information session; (5) Provisional measures; (6) Fixing a trial date; (7) The trial; (8) Appeal.

Graphic 2: THE TRIAL PROCESS



Graph description: This is a graph that provides a general overview of a trial. The graph outlines three different steps. (1) Your opening statement; (2) Your evidence; (3) Your closing statement.

courtroom.

95. These are equally beneficial for SRLs who are hearing impaired.

2. *Determining the legal issues*

a. *Problem*

Judges highlighted that a major obstacle in cases involving SRLs is that they have not identified the precise legal issue to be resolved that day. One judge explained, "it's difficult to get the right information from the parties, to really know what the parties want and why they are in court that day."[96] SRLs often believe that all issues will be resolved in one proceeding.[97] However, family law matters involve numerous stages; some issues are resolved at an interim stage (such as child support and custody leading up to the trial), while others are resolved at a final stage (such as the division of family property). Moreover, SRLs struggle to parse relevant and irrelevant information based on the legal issue at hand. SRLs who lack legal advice and are unfamiliar with procedural law submit an abundance of irrelevant information: "Since they don't know what is important and relevant in a given situation, they respond to us with a very, very wide range of information; we end up having a lot of sorting to do."[98] Interviewees indicated that proceedings with SRLs are more prone to disorganization, particularly when both parties are self-represented.

b. *Solution*

I propose two ways to identify the legal issue(s) which must be resolved during the proceeding in question and ensure SRLs are aware of and understand them. One option is for the judge to summarize to the parties what they, as the judge, have understood as the main legal issues to be resolved that day. After reading the file, one judge explained that they list to the parties what they have understood as the main issues in dispute, then they ask the parties if any issues have been overlooked.[99]

Alternatively, the judge may ask each of the parties to briefly outline the main legal questions to be resolved. The judge then summarizes back to the parties what the judge has understood from both sides. In both scenarios, the judge should ask the SRL(s) if they have understood the

96. Interview, Judge 2, 27 November 2018. This quotation was translated by the author. The original reads: "c'est difficile d'obtenir la bonne information en provenance des parties, savoir véritablement ce que les parties veulent et pourquoi elles sont à la cour aujourd'hui."

97. Interview, Judge 1, 5 November 2018; Interview, Judge 2, 27 November 2018; Interview, Judge 3, 16 November 2018; Interview, Judge 4, 29 November 2018; Interview, Judge 5, 14 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018; Interview, Judge 9, 17 December 2018; Interview, Judge 10, 6 November 2018.

98. Interview, Judge 2, 27 November 2018. This quotation was translated by the author. The original reads: "Vu qu'ils ne connaissent pas ce qui est important et pertinent comme information pour la situation donnée, ils nous répondent avec un éventail très, très large et nous avons beaucoup de triage d'information à faire."

99. Interview, Judge 6, 21 November 2018.

requests made from the opposing party. If they have not, the judge should reiterate these requests in a simplified manner.[100]

These proposed solutions are in line with the CJC's *Principles on SRLs* that suggests when one or more SRLs are present, a judge may "inquire whether both parties understand the process and the procedure."[101] However, these solutions go a bit further by suggesting concrete ways a judge can inquire into an SRL's understanding of the legal process and the legal issues relevant to their case on that day. The second proposed solution, in particular, requires a judge to be satisfied that an SRL understands the current legal issue based on the explanation the SRL will provide. The SRL cannot simply acquiesce to understanding.

These solutions are evidently more time consuming in the short-term, specifically at the beginning of the proceeding. Whereas identifying the legal issues may take five seconds to two minutes with a lawyer, it often takes ten to thirty minutes with SRLs.[102] However, judges explained this technique will likely save time in the long term.[103] Furthermore, it also requires more pre-court preparation time, as judges must take more time to read the file. One judge explained that they will suspend court for ten to fifteen minutes when they realize one or more SRLs are involved in the case: "I suspend and reread the entire file."[104] Nonetheless, this solution ensures organization of the proceeding, which benefits the judge and the parties. It also allows SRLs to focus on the information that is relevant to the specific proceeding. Finally, this technique is especially useful when there is a lack of communication between the two parties. By putting both parties on the same page at the beginning of the proceeding, the judge effectively builds a bridge between them.[105] While the practices explained above may seem rudimentary, determining and/or clarifying the legal issues is crucial to helping SRLs have their voices heard and ensuring they understand the content of proceedings.

100. Interview, Judge 8, 5 November 2018. This interview suggested that this judge takes a very active approach with regard to their duty of assistance, as they explained this is a technique they regularly use. This quotation was translated by the author. The original reads: "je vais demander à chaque partie ce qu'elle veut aujourd'hui."
101. See "Promoting Equal Justice. B. (4)(a)(b)" in CJC, "Statement of Principles," *supra* note 5 at 4.
102. Interview, Judge 5, 14 November 2018.
103. Interview, Judge 2, 27 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018.
104. Interview, Judge 8, 5 November 2018. This quotation was translated by the author. The original reads: "Je me retire et je relis le dossier en totalité."
105. Interview, Judge 8, 5 November 2018.

3. *Modifying examination and cross-examination*

a. *Problem*

Every judge I interviewed emphasized that SRLs struggle to understand and differentiate between pleadings, examination, and cross-examination. One judge stated, "instead of questioning the witness during examination, unrepresented parties often start talking to me and tell me their claims."[106] Another judge explained, "often, in cross-examination, the party does not even ask questions. Rather, they criticize the interrogation of the first party by saying *none of that is true*!"[107] This issue must be addressed to save time and simplify proceedings for both SRLs and judges.

b. *Solution*

I propose two solutions to address this challenge. First, judges can attempt to explain what each of these examinations consist of—using Graphic 2 proposed above would provide an extra tool to assist in these explanations. Second, if after doing so, the SRL is unable to properly grasp and follow the different stages of the trial, an effective solution is to modify the examination and cross-examination. Accordingly, the judge can modify the order of the proceeding by suspending the cross-examination and allowing the SRL to testify.[108] One judge explained how they utilize this technique:

> This is how I explain it to the unrepresented person: What I sense is that you can't wait to tell me your version. So, what I propose is that you suspend your cross-examination and testify. I am not cancelling your cross-examination. After your testimony, if you have any questions for the lady, we will resume your cross-examination.[109]

---

106. Interview, Judge 4, 29 November 2018. This quotation was translated by the author. The original reads: "Au lieu de poser des questions au témoin pendant l'interrogatoire principal, la partie non représentée va commencer à me parler et essentiellement me dire leurs réclamations."

107. Interview, Judge 2, 27 November 2018. This quotation was translated by the author. The original reads: "Souvent lors de le contre-interrogatoire, la partie ne pose même pas de questions. Plutôt, elle critique l'interrogatoire de la première partie en disant ce n'est pas vrai tout ça!"

108. Interview, Judge 4, 29 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 10, 6 November 2018. See Principle on "Promoting Equal Justice. B. (4)(e)" in CJC, "Statement of Principles," *supra* note 5 at 4, which suggests to sometimes "modify the traditional order of taking evidence." See also "Informal Domestic Relations Trial" (last visited 24 February 2022), online: *Oregon Judicial Branch* <www.courts.oregon.gov/programs/family/forms/Pages/Informal-Domestic-Relations-Trial.aspx> [perma.cc/SUL2-9HMU].

109. Interview, Judge 6, 21 November 2018. This quotation was translated by the author. The original reads: "C'est comme ça que je l'explique à la personne non représentée : Ce que je sens c'est que vous avez hâte de me donner votre version. Alors ce que je vous propose c'est de suspendre votre contre-interrogatoire et de témoigner. Je n'annule pas votre contre-interrogatoire. Après votre témoignage, si vous avez des questions à poser à madame on va reprendre votre contre-interrogatoire."

Generally, SRLs simply want to voice their side of the story to the judge and do not have questions to ask the opposing party.[110] By suspending the cross-examination instead of cancelling it, this ensures that the litigant's procedural rights are still protected if they ever wish to come back to the cross-examination. Suspending the cross-examination is in line with the principle of proportionality[111]: modifying procedural rules to the capacities of the litigant before the court will "facilitate the resolution of disputes and bring out the substantive law and ensure that it is carried out."[112] Furthermore, the technique helps save time, as allowing an SRL to improperly continue with a cross-examination leads to repeated objections by the opposing lawyer.[113] In the case of two SRLs, one judge explained this technique brings about the contentious issues immediately: "Then, I have both versions and can guide the trial more efficiently."[114]

Judges utilizing this technique concluded that it greatly simplified proceedings and therefore rendered them more accessible to SRLs: "it works nine out of ten times."[115] Despite the purported efficacy of this approach, only three judges interviewed reported using this technique.[116] There is reason to be optimistic about this technique being adopted by judges, as it received a great deal of positive feedback during the February 2020 judicial conference. Therefore, it seems the issue with this solution is not its effectiveness, but rather judges' awareness of it and whether they utilize it in the courtroom. Ultimately, suspending the cross-examination is a valuable technique advantageous to both SRLs and judges. Judges can better manage proceedings and save time, while SRLs can voice their concerns promptly and therefore feel heard.

110. *Ibid*.
111. CCP, *supra* note 8, art 18.
112. *Ibid*, art 25.
113. *Ibid*.
114. Interview, Judge 4, 29 November 2018. This quotation was translated by the author. The original reads: "Parce que là j'ai les deux versions et je peux diriger le procès plus efficacement."
115. Interview, Judge 4, 29 November 2018. This quotation was translated by the author. The original reads: "et cela marche 9/10." See also *CAT v STB*, 2020 BCSC 593, where the trial judge modified the usual trial process (examination and cross-examination) to assist the SRL.
116. Interview, Judge 4, 29 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 10, 6 November 2018.

4. *Dealing with a lack of objections*

a. *Problem*

A preeminent advantage of legal representation is that a lawyer will ensure their client's rights are respected: "The lawyers are the watchdogs."[117] However, without legal representation, SRLs are often unaware of the possibility of raising objections when procedural and evidentiary rules are not being followed. For example, judges explained that SRLs often do not raise objections to improper leading questions being asked by opposing counsel or to the admission of evidence via hearsay.[118] Another judge described a situation where the opposing lawyer was attempting to admit documents that had not been disclosed to the SRL prior to trial.[119] Judges interviewed highlighted the difficult and delicate position in which they are placed when these situations arise. While judges cannot become an advocate for the SRL and raise the objection,[120] they must ensure procedural fairness and that "the rights of all parties are not infringed."[121]

Some judges stated they steer clear from these potentially conflictual situations, insisting, "I cannot object on behalf of the litigant."[122] Others stated they creatively attempt to mitigate the imbalance between an SRL and a lawyer.[123] Interviews demonstrated that judges are more concerned about a lack of objections by an SRL when the proceeding involves one SRL and a represented party, rather than when a proceeding involves two SRLs. In the latter case, a lack of objections on the part of either or both SRLs is generally not as problematic, as they are operating on a relatively equal playing field. Accordingly, judges explained that in such a situation they may reasonably loosen the rules of evidence, allowing both parties to have their case heard without being unnecessarily impeded by procedural or evidentiary requirements.[124] For example, certain judges explained that often both parties will admit evidence via hearsay. When deliberating, the judge will determine the weight they should assign to

---

117. Interview, Judge 2, 27 November 2018. This quotation was translated by the author. The original reads: "Les avocats sont les chiens de garde."
118. Interview, Judge 10, 6 November 2018.
119. Interview, Judge 4, 29 November 2018.
120. Art 2859 CCQ: "The court may not of its own motion raise a ground of inadmissibility […] where a party who is present or represented has failed to raise it."
121. Interview, Judge 5, 14 November 2018. This quotation was translated by the author. The original reads: "les droits de toutes les parties ne sont pas brimés."
122. Interview, Judge 9, 17 December 2018. This quotation was translated by the author. The original reads: "je ne peux pas faire les objections pour la personne."
123. Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018.
124. Interview, Judge 2, 27 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018.

this evidence according to the rest of the case presented by each litigant.[125] Some judges allow SRLs to present proof of employment or earnings via copies or letters, rather than originals or authentic acts.[126] Thus, in cases with two SRLs, judges often deal with a lack of objections by both sides by loosening evidentiary rules. This is in line with the principle of proportionality[127] and the objective of bringing out the substantive law to allow the case to be heard and resolved.[128]

While a lack of objections may not be problematic in proceedings involving two SRLs, SRLs may still be prejudiced by their lack of knowledge regarding how and when to object, specifically when opposed by a represented party. This must be addressed to facilitate fair proceedings for all litigants.

b. *Solution*

In cases where one party is self-represented and the other is represented by counsel, I propose that a judge can intervene when they believe that a lack of an objection would infringe the principles of natural justice, procedural equity, or the best interests of the child. To be clear, the judge would not be making the objection for the SRL. Rather, in these circumstances, the judge would remind the opposing lawyer of their obligation to respect the rules of procedure and evidence required by the court. Article 19 CCP states the following: "the parties control the course of their case insofar as they comply with the principles, objectives and rules of procedure and the prescribed time limits."[129] In addition to lawyers being bound by the rules of procedure and evidence, both parties must "refrain from acting with the intent to cause prejudice to another person or behaving in an excessive or unreasonable manner, contrary to the requirements of good faith."[130] Further, the CCP reminds lawyers that they cannot knowingly prejudice another party to advance their case. Indeed, lawyers know they cannot admit evidence via hearsay or rely on suggestive questions except in limited circumstances. Consequently, in cases where a judge feels an objection should have been made by the SRL and a lack thereof is likely to prejudice them, a judge can remind opposing counsel of their obligation to respect the rules of the court.

125. *Ibid*.
126. Interview, Judge 2, 27 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018. Judges clarified that in cases where the earnings of one or both litigants were contested, this would not be accepted.
127. CCP, *supra* note 8, art 18.
128. *Ibid*, art 25.
129. *Ibid*, art 19. See CCQ, *supra* note 120, art 2811.
130. CCP, *supra* note 8, art 19(2).

In the event of suggestive questions raised by the opposing lawyer, one judge explained that they intervened by remarking, "counsel, the court is aware that the other party is self-represented; your question could be worded differently."[131] In addition to these interventions, judges emphasized the role of body language. In particular, one judge highlighted its importance in dissuading lawyers from undertaking oppressive acts: "Non-verbal communication can say a lot. My non-verbal will indicate, *What is that question? Where are you going with this?* Professional lawyers will know their judges, they will know how to read them and maintain eye contact."[132] Coupling verbal interventions with appropriate body language is helpful when the SRL has failed to raise an objection which may prejudice them. Ultimately, these types of interventions are in line with Comment 2.D.2 of the *Ethical Principles*.[133] They maintain the impartiality of the judge while upholding the procedural rights of all parties to the proceeding and ensuring an equitable process.[134]

Importantly, judges may intervene to prevent certain evidence from being admitted when a lawyer's failure to comply with procedural or evidentiary rules would violate public order or the rights of a child.[135] For example, one judge explained that if a lawyer attempts to admit psycho-social reports of an adolescent to corroborate their position, the judge would intervene even without the objection of the SRL and disallow the party from admitting the evidence. The judge would ask how the document was received and request proof of the adolescent's consent for its use in court.[136] This scenario is in line with article 2848 *Civil Code of Québec* (CCQ) which permits the court "even of its own motion, [to] reject any evidence obtained under such circumstances that fundamental

131. Interview, Judge 4, 29 November 2018. This quotation was translated by the author. The original reads: "Vous savez Maître, le tribunal est conscient que l'autre partie n'est pas représentée et que votre question pourrait être formulée différemment."

132. Interview, Judge 7, 17 December 17 2018. This quotation was translated by the author. The original reads: "Le non verbal peut en dire beaucoup. Mon non verbal va indiquer c'est quoi cette question-là? Où allez-vous avec ça? Un avocat qui est professionnel va connaitre son juge, va savoir le lire et maintenir un contact visuel."

133. CJC, "Ethical Principles 2021," *supra* note 35 at 24. Comment 2.D.2 of the revised Ethical Principles states the following: "Passive neutrality and treating everyone in the same manner may not always be appropriate. Parties often appear before the court as self-represented litigants. Judges should provide information and reasonable assistance, proactively where appropriate, on procedural and evidentiary rules, while being alert not to compromise judicial impartiality and the fairness of the proceeding."

134. See *Watterson v Canadian EMU*, 2016 ONSC 6744 (where the court found the trial judge should have explained to the SRL that they could have objected to the calling of a witness without notice by opposing party and should have explained that they could have requested adjournment to prepare for the cross-examination of the witness).

135. CCQ, *supra* note 120, art 2848.

136. Interview, Judge 2, 27 November 2018.

rights and freedoms are violated and whose use would tend to bring the administration of justice into disrepute."[137] Hence, when the rights of a child are being violated by a party and the opposing party has not made an objection, the judge may intervene on their own initiative.

5. *Addressing a failure to ask for claims*

a. *Problem*

Judges interviewed noted that SRLs regularly neglect to ask for certain claims, notably a provision for costs or child-related claims. For example, SRLs may not be aware of their duty to provide reciprocal information and their right to obtain that information from the other party. At times, they may fail to disclose their income or to ask the other party to do so.[138] Further, an SRL may not know that a provision for costs exists or that they could ask for it if their situation warrants it.[139] This is an unfortunate predicament given that most SRLs find themselves self-represented due to their precarious financial situation.[140] An SRL may fail to ask for support for certain child-related expenses, such as retroactive child support,[141] medical or dental insurance,[142] or certain special and extraordinary expenses.[143]

Judges admitted that their duty of assistance is limited in these situations, as such interactions can rapidly become legal advice. When asked if they employ any techniques to mitigate these, most judges answered that they didn't and that they were unaware of what could be done.[144] While some judges stated that it was up to the SRL to get a lawyer,[145] others affirmed that these situations need to be addressed, as they illustrate clear instances where an SRL is disadvantaged.[146] One judge explained, "obviously, the person will suffer a harm, but we can't prepare the case for them."[147] Another

137. CCQ, *supra* note 120, art 2848.
138. *Ibid*, art 596.1.
139. CCP, *supra* note 8, art 416; CCQ, *supra* note 120, art 588(2); Interview, Judge 1, 5 November 2018.
140. Action Committee, *supra* note 24 at 4.
141. CCQ, *supra* note 120, art 595.
142. *Federal Child Support Guidelines*, SOR/97-175, s 6 [*FCSG*].
143. *Ibid*, s 7(1).
144. Interview, Judge 2, 27 November 2018; Interview, Judge 4, 29 November 2018; Interview, Judge 5, 14 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 9, 17 December 2018; Interview, Judge 10, 6 November 2018.
145. Interview, Judge 1, 5 November 2018; Interview, Judge 3, 16 November 2018.
146. Interview, Judge 4, 29 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018.
147. Interview, Judge 7, 17 December 2018. This quotation was translated by the author. The original reads: "évidemment une personne va subir un préjudice, mais on ne peut pas préparer le dossier pour

judge noted that in these scenarios they will make general comments about the benefits of receiving legal advice to the SRL: "Without naming things precisely, I will say that because of the claims made in your file, it would be in your best interest to consult a lawyer."[148] However, this same judge said that these measures were insufficient, as the parties regularly proceed without legal representation despite the advice and will not know the gaps in their file. These challenges need to be addressed, especially for SRLs of lower socio-economic status and women. For example, a failure to request certain child-related expenses or costs can have far-reaching consequences on the SRL and the children associated with the file.

b. *Solution*

The following provides two potential solutions to address the two challenges elucidated above: the failure of an SRL to 1) ask for a provision for costs; and 2) ask for child-related claims. Unlike the other solutions proposed in previous sections, judges I interviewed had little or nothing to suggest in terms of how to rectify situations when SRLs fail to ask for certain claims. In fact, during many interviews, they would turn the question around on me, asking what I would suggest in these situations.[149] After the interviews, I began thinking about how these problems could be addressed. I developed the following proposed solutions based on recent literature, jurisprudence, and legislative interpretation. Subsequently, I discussed these possibilities during the judicial conference I facilitated in February 2020. The feedback received during the judicial conference helped modify and strengthen the proposed solutions.[150]

Provision for Costs

A provision for costs is an order by the court which requires one party to pay for part of the legal costs of the opposing party associated with a family law file. A judge may order a provision for costs when one party, as a result of their financial situation, would be otherwise unable to effectively present their case.[151] The underlying goal of a provision for

---

eux."

148. Interview, Judge 2, 27 November 2018. This quotation was translated by the author. The original reads: "Sans nommer précisément les choses, je vais dire que par rapport à l'ensemble des réclamations faites dans votre dossier, ce serait dans votre intérêt de consulter un avocat."

149. Interview, Judge 1, 5 November 2018; Interview, Judge 4, 29 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018; Interview, Judge 10, 6 November 2018.

150. These solutions were presented at a judicial conference in February 2020. They generally received positive feedback from many of the attendees. The feedback was not collected using any distinct method, rather it was received in a conversation style format.

151. CCP, *supra* note 8, art 416. See also CCQ, *supra* note 120, art 588(2). See *Droit de la famille-191999*, 2019 QCCS 4145 at para 52 which explains the differences between the articles: "Contrary to article 588 [CCQ] which authorizes the court to grant a provision for costs only in

costs is to attempt to place both parties on an equal playing field in cases where the financial resources of one party are incommensurate with those of the other. The provision for costs seeks to facilitate a fair and equitable trial.[152] When an SRL has not asked for a provision for costs, yet a judge believes it is appropriate in the circumstances,[153] I propose that a judge can, on their own initiative, order it. I argue that a judge has authority to do so for two reasons.

First, the criteria that must be met for a provision for costs to be granted do not require that the party obtaining it raise the request themselves. The Quebec Court of Appeal has outlined principles that a judge should consider when ordering a provision for costs. The judge must consider the financial means of the party claiming the provision for costs and the resources of the debtor party. When doing so, six criteria should be considered: (1) the nature and importance of the dispute; (2) the means of the parties; (3) the respective behaviour of each party; (4) the amount of child support; (5) the protection of the children associated to the dispute.[154] Nowhere in the criteria listed by the Quebec Court of Appeal is the party receiving the provision for costs required to raise this issue on their own initiative. While the judge must be convinced that each criterion has been met, this does not include the party actually raising the issue in the first place.[155] For this reason, I argue that when a judge hears a case involving a self-represented party who's financial situation is impeding their ability to present their case, they may bring the provision for costs to the attention of the parties. If the receiving party meets the necessary criteria, a judge can order the provision for costs.

Second, the provision for costs is a discretionary measure.[156] The underlying objective of the provision for costs is to allow eligible parties to obtain the services of a lawyer. In *Droit de la famille-16940*, the court stated the provision for costs "is intended to allow the economically disadvantaged party to assert its rights, with a view to a fair and equitable resolution to the dispute, but should not encourage and fuel unnecessary

favour of the alimentary creditor, articles 409 and 416 [CCP], allows the court to order a party to pay a provision for costs to the other party when the hearing deals with an application under book two of the [CCQ]."

152. *Droit de la famille-2013*, 2020 QCCA 19 at para 18 [*DF-2013*]; *Droit de la famille-19982*, 2019 QCCA 930 at para 37 [*DF-19982*]; *Droit de la famille-18949*, 2018 QCCA 711 at paras 34-35 [*DF-18949*].

153. See *Droit de la famille-172765*, 2017 QCCA 1844 for the criteria that need to be met.

154. *DF-2013*, *supra* note 152 at para 18; *DF-19982*, *supra* note 152 at para 37; *DF-18949*, *supra* note 152 at paras 34-35.

155. *Ibid*.

156. *DF-18949*, *supra* note 152 at para 57.

proceedings."[157] Further, in *Droit de la famille-18230*, the court insisted a provision for costs seeks to promote access to justice and fairness, allowing both parties to oppose each other on equal footing.[158] Therefore, courts have recognized that a provision for costs is a tool that should be used to promote a fair and equitable proceeding. The discretionary nature of this provision allows judges to order it on their own initiative in order to fulfill its underlying objectives when the party meets the corresponding criteria.

Practically, in a case where the judge believes the SRL is economically weaker than the other party, which undermines the SRL's ability to assert their rights, the judge may ask the SRL if they are making a request for a provision for costs. The judge may then direct the SRL to article 416 CCP or 588(2) CCP, and, if necessary, explain the general criteria that must be met for the provision to be granted. Such direction from the judge does not amount to becoming the SRL's advocate, as it remains the latter's responsibility to ensure that the evidence before the court is sufficient to meet the criteria. If such evidence is before the court, the judge may grant the order.

The provision for costs is not automatically granted simply because one is self-represented.[159] Judges must carefully consider whether the circumstances justify the order. However, if an SRL meets the criteria, judges should ensure the litigant does not fail to benefit from the provision for costs simply because they were unaware of its existence. Indeed, judges confirmed that a provision for costs is most useful when one party is represented and the other is not.[160] It is also relevant when there exists a significant power imbalance between the two parties as a result of the litigants' financial situations or domestic violence history.[161] Ultimately, the provision for costs is a discretionary measure that ensures an equitable and just process for the most vulnerable litigants.[162] To give full effect to the underlying objectives of the provision for costs, I argue that a judge can grant this when the criteria are met, even when the receiving party does not raise the request on their own initiative.

---

157. *Droit de la famille-16940*, 2016 QCCS 1892 at para 39 [*DF-16940*]. This quotation was translated by the author. The original reads : "[…] vise à permettre à une partie économiquement plus faible à faire valoir ses droits, en vue d'une solution juste et équitable du litige, mais ne devrait pas encourager et alimenter des procédures inutiles."

158. *Droit de la famille-18230*, 2018 QCCS 421 at para 31. *See also Droit de la famille-172327*, 2017 QCCS 4849 at para 176.

159. *Droit de la famille-16836*, 2016 QCCS 1617 at para 100.

160. Interview, Judge 1, 5 November 2018; Interview, Judge 4, 29 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018; Interview, Judge 10, 6 November 2018.

161. Interview, Judge 4, 29 November 2018; Interview, Judge 10, 6 November 2018;

162. *DF-16940*, *supra* note 157 at para 39.

Child-Related Claims

SRLs often omit to ask for certain child-related expenses.[163] In these circumstances, I suggest that a judge may raise this omission to the parties. Take, for example, where an SRL pays for the entire cost of their child's braces and fails to ask for the associated special and extraordinary expenses. After considering the evidence before them, a judge may ask the SRL if they plan on making a request related to special and extraordinary expenses by directing the SRL to the appropriate section in the *Federal Child Support Guidelines*.[164] Despite the SRL not having made the initial request, if the evidence before the judge demonstrates that special and extraordinary expenses should be ordered, then the judge may grant them. While this solution requires the judge to raise the omission to the parties, it does not consist of the judge providing the evidence nor the arguments to justify granting the order. The SRL must present this evidence to the court, which the judge then weighs. Once again, the judge does not become the SRL's advocate, but rather ensures that all evidence is before them to make an informed child support order in the best interests of the child.

This intervention can be justified pursuant to two duties imposed by the CCQ in family law cases. First, adjudicating courts must make all decisions relating to children in the best interests of the children.[165] Second, a judge rendering a decision relating to child support has a duty to ensure the respect of child support which is of public order.[166] In other words, a judge must make a decision regarding child support that reflects the best interests of the child. If an SRL's failure to request extraordinary expenses undermines this principle, I argue a judge may intervene to raise the omission. In this same vein, a judge would also be able to intervene to raise omissions on the part of a lawyer if failing to do so would jeopardize the best interests of the child.

Support for this solution can be found in article 268 CCP (previously article 292 CCP), which allows the court to "draw the parties' attention to any deficiency in the proof or procedure and authorize the parties to remedy it, subject to the conditions it determines."[167] This provision is analyzed in depth in *Droit de la famille-16436*.[168] The court explained that the provision gives the trial judge discretion to bring a perceived injustice

163. An SRL may fail to ask for support for certain child-related expenses, such as retroactive child support, medical or dental insurance, or certain special and extraordinary expenses.
164. *Supra* note 142, s 7(1).
165. CCQ, *supra* note 120, art 33.
166. *Ibid*, art 586ff.
167. CCP, *supra* note 8, art 268.
168. *Droit de la famille-16436*, 2016 QCCA 376 at paras 21-22.

to the parties' attention. However, the judge is not permitted to intervene substantially or to drive the presentation of the proof. These deficiencies must also be significant enough as to fundamentally affect the outcome of the case should they go entirely unaddressed.[169]

Article 268 CCP gives judges the discretion to raise a deficiency in evidence or procedure.[170] If a judge allowed child support to be granted without addressing the failure of the SRL to speak to the issue of special or extraordinary expenses that are otherwise relevant, this would constitute a deficiency in the evidence and undermine the fundamental principle of rendering decisions in the best interest of the child. Therefore, intervening per the solution I propose ensures that a decision is rendered in a just manner all while maintaining the judge's impartiality.

There are other instances in the CCP where the legislator has given judges the tools to highlight omissions on behalf of the parties. For example, article 49 CCP gives judges "all the powers necessary to exercise their jurisdiction. […They] may make such orders as are appropriate to deal with situations for which no solution is provided by law."[171] Similarly, article 446 CCP authorizes a judge to supplement missing information, such as parent's income.[172] These are but two examples that demonstrate how the legislator empowers judges to undertake active adjudication, particularly in situations where an injustice would result from their inaction.[173]

The solution I propose above is in line with these provisions of the CCP, as well as the duty to render decisions in the best interests of the child and uphold the public order of child support. Accordingly, raising omissions by SRLs related to certain child-related claims ensures an equitable resolution of the file, where the judge retains their impartiality to render a judgement on the totality of the evidence.

6. *Implementing systemic and consistent change*

Part IV of this paper has considered prominent procedural and evidentiary obstacles faced by SRLs in family law proceedings and provided solutions

169. *Ibid*.
170. *Ibid*; CCP, *supra* note 8, art 268.
171. CCP, *supra* note 8, art 49.
172. CCP, *supra* note 8, art 446.
173. See Rosalie Jukier, "The Impact of Legal Traditions on Quebec Procedural Law: Lessons From Quebec's New Code of Civil Procedure" (2015) 93:1 Can Bar Rev 211 at 232, 235-237. See also "Le Rapport d'évaluation de la Loi portant réforme du Code de procédure civile" (March 2006), online (pdf): *Ministère de la Justice du Québec* <collections.banq.qc.ca/ark:/52327/bs58721> [perma.cc/6F7E-DM3U]; Jean-Guy Belley, "Une justice de la seconde modernité : proposition de principes généraux pour le prochain Code de procédure civile" (2001) 46:2 RD McGill 317 at 371; JA Jolowicz, "Adversarial and Inquisitorial Models of Civil Procedure" (2003) 52:2 ICLQ 281 at 294-295.

for judges to mitigate these obstacles. The success of these solutions depends on their adequate implementation. Interviews demonstrated that while some judges consistently assist SRLs and routinely employ many of the techniques discussed above, others do not. Truly promoting access to justice for all litigants requires that the duty of assistance given to SRLs be systemic and consistent. For example, we cannot have some judges modifying examination and cross-examination in proceedings with SRLs while others do not. The degree to which an SRL is assisted and is able to access justice should not depend on the judge before them. As a legal community we must want to foster active adjudication by spreading the word through systemic and mandatory continued judicial education. As the number of SRLs continue to rise, all judges need to be adequately trained to respond to the needs of those before them.[174] Greater judicial education would allow all judges to become aware of these techniques and apply them consistently when needed.[175]

Through qualitative interviews undertaken with ten judges at the Superior Court of Québec, this study considered procedural and evidentiary challenges faced by SRLs in family law matters. Based on these interviews, recent literature, and jurisprudence, it provided solutions to the problems identified. These solutions seek to improve access to justice for SRLs within a framework that upholds judges' duties of impartiality and assistance to create a fair process for all.

Although a separate set of rules for SRLs and lawyers is not the answer, rules must be conceptualized and tailored to those who must abide by them. Are SRLs able to tell their story? Do they leave the courtroom feeling heard and understood? The legal system exists to serve the public. Therefore, whether justice has been achieved must also be considered from the perspectives of SRLs. SRLs comprise a vast segment of those using Canadian courts, particularly in family law: "[SRLs] are not, as they are too often seen, an inconvenience; they are why the system exists."[176] Unfortunately, our legal system has been designed with a different, legally-trained clientele in mind. It is time that we "put the public first"[177] and create systems responsive to the realities of everyday people who must

174. This also requires judicial education focused on the lived experiences of diverse litigants that come before the courts.
175. While judicial education is and continues to focus on SRLs, this is not mandatory for all judges. Moreover, the public has no ability to know what training judges have taken in a certain area of law, nor the amount. Further, the content of many judicial trainings is not publicly available. For example, the National Judicial Institute does not often make the subject or content of their continuing judicial education publicly available..
176. Action Committee, *supra* note 24 at 7.
177. *Ibid*.

engage in them. Former Supreme Court Justice Rosalie Abella has long called for change in this direction: "[we must redesign] a whole new way to deliver justice to ordinary people with ordinary disputes and ordinary bank accounts. That's what real access to justice needs and that's what the public is entitled to get."[178] Truly promoting access to justice requires a change in how we operate and a readiness to explore innovative solutions.

178. Rosalie Abella, "Our civil justice system needs to be brought into the 21st century," *The Globe and Mail* (24 April 2020), online: <www.theglobeandmail.com/opinion/article-our-civil-justice-system-needs-to-be-brought-into-the-21st-century/> [perma.cc/8R68-RDN7].

Appendix A

Interview Questions

The data collection process will consist of semi-structured interviews lasting approximately 60 minutes each, with 10 judges. The interviews will be conducted in English or French, based on the wishes of participants. All questions relate to family law cases.

(1) What did you do before being appointed as a judge?
(2) Do you find you are increasingly seeing self-represented litigants in family law cases?
    a. What is the approximate percentage of family law cases you hear in which at least one party is a self-represented litigant?
    b. Is that percentage higher in family law than other areas of law?
(3) Are there things you do differently with a self-represented litigant in a family law case than another case?
(4) Do you deal differently when one party is a self-represented litigant vs. when both are?
(5) Do you think a judge should assist self-represented litigants? For example, explaining procedure, clarifying the position and legal issues through questioning, etc.?
    a. To what extent do you assist self-represented litigants during trials? Can you think of examples where you have assisted self-represented litigants?
    b. What are some of the techniques you use when interacting with self-represented litigants?
    c. How successful do you find these techniques in simplifying and expediting procedures?
(6) Do you think there are potential concerns regarding judges' increased interactions or involvement with self-represented litigants?
(7) What solutions would you propose to facilitate your interactions with self-represented litigants?
(8) Under the new CCP, judges have been given greater case management powers. Do you think this has had an impact on facilitating interactions with self-represented litigants?
(9) The literature often insists that self-represented litigants fare worse than those with legal representation. Do you believe that self-represented litigants are disadvantaged by their lack of legal representation? Does this have an impact on the outcome of the case?

(10) Do you believe it would be beneficial to have all family law cases dealt with in accordance with special case management (ie: dealt with by one judge throughout)?
(11) Do you think Quebec, like Ontario, should impose mandatory mediation for family law cases?
(12) Do you believe Quebec would benefit from a separate family law court, such as a unified family court in Ontario?
(13) Do you think a solution to tackling the challenges associated with self-represented litigants is increased legal aid?

Montreal Declaration
UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE

Unanimously adopted at the final plenary session of the First World Conference on the Independence of Justice held at Montreal (Quebec, Canada) on June 10th, 1983.

Preamble
Whereas justice constitutes one of the essential pillars of liberty;

Whereas the free exercise of fundamental human rights as well as peace between nations can only be secured through respect for the rule of law;

Whereas States have long established courts and other institutions with a view to assuring that justice be duly administered in their respective territories;

Whereas the Charter of the United Nations has established the international Court of Justice as its principal judicial organ in order to promote the peaceful solution of disputes between States, in conformity with the principles of justice and international law;

Whereas the Statute of the International Court of Justice provides that the latter shall be composed of a body of independent judges, elected regardless of nationality, which as a whole shall be representative of the main forms of civilisation and of the principal legal systems of the world;

Whereas various Treaties have established other courts endowed with an international competence, which equally owe exclusive allegiance to the international legal order and benefit from representation of diverse legal systems;

Whereas the jusrisdiction vested in international courts shall be respected in order to facilitate the interpretation, application and progressive development of international law and the promotion of human rights;

Whereas national and international courts shall, within the sphere of their competence, cooperate in the achievement of the foregoing objectives;

Whereas all those institutions, national and international, must, within the scope of their competence, seek to promote the lofty objectives set out in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Optional Protocol to the latter Covenant and other pertinent international instruments, objectives which embrace the independence of the administration of the justice;

Whereas such independence must be guaranteed to international judges, national judges, lawyers, jurors and assessors;

Whereas the foundations of the independence of justice and the conditions of its exercise may benefit from restatement;

The World Conference of the Independence of Justice recommends to the United Nations on the consideration of this Declaration.

1. International Judges

Definitions
LOl In this chapter:
a) "judges" means international judges and arbitrators;
b "court" means an international court or tribunal of universal, regional, community or specialized competence.

Independence

1.02 The international status of judges shall require and assure their individual and collective independence and their impartial and conscientious exercise of their functions in the common interest Accordingly; States shall respect the international character of the responsibilities of judges and shall not seek to influence them in the discharge of these responsibilities

1.03 Judges and courts shall be free in the performance of their duties to ensure that the Rule of Law is observed, and shall not admit influence from any government or any other authority external to their statutes and the interests of international justice.

1.04 When governing treaties give international courts the competence to determine their rules of procedure, such rules shall come into and remain in force upon adoption by the courts concerned.

1.05 Judges shall enjoy freedom of thought and, in the exercise of their duties, shall avoid being influenced by any considerations other than those of international justice.

1.06 The ethical standards required of national judges Sun the exercise of the judicial functions shall apply to judges of international courts.

1.07 The principles of judicial independence embodied in the Universal Declaration of Human Rights and other international instruments for the protection of human rights shall apply to judges.

1.08 Judges shall promote the principle of the due process of law as being an integral part of the independence of justice.

1.09 N reseation shall be made or admitted to treaty provisions relating to the fundamental principles of independence of the judiciary.

1.10 Neither the accession of a state to the statute of a court nor the creation of new international courts Shall affect the validity of these fundamental principles.

Appointment

1.11 Judges shall be nominated and appointed, or elected in accordance with governing constitutional and statutory provisions which shall, if possible, not confine the power of nomination to governments or make nomination dependent on nationality.

1.12 Only a jurist of recognized standing shall be appointed or elected to be a judge of an International court.

1.13 When the statute of a court provides that judges shall be appointed on the recommendation of a government, such appointment shall not be made in circumstances in which that government may subsequently exert any influence upon the judge.

Compensation
1.14 The. terms of compensation and pension of judges shall be established and maintained so as to ensure their independence. Those terms shall take into account the recognized limitations upon their professional pursuits both during and after their tenure of office. which are defined either by their statute or recognized and accepted in practice.

Immunities and Privileges

1.15 Judges shall enjoy privileges and immunities, facilities and prerogatives, no less than those conferred upon chiefs of diplomatic missions under and recognized by the Vienna Convention on Diplomatic Relations. Only the nowt concerned may lift these immunities.

1.16 Judges shall not be liable for acts done in their official capacity.

1.17 a) In view of the importance of secrecy of judicial deliberations to the integrity and independence of the judicial process, judges shall respect secrecy in, and in relation to their judicial deliberations;
b States and other external authorities shall respect and protect the secrecy and confidentiality of the courts' deliberations at all stages.

Discipline and Removal

1.18 All measures of discipline and removal relating to judges shall be governed exclusively by the statutes and rules of their courts, and be within their jurisdiction.

1.19 Judges shall not bc removed from office, except by u decision of the other members of the court and in accordance with its statute.
Judges Ad Roe and Arbitrators

1.20 Unless reference to the context necessarily makes it inapplicable or inappropriate, the foregoing articles shall apply to judges ad hoc and to arbitrators in public international arbitrations.

IL National Judges
Objectives and Functions

2.01 The objectives and functions of the judiciary shall include:
a) to administer the law impartially between citizen and citizen, and between citizen and state;
b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights;
c) to ensure that all peoples are able to live securely under the rule of law.

Independence

2.02 Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

2.03 In the decision-making process, judges shall be independent vis-a-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgment freely.

2.04 The judiciary shall be independent of the Executive and Legislative.

2.05 The judiciary shall have jurisdiction, directly or by way or review, over all issues of a judicial nature. -

2.06

a) No ad hoc tribunals shall be established;
b) Everyone shall have the right to be tried expeditiously by the established ordinary courts or judicial tribunals under law, subject to review by the courts;
c) Some derogations may be admitted in times of grave public emergency which threatens the life of the nation but only under conditions pre rihed by law, and only to the extent strictly consistent with internationally rognied minimum standards and subject to review by the courts;
d) in such times of emergency
I. Civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts, expanded where necessary by additional

competent civilian judges;
H. Detention of persons administratively without charge shall be subject to review by ordinary courts by way of habeas corpus or similar

procedures, so as to insure that the detention is lawful, as well as to inquire into any allegations of ill-treatment;
e) The jurisdiction of military tribunals shall he confined to military offences committed by military personnel. There shall always be right of app ei from such tribunals to a legally qualified anoellate court. ith the power shall be exercised so as to intcrfcrc ;ve judicial process.
b) The Executive shall not have control over judicial functions.
c) The Executive shall not have the power to close down or suspend the operation of the courts.

d) The Executive shall refrain from any act or omission which preempts the judicial resolution of a dispute or frustrates the proper execution of a court decision.

2.08 No legislation or executive decree shall attempt retroactively, to reverse specific court decisions, nor to change the composition of the court to affect its decision-making.

2.09 Judges may take collective action to protect their judicial independence.

2.10 Judges shall always conduct themselves in such a manner as to Preserve the dignity of their office and the impartiality and independence of the judiciary. Subject to this principle, judges shall be entitled to freedom of belief, expression, association and assembly.

Qualifications, Selections and Training

2.11 candidates for judicial office shall be individuals of integrity and ability, well trained in the law. They shall have equality of access to judicial office.

2.12 In. the selection of judges, there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements.

2.13 The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.

2.14

a) There is no single proper method of judicial selection provided it safeguards against judicial appointments for improper motives.
b) Participation in judicial appointments by the Executive or Legislature is consistent with judicial independence, so long as appointments of judges are made in consultation with members of the judiciary and the legal profession or by a body in which members of the judiciary and the legal profession participate.

2.15 Continuing education shall be available to judges.

Posting, Promotion and Transfer

2.16 The-assignment of a judge, to a post within the court to which he is appointed is an internal adEninistrative function to be carried out by the judiciary.
(Explanatory Note: Unless assignments are made by the court, there is a danger of erosion of judicial independence by outside interference. It is vital that the court not make assignments as a result of any bias or prejudice or in response to external pressures. These comments are not intended to exclude the practice in some countries of requiring that assignments be approved by a Superior Council of the judiciary or similar body.)

2.17 Promotion of a judge shall be based on an objective assessment 01 the candidate's integrity and independence of judgment, professional competence, experience, humanity and commitment to uphold the rule of law. Article 2.14 shall apply to promotions.

2.18 Except pursuant to a system of regular rotation, judges shall not be transferred from one jurisdiction or function to another without their consent, but such consent shall not be unreasonably withheld.
[Explanatory Note: Unless this principle is accepted, transfer can be used to punish an independent and courageous judge, and to deter others from following his example. This principle is not intended to interfere with sound administrative practices enumerated in the law. Thus exceptions may be made, for example, where a judge in his early years is transferred from post to post to enrich his judicial experience.]
Tenure

2.19

a) The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their detriment.
b) Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their term of office, where such exists.

2.20 The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they shall be phased out gradually.
[Explanatory Note: This text Is not intended to exclude part-time judges. Where such practice exists, proper safeguards shall be laid down to ensure impartiality and avoid conflict of interests. Nor is this text intended to exclude probationary periods for judges after their initial appointment, in countries which have a career judiciary, such as in civil law countries.]

2.21

a) During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions.
b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and be regularly adjusted to account fully for price increases.
c) Judicial salaries shall not be decreased during the judges' term of office, except as a coherent part of an overall public economic measure.

2.22 Retirement age shall not be altered for judges in office without their consent.

2.23 The executive authorities shall, at all times, ensure the security and physical protection of judges and their families.
Immunities and Privileges

2.24 Judges shall enjoy immunity from suit, or harassment, for acts and omissions in their official capacity.

2.25

a) Judges shall be bound by professional secrecy in relation to their deliberations, and to confidential information acquired in the course of their duties other tan in public proceedings.
b) Judges shall not be requried to testify on such matters.

Disqualifications

2.26 Judges may not serve in an executive or a legislative capacity unless it is clear that these functions are combined, without compromising judicial independence.

2.27 Judges may not serve as chairmen or members of committees of inquiry, except in cases where judicial skills are required.

2.28 Judges shall not be active members of, or hold positions in, political parties.
[Explanatory Note: This text is not intended to permit membership of judges in political parties in countries where under law or practice such is excluded, but to lay down standards limiting the scope of judicial involvement in countries where such membership is permissible.]

2.29 Judges may not practice law. [Explanatory Note: See note 2.20.]

2.30 Judges shall refrain from business activities, except as incidental to their personal investments or their ownership of property.

2.31 A judge shall not sit in a case where a reasonable apprehension of bias on his part may arise.

Discipline and Removal

2.32 A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice, and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge.

2.33

a) The proceedings for judicial removal or discipline, when such are initiated, shall be held before a court or a board predominantly composed of members of the judiciary and selected- by. the judiciary.
b) However, the power of removal may be vested in the Legislature by Impeachment or joint address, prèfèrably upon a recommendation of a court or board as referred to in 2.33(a).
(Explanatory Note: in countries where the legal profession plays an indispensable role in maintaining the rule of law and judicial independence, it is recommended that members of the legal profession participate in the selection of the members of the court or board, and be included as members thereof.

2.34 All disciplinary action shall be based upon established standards of judicial conduct.

2.35 The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing. discipline and removal shall be held in camera. The judge may, however, request that the

hearing be held in public, subject to a final and reasoned disposition of this request by the disciplinary Tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.

2.37 With the exception of proceedings before the Legislature or in connection with them, the decision of a disciplinary Tribunal shall be subject to appeal to a court.

2.38 A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour, rendering him unfit to continue in office.

2.39 In the event that a court is abolished, judges serving in this court shall not be affected, except for their transfer to another court of the same status.

Court Administration

2.40 The main responsibility for court administration shall vest in the judiciary.

2.41 It shall be a priority of the highest order, for the state to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency, judicial and adminstrative personnel, and operating budgets.

2.42 The budget of the court shall be prepared by the competent authority in collaboration with the judiciary. The judiciary shall submit their estimate of the budget requirements to the appropriate authority.

2.43 The judiciary shall alone be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court.

2.44 The head of the court may exercise supervisory powers over judges on administrative matters.

Miscellaneous

2.45 A judge shall ensure the fair conduct of the trial and inquire fully into any allegation made of a violation of the rights of a party or of a witness, including allegations of ill-treatment.

2.46 Judges shall accord respect to the members of the Bar.

2.47 The state shall ensure the due and proper execution of orders and judgments of the courts; but supervision over the execution of orders and judgments process shall be vested in the judiciary.

2.48 Judges shall keep themselves informed about international conventions and other instruments establishing human rights' norms, and shall seek to Implement them as far as feasible, within the limits

set by their national constitutions and laws.

2.49 The provisions of Chapter II: National Judges, shall apply to all persons exercising judicial functions, including arbitrators and public prosecutors, unless reference to the context necessarily makes them inapplicable or inappropriate.

ilL Lawyers
Definitions
3.01 In this chapter:
a) "lawyer" means a person qualified and authorized to practice before the courts, and to advise and represent his clients in legal matters;
b) "Bar association" means the recognized professional association to which lawyers within a given jurisdiction belong.

General Principles

3.02 The legal profession is one of the institutions referred to in the preamble to this declaration. Its independence constitutes an essential guarantee for the promotion and protection of human rights.

3.03 There shall be a fair and equitable system of administration of justice, which guarantees the independence of lawyers in the discharge of their professional duties without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3.04 All persons shall have effective access to legal services provided by an independent lawyer, to protect and establish their economic, social and cultural, as well as civil and political rights.

Legal Education and Entry into the Legal Profession

3.05 Legal education shall be open to all persons with requisite qualifications, and no one shall be denied such opportunity by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.

3.06 Legal education shall be designed to promote in the public interest, in addition to technical competence, awareness of the ideals and ethical duties of the lawyer, and of human rights and fundamental freedoms recognized by national And international law.

3.07 Programmes of legal education shall have regard to the social responsibilities of the lawyer, including cooperation in providing legal services to the poor and the promotion and defence of economic, social and cultural rights in the process of development.

3.0.8. Every person having the necessary integrity, good character and qualifications
In law shall be entitled to become a lawyer, and to continue in practice

without discrimination for having been convicted of an offence for exercising his internationally recognized civil or political rights.

Education of the Public Concerning the Law

3.09 It shall be the responsibility of the lawyer to educate the members of the public about the principles of the rule of law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties, and the relevant and available remedies.

Rights and Duties of Lawyers

3.10 The duties of a lawyer towards his client include: a) advising the client as to his legal rights and obligations; b) taking legal action to protect him and his interests; and, where required, c) representing him before courts, tribunals or administrative authorities.

3.11 The lawyer, in discharging his duties, shall at all times act freely, diligently and fearlessly in accordance with the wishes of his client and subject to the established rules, standards and ethics of his profession without any inhibition or pressure from the authorities or the public.

3.12 Every person and group of persons is entitled to call upon the assistance of a lawyer to defend his or its interests or cause within the law, and it is the duty of the lawyer to do so to the best of his ability. Consequently the lawyer is not to be identified by the authorities or the public with his client or his client's cause, however popular or unpopular it may be.

3.13 No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or represented any client or client's cause.

3.14 No court or administrative authoirty shall refuse to recognize the right of a lawyer to appear before it for his client.

3.15 It is the duty of a lawyer to show proper respect towards the judiciary. He shall have the right to raise an objection to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing.

3.16 If any proceedings are taken against a lawyer for failing to show proper respect towards a court, no sanction against him shall be imposed by a judge who participated in the proceedings which gave rise to the charge against the lawyer.

3.17 Save as provided in these principles, a lawyer Shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings, or in his professional appearances before a court, tribunal or other legal or administrative authority.

3.18 The independence of lawyers, in dealing with persons deprived of their liberty; shall be guaranteed so as to ensure that they have free and fair legal assistance. Safeguards shall be built to avoid any possible suggestions of collusion, arrangement or dependence between the lawyer who acts for them and the authorities.

3.19 Lawyers shall have all such other facilities and privileges as are necessary to fulfill their professional responsibilities effectively, including: a) absolute confidentiality of the lawyer-client

relationship: b) the right to travel end to consult with their clients freely, both within their own country and abroad; c) the right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional work; d) the right to accept or refuse a client or a brief.

3.20 Lawyers shall enjoy freedom of belief, expression, association and assembly; and in particular they shall have the right to: a)take part in public discussion of matters concerning the law and the administration of justice. b) join Or forfreely local, national and international organizations c) promote and recommend well-considered law reforms in the public interest and inform the public about such matters, and d) take full and active part in the political, social and cultural life of their country.

3.21 Rules and regulations governing the fees and remunerations of lawyers shall be designed to ensure that they earn a lair and adequate income, and legal services are made available to the public on reasonable terms.

Legal Services for the Poor

3.22 it is a necessary corollary of the concept of an independent bar, that its members shall make their services available to all sectors of society, so that no one may be denied justice, and shall promote the cause of justice by protecting the human rights, economic, social and cultural, as well as civil and political, of individuals and groups.

3.23 Governments shall be responsible for providing sufficient funding for legal service programmes for the poor.

3.24 Lawyers engaged in legal service programmes and organizations, which are financed wholly:, or in part, from public funds, shall receive adequate remuneration and enjoy full guarantees of their professional independence in particular by:
- the direction of such programmes or organizations being entrusted to an independent board, composed mainly or entirely of members of the profession, with full control over its policies, budget and staff;
- recognition that, in serving the cause of justice, the lawyer primary duty is towards his client,: whom he must advise and represent in conformity with his professional conscience and judgment.

The Bar Association

3.25 There shall be established in each jurisdiction one or more independent and self-governing associations of lawyers recognized in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person. This shall be without prejudice to their right to form or join, in addition, other professional associations of lawyers and jurists.

3.26 In order to enjoy the right of audience before the courts, all lawyers shall be members of the appropriate Bar Association.

Function of the Bar Association

3.27 The functions of a Bar Association in ensuring the independence of the legal profession shall be inter alia:
a) to promote and uphold the cause of justice, without fear or favour;

b) to maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession;
c) to defend the role of lawyers in .society and preserve the independence of the profession;
d) to protect and defend the dignity and independence of the judiciary;
e) to promote the free and equal access of the public to the system of justice, including the provision of legal aid: and advice;
f) to promote the right of everyone to a fair and public hearing before a competent, independent and impartial tribunal, and in accordance with proper procedures in all matters;
g) to promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation;
h) to promote a high standard of legal education as a prerequisite for entry into the profession;
i) to ensure that there is free access to the profession for all persons having the requisite professional competence and good character, without discrimination of any kind, and to give assistance to new entrants into the profession;
j) to promote the welfare of members of the profession and render assistance to a member of his family in appropriate cases;
Q to affiliate with, and participate in, the activities of international organizations of lawyers.

3.28 Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the Bar Association shall cooperate in assisting the foreign lawyer to obtain the necessary right of audience.

3.29 To enable the Bar Association to fulfill its function of preserving the independence of lawyers, it shall be informed immediately of the reason and legal basis for the arrest or detention of any lawyer; and for the same purpose the association shall have prior notice for: t) any search of his person or property, ii) any seizure of documents in his possessions, and iii) any decision to .take or calling into question the integrity of a lawyer. In such cases, the Bar Association shall be entitled to be represented by its president or nominee, to follow the proceedings, and in particular to ensure that- professional secrecy is safeguarded.

Disciplinary Proceedings

3.30 The Bar Association shall freely establish and enforce, in accordance with the law, a code of professional conduct of lawyers.

3.31 . The Bar Association shall have exclusive competence to initiate and conduct disciplinary proceedings against lawyers on its own initiative or at the request of a litigant. Although no court or public authority shall itself take disciplinary proceedings against a lawyer, it may report a case to the Bar Association with a view to its initiating disciplinary proceedings.

3.32 Disciplinary proceedings shall be conducted in the first instance by a disciplinary committee established by the Bar Association.

3.33 An appeal shall lie from a decision of the disciplinary committee to an appropriate appellate body.
334 Disciplinary proceedings shall be conducted with full observance of the requirements of fair and proper procedure, in the light of the principles expressed in this declaration.

IV. Jurors
Selection of Prospective Jurors

4.01 The opportunity for jury service shall be extended without distinction of any kind by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements.

4.02 The names of prospective jurors shall be drawn from a jury source list compiled from one or more regularly maintained lists of persons residing in the court's jurisdiction.

4.03 The jury source list shall be representative, and shall be as inclusive of the adult population in the jurisdiction, as is feasible.

4.04 The Court shall periodically review the jury source list for its representativeness and inclusiveness. Should the Court determine that improvement is needed in the representativeness or inclusiveness of the jury source list, appropriate corrective action shall be taken.

4.05 Random selection procedures shall be used at all stages throughout the jury selection process except as provided herein.

4.06 The frequency and the length of time that persons are called upon to perform jury service and to be available therefor, shall be the minimum, consistent with the needs of justice.

4.07 All automatic excuses or exemptions from jury service shall be eliminated.

4.08 Eligible persons who are summoned may be excused from jury service only for valid reason by the court, or with its authorization.

Selection of a Particular Jury

4.09 Examination of prospective jurors determining whether to remove peremptory challenges. shall be limited to matters relevant to a juror for cause, and to exercising

4.10 if the judge determines during the examination of prospective jurors, that an individual is unable or unwilling to hear the particular ease at issue fairly and impartially, the individual shall be removed from the paneL Such a determination may be made on notion of a party or on the judge's own initiative.

4.11 In jurisdictions where peremptory challenges are permitted, their number and the procedure for exercising them shall be uniform for the same type of case.

4.12 Peremptory challenges shall be limited to a number no larger than necessary, to provide reasonable assurance of obtaining an unbiased jury.

Administration of the Jury System

4.13 The responsibility for administration of the jury system shall be under the control of the judiciary. understandable, and delivered sufficiently in advance.

4.15 Courts shall employ the services of prospective jurors, so as to achieve the best possible use of them with a minimum of inconvenience.

4.16 Courts shall provide adequate protection for jurors from threat and intimidation.

4.17 Courts shall provide an adequate and suitable environment for jurors, and jury facilities shall be arranged to minimize contact between jurors and parties, counsel and the public.

4.18 Persons called for jury service shall receive a reasonable allowance.

4.19 Employers shall be prohibited from penalizing employees who are called for jury service.

Jury Consideration and Deliberations

4.20 Procedures shall be provided to prevent a trial from being terminated because of unforeseen circumstances which would reduce the number of jurors.

4.21 Courts shall provide some form of orientation or instruction to persons called for jury service, to increase prospective jurors understanding of the judicial system, and prepare them to serve competently as jurors.

4.22 In simple language the trial judge shall: i) directly following empanelment of the jury, give preliminary explanations of the jury's role and of trial procedures; ii) prior to commencement of deliberations, direct the jury on the law.

4.23 A jury's deliberations shall be held in secrecy. Jurors shall not make public, reasons for their decisions.

4.24

a) A jury shall be sequestered only for the purpose of insulating its members from improper imformation or influence.
b) Standard procedures shall be promulgated to make certain that the inconvenience and discomfort of the sequestered jurors are minimized.

V. Assessors
Status

5.01 In defining assessor, the following shall be considered: In general, on certain judicial, quasi-judicial bodies or administrative tribunals, the assessor sits with a judge, magistrate or other jurist, to assist him in his duties. In most cases he is ..a person who does not necessarily have legal training, but who has some specific professional qualification or socio-economic expertise, that pertains to the subject-matter under consideration.

5.02 In some cases, the assessor shares with his legally-trained colleague, responsibility for the decision to be rendered: this then becomes a multi¬disciplinary judicial or quasi-judicial body.

Appointment

5.03 Unless he is selected by the parties unanimously, the assessor shall be appointed by a neutral authority not involved in the dispute.

5.04 Unless agreed upon by the parties or provided by law, the assessor shall be paid according to the decision of a neutral authority not involved in the dispute.

5.05 The assessor shall be selected for reasons of integrity and competence especially relevant to the matter to be considered by him.

5.06 The assessor shall enjoy a tenure which guarantees his independence; if he serves on a permanent basis he shall be guaranteed security, adequate remuneration and conditions of service.

5.07 Before commencing his duties, the assessor shall take an oath or affirmation of office.

Exercise of Mandate

5.08 In the decision-making process, the assessor shall be free from any order or instruction by the authority which has appointed him, by the parties or by the professional associations to which he belongs.

5.09 The assessor shall have the right to participate in the decision with complete freedom and independence in the area of his jurisdiction.

5.10 The assessor shall behave in such a manner as will maintain the dignity of his position and the impartiality and independence of justice.

5.11 The assessor shall not sit in a case where a reasonable apprehension of bias on his part may arise.

5.12 The. assessor shall be free to withdraw for generally accepted reasons.

Powers and Immunity

5.13 The assessor shall be vested with the authority, immunity and powers necessary to carry out his duties.

5.14 The assessor shall not be sued or harassed for acts and omissions in his official capacity.

Dismissal

5.15 The assessor shall not be dismissed in the course of his mandate except for incapacity or misbehaviour.

Other contributors to the Montreal Conference
Mauro Cappelletti

Debo Akande
Marc-Andre Ballard,
Judge Jules Deschenes
Bttonier Louis Phillippe de Grandpre
Judge Guerin
Justice David K Haese
Justice Gonthier
Professor Mark MácGuigan,
Lord Lane
Judge Oxner
Mr. James Parkison
L.E.Pettiti,
Judge Poirier
Simone Rozes
Professor Shimon Shetreet
Manfred Simon
William Sinclair
L. 'M. Singhvi,
Sir Ninian Stephen

Chief Justice Leonard King

Michael D Kirby
Hans W. Fasching
M A Mutaleb
Marcel Storme
Celso Agricola Bar bi
Irma Lager
F. GrivartdeKerstrat
Enoch D. Kom
Peter Schlosser

Walther Habseheld
Peter Gilles
Manfred Wolf
K D Kerameus
D. B. Casson

I. R. Scott
Anand Prakash
Alessandro Pizzorusso
Yasuhei Taniguchi
Nobuo Kumamuto

J.M. Ganado
B. J. Van Heyst
Niki Tobi
Haakon I Flaraidsen
Alexandra M. PessOa Vaz
G.D. Andrew
A. trani Pelayo
Andrea Audersson
Joseph. M. N. Kakooza
Robert B. McKay
James M. Parkison

E. Vescovi

PRINCIPLES ON
THE FUNDING AND RESOURCING OF THE JUDICIARY IN THE COMMONWEALTH

INTRODUCTION

The **Commonwealth (Latimer House) Principles on the Accountability of and Relationship Between the Three Branches of Government**[1] state:
"Each Commonwealth country's Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchments of good governance based on the highest standards of honesty, probity and Accountability".

In order to fulfil this responsibility, the judiciary must be institutionally independent. The provision of adequate financial resources and autonomy in finance and administration are fundamental to institutional independence. The proper funding and repair of the court estate, the provision of adequate computer systems and up to date software for courts and court users, and the provision of adequate numbers of judicial officers (judges and magistrates) and court staff help access to justice, the rule of law, and the independence of the judiciary.

Institutions need to be accountable for the funding allocated. However, any measures such as cost control mechanisms, performance indicators or algorithms which assess the numbers of cases cleared, the reduction of delays, etc…, whilst being useful tools, should not be depended on in the allocation of funding. These processes must not impact adversely on the independence of the judiciary or the quality of justice.

The Commonwealth Magistrates' and Judges' Association (CMJA) has been concerned with the funding of the Judiciary for many years. In order to safeguard the independence, integrity, and accountability of the judiciary, it is imperative that adequate resources are allocated to the judiciary. Whilst there may be reasons for budgetary constraints imposed by the Executive Branch, the judiciary must not be treated like a department of state but as the third arm of democracy. Limitations imposed on resources allocated to the Judiciary severely undermine the rule of law and access to justice. Sufficient resources must be allocated to the judiciary in order for it to manage its

[1] *endorsed by Commonwealth Heads of Government Meeting (CHOGM) in 2003, becoming an integral part of the Commonwealth political fundamental values at the CHOGM in 2005*

functions in an efficient and effective manner. Without adequate funding, access to justice and the right to a fair trial within a reasonable time limit may be jeopardised. The existence of an impartial, honest, and competent judiciary and the observance of the law are essential to economic growth and investment and is the right of every citizen.

The following principles are intended to provide a framework for the Legislature and Executive Branches of State in relation to the funding of the Judiciary and to assist in better understanding and supporting the judiciary in the fulfilment of their functions. They will also provide a guide to the Judiciaries of the Commonwealth in their requests for sufficient funding.

[NB: *Judicial Officer in the Principles below refers to all judicial officers whatever their titles, of limited or unlimited jurisdiction and at any level*].

WHEREAS:

i. **Principle IV of the Commonwealth (Latimer House) Principles** of 2003 on the Three Branches of government states:
"Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought".

ii. **The Commonwealth (Latimer House) Guidelines on Parliamentary Supremacy and Judicial Independence** of 1999 annexed to the Principles state:
*"**Funding***
Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.[2]

Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary.

As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained". Chapter II (2).

iii. **The UN Basic Principles on the Independence of the Judiciary** of 1985 state that:
"It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions".

iv. **The Limassol Conclusions on Combating Corruption in the Judiciary of 2002** recommended that "……. *governments should allocate sufficient resources to the courts to ensure their ability to provide an efficient, impartial and accessible service;" (*10 ix) and *"to promote the recruitment and retention of persons of the requisite integrity and competence, Governments should ensure at all times that the remuneration of judicial officers is fixed at a level that will ensure that they enjoy financial security during their tenure of office and that upon retirement they continue to*

[2] The Guidelines provide in the footnote to this article that "*The provision of adequate funding for the Judiciary must be a very high priority in order to uphold the rule of law, to ensure that good governance and democracy are sustained and to provide for the effective and efficient administration of Justice. However, it is acknowledged that a shortfall in anticipated national income might lead to budgetary constraints. Finance ministries are urged to engage in appropriate consultations in order to set realistic and sustainable budgets which parliaments should approve to ensure adequate funds are available".*

enjoy such security" (10 xi).

v. The **Commonwealth Charter** agreed by Heads of Government and signed by the Head of the Commonwealth in 2013 states: *"We believe in the rule of law as an essential protection for the people of the Commonwealth and as an assurance of limited and accountable government. In particular we support an independent, impartial, honest, and competent judiciary and recognise that an independent, effective and competent legal system is integral to upholding the rule of law, engendering public confidence and dispensing justice"* (VII- Rule of Law).

vi. The CMJA adopted a **Resolution On The Lack Of Sufficient Resources Provided To The Courts** At Its General Assembly In September 2015 In Wellington, New Zealand (see annex 1).

THE CMJA, REPRESENTING ITS MEMBERSHIP IN THE COMMONWEALTH, HAS RESOLVED TO ADOPT THE FOLLOWING PRINCIPLES:

1. INDEPENDENCE

Institutional independence of the Judiciary and the individual independence of each judge must be protected as the right of every citizen to a fair trial and to the protection of their human rights and fundamental freedoms. No cost cutting can be allowed to undermine judicial independence.

Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.

The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.

2. ADEQUATE RESOURCES

Whilst budgets will always be subject to scrutiny by the Legislature, each state should allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with international standards and to enable judges to work efficiently without undue delay. This includes physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency; judicial and administrative personnel; and operating budgets. Where economic constraints make it difficult to allocate to the court system facilities and resources which judges consider adequate to enable them to perform their functions, the essential maintenance of the rule of law and the protection of human rights require that the needs of the judiciary and the court system be accorded the highest level of priority in the allocation of resources.

The independence of the judiciary and the quality of justice will be compromised both directly or indirectly by reducing the financial resources allocated or by restricting the number of judicial officers and staff appointed to deal with increasing responsibilities and caseloads.

The Judiciary should have the authority, independent of the other branches of power, to prioritise the allocation of its resources and to define the prioritisation of use of such resources in line with a set of transparent criteria.

Courts should not be financed on the basis of discretionary decisions of official bodies but in a

stable way on the basis of objective and transparent criteria. Funding of courts should not be subject to political fluctuations. No decision of the Legislature in relation to the Budget of the Judiciary should be reversed or diminished by the actions of the Executive Branch of State.

3. ROLE OF THE JUDICIARY IN THE BUDGETARY PROCESS

The budget of the Judiciary should be prepared by the courts or a competent authority in collaboration with the courts at all stages in the budgetary process. The Judiciary should have an opportunity to express its views about any proposed budget directly to the Legislature and having regard to the needs of the independence of the judiciary and its administration. The best approach is for a senior member of the national Judiciary in each country to appear before a Legislative Committee established for the purpose of determining an appropriate amount of funding for the Judiciary. The Committee should then advise the Legislature of the amount of the budget appropriation necessary to fund the Judicial branch for the upcoming year. The amount allotted should be sufficient to enable each court to function at the highest of standards and with sufficient judges to avoid delays.

In order to meet the expectations of society, the judicial budget should include resources to innovate and modernise in line with the development of information technology, but with due regard to providing continued access to justice by the public as well as open justice.

The maintenance of the rule of law requires long-term financial stability in the funding of the judiciary. Courts should not be funded only on an annual basis but should have the certainty of longer-term financial budgets. Funding of courts should be protected from fluctuations caused by political instability.

Judges should receive appropriate training in order to fulfil their administrative and financial responsibilities and have the necessary support to carry out this task.

4. REMUNERATION

The remuneration of judges must remain at all times commensurate with their professional responsibilities, public duties and the dignity of their office. Judges' remuneration should be sufficient to shield them from inducements aimed at influencing their decisions. Remuneration must be entrenched constitutionally or guaranteed in law so as to preserve judicial independence and impartiality. All discussions and negotiations relating to judicial remuneration should involve the judiciary.

The salaries and emoluments (such as, and including, benefits and pensions) of the judiciary should not be altered to the disadvantage after their appointment. A reduction in the remuneration and pensions or deterioration in working conditions of judges is likely to adversely affect the quality and the independence of the judiciary as well as adversely affect the recruitment and retention of suitably qualified persons as judges and should therefore be avoided.

The remuneration should be based on independently set standards that rely on objective and transparent criteria, not on an assessment of the individual performance as a judge.

There should be provisions for the periodic review of judges' remuneration by an independent body to overcome or minimise the effect of inflation. Recommendations by the independent body should be accepted by the Executive.

Judges should receive pensions after their retirement, which should be adequate and should be in a reasonable relationship to their level of remuneration when working to avoid any ethical challenges that might arise if they were considering returning to private practice as lawyers.

5. TRAINING

All budgets should include provision for judicial training including international, regional and local training. Proper training promotes high quality and prompt judicial decisions, which themselves strengthen predictability and legal certainty. The body responsible for judicial training, should be autonomous and have its own budget. The body responsible for judicial training should be under the supervision of the Judiciary.

6. ACCESS TO JUSTICE AND CONFIDENCE IN AN INDEPENDENT JUDICIARY

No budgetary constraints should be imposed with a view to restricting access to justice by members of the public. No increase in court fees should disenfranchise the public's access to justice.

The public must be confident in the independence and integrity of the judiciary and if they are aware that adequate resources are not being allocated, there is a risk that the judiciary will be seen as a pawn of the state. Any budgetary constraints must be explained in a transparent way.

Commonwealth Magistrates' and Judges' Association
July 2020

In preparing these principles, reference has been made to several international instruments and documents including the following:

(a) The Commonwealth (Latimer House) Guidelines on Parliamentary Supremacy and Judicial Independence (1998);
(b) The Commonwealth (Latimer House) Principles on the Accountability and Relationship Between the Three Branches of Government (2003);
(c) The UN Basic Principles on the Independence of the Judiciary (1985);
(d) The Limassol Conclusions to the Commonwealth Colloquium on Combating Corruption in the Judiciary (2002);
(e) The Commonwealth Charter (2013);
(f) The European Network of Councils for the Judiciary (ENCJ) report on "Funding the Judiciary" (2015-2016);
(g) Paper presented to the Commonwealth Law Ministers Meeting in October 2017 on "The financial and administrative aspects of institutional judicial independence drafted by the Commonwealth Secretariat's Rule of Law Section;
(h) First Study Commission of the International Commission of Judges 2017 on: ""Threats to the Independence of the Judiciary and the Quality of Justice: workload, resources budgets and other threats."

Annex 1

"**RESOLUTION ON THE LACK OF SUFFICIENT RESOURCES PROVIDED TO THE COURTS**
Adopted at the CMJA General Assembly September 2015, Wellington, New Zealand

Noting that jurisprudence and international conventions recognise that institutional independence is one of the fundamental pillars of judicial independence,

Noting that in every Commonwealth country there are pressures to reduce the cost of providing justice,

Noting that courts are expected to deliver results faster and with fewer resources, and

Noting that there is an ever increasing tension between governments who have the responsibility to fund the administration of justice and the courts that have the obligation to deliver justice,

Whereas, Paragraph IV of the Commonwealth (Latimer House) Principles on the Three Branches of Government states that adequate resources should be provided for the judicial system to operate, The Commonwealth Magistrates' and Judges' Association notes with concern the continued lack of sufficient resources provided to the courts in many Commonwealth countries,

Therefore, the General Assembly of the Commonwealth Magistrates' and Judges' Association records that the provision of sufficient resources to the courts is a fundamental constitutional obligation of the Executive branch of government".

SENATE OF CANADA

Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs

Issue 32 - Evidence

OTTAWA, Wednesday, September 30, 1998

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-37, to amend the Judges Act and to make consequential amendments to other Acts, met this day at 3:37 p.m. to give consideration to the bill.

Senator Lorna Milne (*Chairman*) in the Chair.

[*English*]

The Chairman: We have before us Mr. David Scott, the author of the 1995 Commission on Judges' Salaries and Benefits.

We await your comments with some interest, Mr. Scott.

Mr. David Scott, Chair, 1995 Commission on Judges' Salaries and Benefits: I wish to reaffirm that I am one of the authors of this report. The other two authors are Michel Vennat, a distinguished lawyer with Stikeman Elliot in Montreal, and Barbara Rae, a very distinguished businesswoman from Vancouver. Ms Rae was an enormous resource for us, because she brought her background in personnel management to the job without the baggage of a connection to the judiciary. Since I have spent all of my life in the courts, I have a certain amount of baggage about the judiciary.

[*Translation*]

Senator Beaudoin: Your report is very interesting. I have a question about page 28 of your report, where you recommend that the Judges Act provide for the payment of a lifetime annuity to a common law spouse under legally applicable circumstances. I don't have any trouble with the whole question of paying out pensions, because that comes under section 100 of the Constitution. Everything is fine from that point of view.

When it comes to common law spouses, what do you mean by, "we recommend that the Judges Act allow for payments to a common law spouse, under legally applicable circumstances."

[*English*]

Does this refer to provincial law or to federal law? What do you mean by that?

Mr. Scott: We mean legal situations in which a person qualifies as a common-law spouse, which assumes a certain period of cohabitation. Our intent was not to define any circumstances in particular, but rather to take common-law spouses who had established rights in accordance with provincial law in all of the provinces, and to carry that forward for the benefit of the common-law spouses of judges.

Senator Beaudoin: Some of my colleagues will return to the issue of a common-law spouse.

Senator Murray: It is assumed that both parties to the common-law union are legally free to marry; that is to say, not married to someone else.

Mr. Scott: Let me begin by saying that I am not a family law lawyer. However, I do not think that the definition of a common-law spouse assumes freedom to marry. If I understand your question, you are saying that if the person is already married, he or she is incapable of being a common-law spouse.

Senator Murray: Well, he or she is certainly incapable or legally marrying someone else.

Mr. Scott: I could be quite wrong, but I do not think that precludes someone from being a common-law spouse. In my understanding such a person can qualify as a common-law spouse.

Senator Beaudoin: Let us return to the first question on the commission. I do not have any problem with the commission as such. Whether we like it or not, the fact is that the Supreme Court has already said that, in order to protect judicial independence, we need an organization such as the commission. I know that Mr. Justice La Forest is dissenting on this, but the majority of the court is of the opinion that to have judicial independence we need a commission such as this one.

What is your opinion on this? I understand that the report is not binding on the legislative and the executive branches, but that if Parliament or the government disagrees, they must justify themselves, and even in court if necessary.

Did you study that problem for your report?

Mr. Scott: Senator, as a result of reading some of the debates which were held here, the only thing that alarmed me somewhat was the suggestion from some witnesses that the triennial commission system works fine and that we should stick with it.

My colleagues and I were in complete agreement that the triennial commission system not only did not work well, but that it did not work at all. It might have looked very appealing, but nothing ever happened. We felt very strongly that it became, as we said in our report, a mechanism that allowed the government of the day to do nothing about the judges, because doing something about the judges is a very unpopular thing.

The discussion that we are now having is most unique. Previously, no one wanted to do anything for the judges because people believe that judges were well looked after. That is, they have tenure and pensions and everything else, so there is no reason no bother with them. Politically, it is very unappetizing to be preoccupied with judges.

When we were appointed and began our work, we read what had happened before. Every previous commission had said that the system did not work. The government not take up any of the meaningful ideas for reform in terms of issues such as pay and allowances, nor did it take up any of the suggestions for reforming the triennial commission system. The thrust of our report is that this must be fixed.

Luckily, the decision of the Supreme Court of Canada in the P.E.I. case came along at the same time. We certainly were not anticipating that, nor would we have developed any such notion, although I would defend it. We felt that the government should be forced to react to the views of the triennial commission. Further, we felt that it should be forced to table a bill; that the government should be forced to do something in order to legitimize the process of inviting citizens to take part in this lengthy study and then allowing it to drift off before a committee and disappear.

The most important thing to me is for this committee and anyone charged with responsibility to recognize that the triennial commission system does not work.

As I understand it, the bill does not provide for what the commission suggested, which was a requirement to table the bill -- and I understand that that may be an unrealistic expectation -- but that the government will have to respond in some way. Therefore we now have this overlay from the court, and the whole process will be subject to judicial review and the test will be rationality.

I confess that I read the very impressive statements before you from the law professors. I am not nearly as alarmed about it as they are. Constitutional substance aside, I believe that a test of rationality for a commission report such as this one will be a very easy threshold for the government of the day to meet. If it cannot meet rationality, then, constitutional imperatives aside, what is wrong with the notion that the court advanced?

As a member of this commission, I believe that something must be done to fix this problem. The bill goes a certain way to fixing it. The Supreme Court overlay is another question.

Senator Beaudoin: I understand your point of view, and I have great respect for it. The question is, what happens if the government does not like it? A strong majority of the court said that the executive and the legislative branches must justify their points of view. At the end, if there is what in French is called une impasse, then the court may rule on the basis of rationality.

Mr. Scott: Should the government be told that it has to give reasons? The judges do not like to be told that they have to give reasons, so for the judges to tell Parliament that they have to give reasons may be a bit offensive.

The bottom line is that it is a rationality test, and I am not nearly as alarmed about that as others are.

Senator Joyal: We have tried to understand the fundamental changes to the principle of our Constitution stemming from this proposal in Bill C-37. To put the issue simply, section 100 of the Constitution vested the responsibility to ensure appropriate compensation for judges in the Parliament of Canada. The triennial commission did not produce a satisfactory result in a reasonable period of time. It seems to us that, in the judges' opinions, we ought to go to the other extreme whereby Parliament abandons its responsibility to have the final say in the vote for the appropriation to pay the salaries. In my opinion this is wrong. It is one thing to say that Parliament filibustered, but to amend the system by including a time frame within it so that there is an end result, either in the affirmative or in the negative, is the proper way to manage Parliament's responsibility. I can understand that and I think a reasonable citizen can understand that.

What goes beyond common sense is that the commission has no parameters to decide what constitutes a proper increase. The bill contains no criteria that defines the scope of the commission to decide upon what is a fair increase for whatever reasons they think are just. The other problem is that if the government does not give effect to the recommendations of the House of Commons or the Senate committee, or its own financial policies criteria, then the court might decide that there is litigation and the government must justify its decision in the court. We are both judges and parties in a decision like that. That is where the fine-tuning of the solution that is proposed to us must be investigated.

You have spent a lot of time with learned peoples to study the compensation for judges. Is it the same way in other countries -- that is, do the judges have the last word on their pay increase and must the governments in those countries abide by commission reports because they do not have the capacity to say "No"? In Canada, the government civil service and the armed forces, among others, have had their salaries frozen. Judges are like other people; they make an effort. I am not against an increase in salaries at all. In fact, judges are underpaid in my opinion. However, in order not to go to the other extreme, we must protect the principles in the new system that we are putting into place. Can we not find a middle balance compared to what existed before, which did not produce a satisfactory result for the learned justices? Can we go the other way? There might be another way to fine-tune this.

Mr. Scott: The way you divide it out is the way to divide it. The decision of the court that the judges will have the last word on their salaries is one question; the whole question of the government having to meet a rationality test as proposed by the court is another question.

As far as the commission is concerned and the analysis of what is appropriate compensation, this has a historical base. Before 1981, there was no independent assessment of any kind. The triennial commission was established by statute as the basis of getting some independent input for Parliament about what is appropriate. Criteria for that would not be a good idea. How would you establish it? Would there be limits? No. The commission -- that is, assuming that it is appropriately selected in terms of make-up -- should be able to free-wheel in terms of what they think should happen. They then make a report. Up to that point, we have an appropriate historical basis for doing this.

What happens next? In our brief, we say that instead of nothing happening, something must happen.

Senator Moore: Within a set time-frame?

Mr. Scott: Yes. Otherwise, it is a screen of some design. Something must happen.

I accept the proposition that under the Constitution, Parliament will decide. Parliament should have the last word. We are talking about the mechanism for ensuring that something happens. This bill, which does not go as far as we hoped it would, says that within a fixed period of time government must react with a position statement. The court is saying that they must give reasons and the court will have this judicial review power. Whether or not people find that desirable is an interesting question. The court has spoken, so what happens next?

The task here is to fix on the nature of the commission, its make-up and its jurisdiction. It is important that that not get lost in the minds of some who are outraged about what the judges are doing to the vehicle of this judgment. I am more interested in what happens down the road and having a workable, practical commission that does the job.

Senator Joyal: I totally agree with you, as do some of my colleagues around the table, when you talk about a time-frame and trying to establish some kind of compelling agenda so that we arrive at the end of that process to have it resolved. That is a common understanding.

I have a slight reservation about your statement that you do not want criteria. Even the Supreme Court of Canada said that the commission should have some criteria. The judgment of the majority of the court was that the body must convene if a fixed period of time has elapsed since its last report in order to consider the inadequacy of judges' salaries in light of the cost of living and other relevant factors. Even the Supreme Court of Canada has recognized that there must be some factors.

We cannot abandon to a commission the overall open-ended door to say, "Let us discuss whether or not we must increase judges' salaries." Perhaps judges in Australia had an increase last year. Our judges may say, "We work as hard as them, so we should have the same increase." There must be some criteria. Treasury Board negotiates with the union and they have criteria. The Government of Quebec will open negotiations with teachers, with unions, and with all the other services. They have some criteria such as equity, pay, and a lot of other principles that they want to implement.

It does not hurt my sense of democracy or fairness with judges if the commission is bound to follow specific criteria rather than offering us a general report that judges are nice people who are learned and forego part of their freedom to live in society because they are seen as symbols of rectitude, and so on. We all know that.

Let us frame the mandate of the commission so that Parliament has a fair perception that those people are not just looking for any kind of increase -- especially if we bound them to have a result at the end of the road. It is one thing to have everything on one side and nothing on the other side. I think it is a fair balance of the two. Even the court has recognized that.

Mr. Scott: I am not disagreeing with you. I am not saying that the commission should function arbitrarily. I am not sure how much needs to be said. The court said, "and other relevant criteria." Will we now statutorily define the criteria? These previous triennial commissions -- and let us exclude ours for the moment -- followed the same process, namely, analyzing what salaries were in the private sector, what they were in the practising bar, and what they were in the government. They were then compared, as were the cost-of-living increases. That is the relevant criteria.

If you talk about hard criteria, such as whether the judges' salaries should be measured against the salaries of civil servants, our American friends are in the process of trying to disengage that right now. There is a kind of lock-step arrangement there and they are trying to eliminate it. I am not saying that there should not be any criteria, but once you start down the road of developing criteria, you may create a monster. These commissions should take into account all the relevant factors -- certainly not irrelevant factors or arbitrary factors. You would not confine it to cost-of-living increases, although it would be a logical thing to consider. I am not sure what the relevant criteria would be.

Senator Joyal: When you did your report, you followed a certain number of criteria. What are they?

Mr. Scott: Those were exactly the criteria that anyone would use to complete this task. No one provided us with criteria. The criteria were: what the judges are making now, what they made previously, what they are making elsewhere, what groups comparable to them are making, and the judges' situation. The problem of what to consider was not a large one. The process of determining what to consider was important, but we were not stuck on it.

We were stuck on the question of whether we should be bound by some public service compensation level. That has been a traditional debate in these commissions. However, that aside, I do not think there was much problem deciding what to consider.

Senator Bryden: It is my understanding that under the bill the recommendation of government, based on the commission's report, will be presented to Parliament and enacted by Parliament. Is that correct?

Mr. Scott: Yes.

Senator Bryden: It is also my understanding that there are at least two places where the court now says clearly that it can intervene. First, it can intervene if the commission itself, like any other administrative tribunal, is alleged to have gone outside its jurisdiction. In such a case, it can quash the decision reached by the commission. The court probably cannot substitute its own position, but it can ask the commission to take the matter up again. That is the normal administrative law procedure.

The courts appear to be taking the position that, if the government acts on the commission's report and someone says that the government has made an irrational decision, that person can make an application to the court for a judicial review of the government's decision. That review could, in a proper case, allow for the quashing of that decision. Is that true?

Mr. Scott: Yes. My understanding is that the theme of the judgment is that the rationality test is tied to undermining independence. In other words, the basis for going this route is the question of preserving independence. I do agree with what you have said, however.

Senator Bryden: I do not want to bring in "the ubiquitous reasonable man," which is where the rationality test takes us, but I would like to go one step further.

The commission makes its recommendation, which is accepted by the government. The government drafts a bill and presents it to Parliament. Parliament debates the bill and rejects it. On the independence test under the Constitution, is it possible for an application to be made to a judge to quash the act of Parliament because it is in violation of the Constitution Act, which gives independence to judges?

Mr. Scott: Forgive me, because I am the furthest thing from a parliamentarian. If Parliament rejects the bill, however, is there an act of Parliament at all?

Senator Bryden: Let me just vary the question a bit. Let us say that the act of Parliament is passed, but it grants the judges only $1.

The concern that some of us have is that, after documents such as the Charter of Rights and Freedoms, Parliament has been allowed to keep very few real parliamentary rights vis-à-vis the courts. The time when Parliament was supreme went out the window with the Charter of Rights and Freedoms. Parliament has always jealously guarded its right to appropriate taxes -- the citizens' dollars.

That is what is troubling a number of us. Are the courts now saying, under the guise of protecting the independence of the judiciary, that the judiciary can override decisions made at the parliamentary level, and say that a particular judgment is irrational and interferes with the constitutional independence of the judiciary?

Mr. Scott: I believe that is what is being said. I will come to the reasons for that in a moment. If the government tables a bill that is not highly recommended by the commission, and the bill becomes law, it is my understanding that the case is saying that the courts, on judicial review, can intervene. That is a bit of a misnomer in terms of judicial review, because it would be questioning the constitutionality of a statute. However, that is the way the court would intervene. It would be confronted with this statute, and it would be exactly the same if the government proposed that the recommendations be followed and Parliament rejected it. I believe that you have analyzed that correctly. I may have this wrong, but that is my reading of it.

What happens if Parliament passes a bill which is deliberately drafted with a view to controlling the behaviour of judges by attacking them economically? What happens if the commission says that the judges have not had a pay raise for 40 years and they are on the poverty lines, yet Parliament attempts to further reduce their salaries? What mechanism do we have to deal with that?

Senator Bryden: The answer to your question is that you would get another Parliament. In a democracy, the final arbiter used to be the people who elected the parliamentarians and if the parliamentarians acted that ridiculously, the parliamentarians got voted out of office.

I hope I am not over-simplifying this, but the concern is that, in addition to all the other powers that now reside in the Supreme Court, we will now give the justices the power to tax. That is, they will be in a position to reject Parliament's decision that the people of Canada cannot afford to do a certain thing, even though it was recommended by the commission and by the government, and to increase the amount of money allocated for judges. We can go through this whole process and have the court says that the result is not acceptable.

Do the justices then fix the amount, or do they do the normal thing, which is to say, "Go back and try again"?

Mr. Scott: I think they say, "Go back and try again."

Senator Bryden: That is of real concern to many of us who grew up believing that Parliament had some power.

Mr. Scott: I understand that, and I suppose it depends upon one's point of view. I look at it entirely from the point of view of the independence of the judiciary. To take a far-fetched example, if a Parliament duly elected by the citizenry concluded that the judiciary was out of control and that therefore Parliament would undermine it economically, it would be modest comfort only to know that the Governor General might not sign the bill into law, or that we could have an election. Presumably, by this time Parliament is uttering the will of the people.

I understand what you are saying. I understand the concern.

I would be very surprised if the judges of the Supreme Court of Canada, and their numbers who supported this notion, contemplated it extending as far as you have described it.

Senator Bryden: I am sure they did not. We are here to try to make sure that we understand all the implications of what is being stated here.

It bothers me as an individual that this is the only time in 130 years that, to preserve the independence of our judiciary, the Supreme Court is requesting the right to review. It was never required before. Why is it necessary, all of a sudden, at this stage?

The Chairman: To follow up in the same area, if the court quashed a bill of this nature, they would not then have the power to tax, because what would stand at that point would be the previous bill, would it not?

Senator Bryden: Quashing it means that we must try it again.

Mr. Scott: It means that the existing regime would continue.

Senator Bryden: It is an indirect ability, because they could go back and say, "Add another 10 and another 10 until we get something that is acceptable."

If the judges rule and say that they will quash the bill for Constitutional reasons, does the notwithstanding clause then come into effect, or is there no ability for it to operate in that situation?

Mr. Scott: No, it does not come into effect in that situation.

Senator Murray: The process that is provided for in this bill is that the commission submits its report and the Minister of Justice is obliged to table it in each of the Houses of Parliament within 10 days, effectively. The report must then be referred to this committee, to the Senate, and to our counterparts in the House of Commons. They have 90 sitting days to report their findings. It then says that "the Minister of Justice shall respond to a report within six months after receiving it."

Are we certain that the obligation is there is for the Minister of Justice to respond to the commission's report or to the parliamentary committee? If you look at the marginal notes on page 4 there is "Report by Committee," "Definition of `sitting day'," and then "Response to report." I ask the question because it is quite normal under the rules in the House of Commons that the government is obliged to respond to reports of parliamentary committees within a certain period of time. We do not have a similar rule in the Senate.

I am not aware that ministers or the government are obliged by statute to respond to reports of other commissions, although they may be obliged to do so.

Mr. Scott: The intent is that the minister respond to the report of the commission. Whether that is regarded by senators as desirable or otherwise, I believe that is the intent. That is because we, and a succession of commissions before us, were of the view that the government should be required to respond rather than simply say nothing. That is my understanding, but I could be wrong.

Senator Murray: We should probably ask the minister.

The Chairman: That is a good question to ask the representatives of the department when they return here.

Mr. Scott: I think that is correct.

Senator Beaudoin: In the same line as the one taken by Senator Bryden, is it true that if the government is resisting the commission's recommendation, the government may have to justify its stand? If I understand the bill correctly, it means that the burden of evidence is on the shoulders of the legislated branch of the state. It is not often that we have that, but it is there. The court ruled on this in the provincial court judges reference.

However, the court may intervene only if it is not rational. That is the way I read the statute. It does not mean -- and I would object strongly to this -- that the court itself would fix the salaries. That would be quite unacceptable. I cannot see how we can go that far.

What is your understanding of this? In other words, the court may say: Your refusal is not rational. That means you must try again.

Mr. Scott: That is correct.

Senator Beaudoin: That does not mean more, which is quite something.

Mr. Scott: As Senator Beaudoin says, it is quite something.

Senator Beaudoin: At least the power of the court is on the irrationality, not on the question of taxation or things of that sort. I know it is close.

Mr. Scott: Rightly or wrongly, it is on rationality as measured by the undermining of independence. It is not economic rationality or some other rationality. I could be wrong, but that is the way I read the judgment. The court is concerned only with the issue of independence, so the rationality is at issue.

Senator Beaudoin: What was raised by Senator Bryden is that the last word is given to a court in a court case.

Mr. Scott: Yes, but it is not given to them to fix their salaries.

Senator Beaudoin: It is not to fix the salaries, so it means to try it again?

Mr. Scott: That is correct.

Senator Beaudoin: The court was not unanimous, but they do not need to be unanimous on this. There was a strong majority to that effect in the court.

Mr. Scott: That is correct.

Senator Beaudoin: We cannot go further than that on that precise question. We may like it or dislike it, but the fact is that there is already one advisory opinion of the court that says that the mechanism of a commission is good. We must abide by the decision of the Supreme Court of Canada.

I cannot see how we may use the notwithstanding clause in this because it is not a Charter case. It is a basic principle of the Canadian Constitution that is judicial independence. This is a difficult debate. The legislative area and the judiciary have been separate in Canada for 300 years. It is one of the basic principles of our Constitution. However, in a case like this it is a bit technical. I am glad that we must solve an interesting question like that.

Senator Sparrow: Let us say that there were no recommendations in the report that the status quo be maintained. What would happen then?

You suggested that that report must go to Parliament. If there was a status quo, you suggest that it still must go to Parliament with no changes. If they did in some way or other go to the house, the judge would determine whether Parliament had made an irrational decision.

Could the irrational decision have been made by the commission? That recommendation had gone, and now the government -- Parliament -- backed that decision, and it was irrational in both cases? Does the court still decide that the commission was irrational, as well as Parliament? If in fact there was no report, could that be considered an irrational decision because there was no recommendation for any changes?

Mr. Scott: I think that Senator Bryden's point is the correct one. If the commission exceeds its jurisdiction by irrationality, if that is possible, then judicial review would lie anyway.

My sense of the rationality here at issue is the government's response to the commission's report rather than the commission's report itself. In other words, the point of the independent commission is that it will be an independent adviser to government, and the concern is that governments are arbitrarily ignoring it. If the commission itself, by its methodology or what it says, is demonstrably irrational or lacks in jurisdiction or whatever, I believe that judicial review would lie anyway, whatever this case provides.

The irrationality or rationality is in the government's reaction to the commission's report. That is what I understand the Supreme Court of Canada is dealing with in the P.E.I. case.

Senator Sparrow: But if both decisions were irrational, in the opinion of a judge, what then?

Mr. Scott: I suppose that if the commission's decision were irrational to a level which merited judicial review, that would be the first step. Obviously, if the judges were challenging it, the first step is to either be supporting the commission's decision or attacking it. This is all premised on the proposition, as I appreciate it, that this independent commission will make a rational recommendation that will be arbitrarily rejected by government.

[*Translation*]

Senator Pépin: According to clause 45, a judge who is in receipt of an annuity can leave his pension to his common law spouse whom he has lived with for at least one year. Some people have pointed out to us that in most provinces, the requirement is three year's cohabitation. Could you explain this to us?

[*English*]

Mr. Scott: I have read what has been said to your committee about this. Certainly, three years is the provincial standard in many jurisdictions. I am not an expert in this area so I will be of no use to you. However, my understanding is that this is an expression of the regime in place in other areas. However, I have no idea whether this is a departure or whether this is an expression of the statutory regime in place in the provinces. I am just not on top of this. My recollection was that it was three years, but obviously this one-year provision is defensible based on the survivors' benefits, which do not apply to judges. I am sorry that I am of no help.

Senator Beaudoin: Someone said that this bill is harmonizing the situation of judges with that of people in other areas of the public service, such as the RCMP.

The Chairman: I believe that it is harmonizing it with the public service.

Senator Beaudoin: Yes, and even members of Parliament.

The Chairman: Yes. We will hear from another witness who is knowledgeable in this area. We can ask the question again then.

Senator Joyal: Did you study how other common-law systems comparable to Canada deal with this issue of judges' compensation to protect the principle of the judiciary's independence?

Mr. Scott: We did. While walking here from my office, I was wondering where our research papers had gone. They have all gone back to the judicial affairs centre and I will see if I can find them.

We did a study of that. As I am sure you have been told, in some Australian states they have negative resolution. I believe they have that in New South Wales. In others, they have commissions that have powers to recommend only. I could not list them for you, but the one most aggressively favourable to the judges is the negative resolution system, which is in place in New South Wales, Australia. The report is tabled and if there is no bill rejecting it, it becomes law.

Senator Joyal: Do you know the system in the U.K. generally?

Mr. Scott: I cannot recollect it. We did a study of that, but I cannot now remember what we learned. I will find out and send it up to the clerk.

Senator Joyal: I should like to come back to the question of rationality. As you realize, it is something that bothers us a lot. You say that the test would be rationality in reference with the maintenance of independency of the judiciary.

Let us take an example that we have experienced in the last years. We were in a difficult economic situation in terms of budgetary issues in Canada and the government decided to institute freezes all over the place. The judges were frozen, too, in terms of compensation.

Let us imagine that some time in the future the same situation arises and the government once again institutes freezes. The commission studies the workload of the judges and concludes that their workload has increased and they request a 2 per cent increase, which seems reasonable in a difficult time. However, the committees of the House of Commons and the Senate recommend against the commission's request, as does the Minister of Justice.

In such a context, where everyone is hit, where, in your opinion, does the maintenance of the rationality principle in relation to the independency of the judiciary stand?

Mr. Scott: A freeze across the board is rational. However, the judges did not always think that. It is very interesting what the Chief Justice said in the P.E.I. case. He said that a freeze across the board, although effectively a reduction, would be defensible.

The judges did not always think that. They did not like to be aligned with the executive branch of government, so they did not like to be swept in with other public servants. In respect of this last freeze, there was a lot of criticism on the part of the judges.

I read in the judgment that the chief justice acknowledges that an across-the-board freeze, where everyone bears the burden, would be rational. I regard that as an advance in judicial thinking. It would be rational, but the question is: What would be irrational? I am not sure of the answer to that question. I suppose that is part of the troubling nature of the problem, because what would be irrational in the face of what is perceived in society as unwarranted judicial activism is a massive reduction in compensation affecting only judges. The judges might regard that as an obvious attempt to undermine their independence and to control their behaviour.

Cases such as the one in P.E.I. have involved efforts include some independence problem associated with salaries. It arose from the fact that the executive branch set the salaries for judges, and the judges had no say whatsoever in the matter. There is always an effort to get the hook of independence into the question. That is why it is not just rationality per se, but rationality as tested by the stability of the independence of the judiciary.

Senator Joyal: On the same basis of your answer, a judge would recognize that when an effort is requested from everyone, it ought to be borne fairly by the judiciary, too. They are part of society as such.

Why are people so reluctant to have the criteria that the commission would follow mirror the criteria that Treasury Board follows when putting forward proposals that are within the framework of the government purse? Essentially, that is what Treasury Board must do when putting together a proposal for the unions. It would seem to be in accordance with the capacity of the taxpayers to pay at this point in time.

Mr. Scott: Perhaps I am pushing this point too far. I am not saying that there should not be any criteria, but at a certain point the criteria become developed enough that you do not need an independent commission. That is, you need only apply the criteria. You could say that the remuneration for the judiciary should be measured by the salaries of deputy ministers or by the incomes or benefits received by deputy ministers. That is the end of it.

I believe in the notion that for the judiciary, who are independent of government, there should be some mechanism for determining what is appropriate in terms of compensation.

I am not saying that we do not need criteria. What I am saying is that we need to determine the nature of the criteria. Will we consider the benefits received by deputy ministers? If so, at what levels? If you get to that point, then you do not need an independent commission, do you?

Senator Joyal: In the United States they have criteria, and they fix the level of compensation to avoid that kind of discretionary involvement of elected people, thereby protecting the independence of the judiciary.

When you put forward some criteria, is that not a way to contain the independence of the judiciary? In that situation you apply the criteria and then there is no discussion.

Mr. Scott: Except for the fact that such a solution presumes that criteria provide the complete answer. There is some judgment in here somewhere, and where there is judgment there is an opportunity to lobby for the judgment to go one way or the other. The way we get into this area is that judges cannot lobby; therefore, you must have an independent commission.

In the United States, there is an enormous boon from removing the link between judges' salaries and bureaucrats' salaries. That is not entirely the work of the judiciary. There is a feeling that the judiciary, as a separate branch of government, should be dealt with separately. The criteria change from time to time, depending upon the attractions of the bench. About four years ago, it was much more attractive to consider an appointment to the bench than it is now. People flocked to be appointed to the bench over the last 10 years. Before that, they did not do so, and they certainly are not doing so now.

You are trying to develop a system that matches what is available outside the judiciary in order to attract the right people. I would not favour simply establishing a set of criteria that says that judges will be treated like a certain group of people with all the same criteria. If you do that, you do not need an independent commission.

Senator Joyal: You said that there is a movement in the United States to deregulate the compensation mechanism for judges. Is that not a way for those people who fight for judicial activism to submit judges to the appreciation of discretionary compensation decisions?

Mr. Scott: The first group pushing for the removal of such a linkage is the judges. They feel that their situation and the need to attract the right people to the judiciary will not be addressed by putting them into a category with federal public servants and that, since they are a separate branch of government, they should be dealt with separately. The motives of others is another question, but that is a hot topic in the U.S. now.

Senator Joyal: I understand your point. Besides the cost of living index, the economic growth of Canada, and the objective that the government is pursuing in its budgetary policy involving salaries, you add the criteria of putting enough money on the table so that there will be enough candidates interested in the profession.

Mr. Scott: Yes, the right candidates.

Senator Joyal: In other words, we must make the package attractive enough to attract those we want to have, and not those who are looking for another job because they feel they are underpaid. Is that what you have in mind?

Mr. Scott: Yes.

The Chairman: I am rather surprised, Mr. Scott, to hear you say that this is not a position that people are avidly seeking. Most members of Parliament would be surprised to hear that, too.

Mr. Scott: But are they the right people? That is the question. From sea to sea, we have had a tremendous judiciary in this country. In my province of Ontario, the Court of Appeal has always had the top lawyers in the profession. This is not true in other countries. In other countries, the judiciary is frequently made up of people who have been appointed to the bench early in their lives. There is a completely different atmosphere in the judiciary. I make no apology for pushing hard for the idea that there should be enough independence in the effort to assess what judges should be paid to attract the right people. The right people are not necessarily Bay Street people, but people from communities across the country. We need to have the top people in the judiciary.

Senator Lawson: On the issue of criteria, I agree with Mr. Scott. I think it would be a serious mistake to try to have fixed criteria. I heard Senator Joyal say that the Treasury Board has some criteria, and I am sure that the executive board does. Every union does, but it is floating, flexible criteria that works on each individual occasion. You keep the ones which work, and if they do not work next time, you change them to meet the changing circumstances.

I have been involved in negotiations for over 40 years and I have learned that it is impossible to have fixed, rigid criteria. One or two criteria are obvious, such as the cost of living, but you simply cannot work within a strict framework.

Those parties with bargaining rights have flexible criteria. To attempt to apply it in this situation would be impossible. I agree with you that there is no point in having a commission if you are to have rigid criteria. Rather, it should be binding arbitration or binding conciliation, as it was in the old days: Fix it and leave it, with no appeal.

Mr. Scott: I do not think that a lot of people genuinely believe that there is a problem in attracting the right people to the bench. However, in reality, the opposite is true. We have some of the most wonderful people on the bench. Yet, every once in a while you get a rush of people who want to be judges and you see a hint of the other side of the coin, which is very unappealing. You see people who want to be judges because they perceive it to be easier work and because they are attracted by the pension, et cetera. Those people we positively do not want. They end up losing their spirit for it in no time at all, and the result is a disaster.

However, taking the point about the criteria, we do always have to be measuring how we compensate our judges against that body of people from which we are drawing to ensure that we are competitive. We obviously do not pay anything like the incomes that are given up, but we must pay enough to ensure that it will not be such an enormous step down that people will not do it.

Senator Bryden: It is interesting that the tremendous courts that we all know and have practised before have all come about without this type of protection. I do not know why we have to go further with it at this particular time. There was an old saying in law school that A students make professors, B students make judges, and C students make money.

As you know, the fact that a given lawyer is making $500,000 a year doing estates and commercial law in no way indicates that he is better than the carefully practising lawyer, even an independent practitioner, who is eking out enough to pay his secretary and his overhead and clear $80,000 or $100,000.

Mr. Scott: That is so.

Senator Bryden: I should like to go back to the issue of criteria or guidelines. Senator Lawson and I have both been in the labour business for a long time. The ability to go to economic warfare is in some instances removed in the public interest. For example, firefighters and sometimes police have the right to strike removed from them and replaced by arbitration.

In most statutes that make arbitration the final decision-maker, there are criteria laid out. If there are not criteria, you cannot take into account the employers' ability to pay. Therefore, the fact that the Province of Prince Edward Island could not afford to pay a 25 per cent increase would not be a factor that an arbitrator could take into consideration. Now they must because it is on the list. In other words, in your deliberations you must take the following into account.

There are criteria for the commissions in many provinces already. The Provinces of Ontario, British Columbia, Alberta, Quebec and Prince Edward Island have them. The act of Prince Edward Island, for example, includes as criteria the need to provide fair and reasonable compensation to judges, the management board policy and other relevant considerations respecting judges' expenses, any changes in the cost of living, the need to attract excellent candidates, the prevailing economic conditions in the province and the overall state of the provincial economy, and the salaries and benefits paid to other provincial court judges in other Canadian jurisdictions. I do not see it here, but it says probably "and any other relevant criteria," but under the ejusdem generis rule you do not get too far away from that sort of stuff.

New Zealand's statute includes very interesting criteria. They are: the need to achieve and maintain fair relativity with the levels of remuneration received elsewhere; the need to be fair, both to the persons or group of persons whose remuneration is being determined, and to the taxpayer or ratepayer; and the need to recruit and maintain competent persons. Those are criteria which the commission must take into account.

Mr. Scott: I started this by sounding as if I do not agree with Senator Joyal on this. I am saying that those are as obvious as they can be. It is not as though they are very earth shattering. While you were speaking, I wrote: "What would the criteria be? What others are being paid, what is being paid elsewhere, what is the cost of living, what is needed to attract the right candidates, and what is the state of the economy."

Senator Bryden: Then put it in the statute.

Mr. Scott: I have no problem with that, but once you go beyond that the problems arise.

Senator Bryden: The commission is to be comprised of three people -- one nominated by the judiciary, one nominated by the Minister of Justice of Canada, and a third, who will be the chairman, agreed upon by the first two.

As Senator Lawson and I know, in the real world people sometimes cannot agree on who the third person will be. There is no provision in the bill for what happens in that circumstance.

I asked the minister what would happen in such a case and her response was that the first two people chosen would be fired and the process would start all over.

I presume that if one party -- presumably the government -- wanted to stonewall the process, it simply would not agree to the chair.

Mr. Scott: That is interesting because most arbitration statutes provide that in the event of a deadlock you apply to a judge -- which would be inappropriate in this case.

Senator Bryden: That is my next point. To break a deadlock you apply to a judge, and the judge would have some degree of interest in who is appointed as chair. That is odd.

Mr. Scott: It is odd. The minister may be right. The minister could tell the two persons who were appointed that if they cannot agree within 10 days, their appointment will be revoked and two will be found who can agree.

Senator Bryden: The minister does not have the power to do that under the statute. They would just have to come to some agreement.

If the judiciary continued to quash recommendations of the government to Parliament, or if they had the ability to quash or find ultra vires under the Constitutional a decision of Parliament, I assume that the status quo would remain in place until a change was finally effected through legislation. Therefore, it is not particularly in their interest to be totally unreasonable.

Senator Moore: They can still change the legislation.

Senator Bryden: That is right, but I am a little concerned in that this whole issue basically grew out of judicial disobedience in P.E.I., where the provincial court judges took the position that they could not handle these cases because they were biased.

They were biased because the person who paid them was either reducing their pay or was not prepared to increase it. Therefore, in any case where you had the Crown, Regina, against Joe Blow, the judge might very well be prejudiced against Regina and let the guy off. To my mind, that is judicial disobedience, like civil disobedience. Finally, it bubbled up and the issue arrived here.

We are back at the arena of Senator Lawson and myself: Who has the most power? Parliament has the ability to refuse to pass the legislation, and the judges have the ability to say that, if that is true, they will not hear any cases. Somehow we have to be sure to avoid those circumstances.

About the question of criteria, there are some criteria already established by the courts. One of them we have not discussed because it does not happen very often. To my knowledge, it has happened only in one case at the inferior level.

In the case of provincial judges, the Supreme Court declared a reduction of salaries as invalid, as ultra vires. It forced the government to reimburse the judges.

When we read the question of independence of judges, we must take into account the fact that, in that case, we were concerned with the real problem because there were some reductions of judges at the provincial level.

I do not know in which constitution this is found but I remember having read a constitution that makes it impossible to reduce the salary of a judge. It is unconstitutional right at the beginning. There is no such thing in our country, but I guess we may infer from that that if there is a reduction, that is at least strike two for the government because it seems, prima facie, to go against the principle of the independence of the judiciary. What do you think?

Mr. Scott: I have two points on that. It is interesting that, in the P.E.I. case, the court concluded that an across-the-board freeze is, theoretically, a reduction. Because the cost of living is increasing, it is a reduction.

In the Beauregard case, the argument was that, after the judge's appointment, a change in the law requiring contributory pensions was a reduction. Chief Justice Dickson concluded that it was a reduction but it was a legitimate reduction. That case came from the Quebec Court of Appeal. There had been a bill in the house and, literally weeks after the judge's appointment, the law was proclaimed to the effect that judges, who before had free pensions, now had to make contributions. He interpreted that, not surprisingly, as a form of reduction of his salary. He sued Her Majesty and it went through to the Federal Court. He was successful at every level until the Supreme Court divided and he lost.

The court concluded -- and this was really the beginning in Chief Justice Dickson's notion of across-the-board, even-handed treatment. The conclusion was that everybody contributes to his or her pension so why should not judges contribute to theirs? They found there was nothing unconstitutional.

The argument was a constitutional one -- that salaries must be fixed and provided and that it is inappropriate to reduce them. It was rejected. A reduction without more is not necessarily, in contemporary terms, evidence of anything.

Senator Beaudoin: There may be a case where it might be justified.

Mr. Scott: It might be justifiable. I think it is the juxtaposition. In an interesting example, a bill was discussed in Arizona where, on the one hand, there was a lot of talk about judges being out of control -- which is the way it develops -- while, coincidentally, over here, there was a discussion about the level of their income being too high. If these things are discussed at the same time, it gives you pause and it is troubling. That is the kind of thing where a reduction may be seen.

Senator Fraser: Almost identical to that, I have been sitting here brooding about how this would play out in practice. I am really troubled by the notion of giving a profession the right to, effectively, control its own pay when its salaries are paid out of public money.

Senator Lawson: That is what MPs do.

Senator Fraser: MPs must go back to the public, which is why they get in such a dither every time they have to think about a pay increase. Judges do not.

I was comforted by the observation of the chairman that, if we are talking about salary increases, when a judge says no to a bill, he does not get any increase at all. He is stuck with the status quo. However, when it comes to reduction, I seriously wonder because then, if a judge says no to the bill, he does not get a pay-cut. He gets to keep what he has.

I have enormous respect for judges but it seems to me that some of their wisdom -- and the pension case you cited is one example -- goes out the window when their own interests are at stake. There was a situation in Montreal a few years ago where judges were actually arguing that, in order to preserve their judicial independence, they had to continue to have indoor parking spots, free, near the elevator.

Mr. Scott: Surely there must be more to the argument than that.

Senator Fraser: No, they were busy persons and did not want to have to walk the length of the garage nor pay for the space.

You have outlined a couple of interesting elements that suggest that, ultimately, the judiciary has come a long way, such as Justice Lamer's reference to an across-the-board freeze being fair, in particular.

I am trying to find out whether, in our present state, we could reasonably assume that, faced with cuts across the board, affecting everybody, in the situation of deflation or of dire budgetary stringency where government needs to reduce pay for everyone, the courts would sit still for that or stonewall.

Mr. Scott: I am confident that they would sit still now. I do not know that they would have done so 10 years ago.

Senator Fraser: You think we have come that far?

Mr. Scott: Yes, I do.

Senator Fraser: You think we can read that into Justice Lamer's comments?

Mr. Scott: Yes. I do not have the language at hand, but he virtually says that. If you have an across-the-board treatment that affects everyone based on economic conditions, of course the judges would be required to accept it. It seems self-evident.

Senator Fraser: Of course, but parking spots near the elevator also seems self-evident to me.

The Chairman: Thank you, Mr. Scott, for your help. You have kept the ball in our court.

Our next witness, Madame Lucie Laliberté, is a lawyer who has been doing research on women and pensions over the past 13 years. Her practice is focussed on family law. She is also the president of the Organization of Spouses of Military Members and has presented briefs on their behalf to the Government of the Province of Ontario, the House of Commons and the Senate Finance Committee. Ms Laliberté asked to appear before this committee because many of the proposed amendments in Bill C-37 are similar to those that she did research on for Bill C-35 and she thought that her experience would be of value to the committee, and the steering committee agreed.

Madame Laliberté, the floor is yours.

Ms Lucie Laliberté, Lawyer, Gahrns & Laliberté: I should like to raise one preliminary matter that arose from my discussions with the clerk before being allowed to appear here. I raised the issue that there is litigation on this matter before the courts at this time, and the clerk of the committee expressed some concern about that. For that reason I would like some direction.

I propose not to deal with the substance or the merits of the case, but it does relate specifically to the definition of "survivor benefit." I will keep my remarks limited to those issues that are raised in the case and also relate them to the issues that I found under Bill C-57.

Senator Beaudoin: Legally speaking, I do not see a big problem with this, if you are simply giving us the information you have in mind. As a committee of the Senate we have the right to hear witnesses. I understand your concern, but if you are prudent in your presentation, I do not see any problem.

Ms Laliberté: My concern was with the fact that the way it was presented to me, I might have declined to appear or I might have limited my presentation. I am a lawyer, so I worked my way around that. I appreciate your comments.

I will be speaking only to the issues relating to pension division and death benefits, including the survivor benefits in Bill C-57. I propose to start with a brief general comparison of the main provisions of the public service plans. The ones I am most familiar with are the CFSA, the RCMPSA and the PSSA, as opposed to some of the others that are covered there. I will then make a comparison with the Judges Act to show that the difference between the legislation is so significant that it cannot be said that what is happening is simply a harmonizing of those pieces of legislation.

The main point that I will be discussing is the fact that judges' pensions cannot be divided at source. No credit splitting is allowed, as is the case in all of the other pieces of legislation, including the Canada Pension Plan, and that significantly affects the impact on the survivor benefits part.

Before I deal with the actual problems, I should like to provide a different conceptual view of pensions as property and a contributory view of pensions as opposed to a dependency view of pensions.

I should like to start with the structure of the public service plans, specifically the three that I mentioned, first as they relate to marriage breakdown.

A credit splitting provision is allowed in all of those pensions. That is done pursuant to the Pension Benefits Division Act, which allows for an actuarial valuation of the pension plan and a lump sum transfer out of the plan into a locked-in RRSP for the spouse on marriage breakdown when it is done pursuant to a court order or to an agreement between the parties. As far as I can see, there is no such provision in the Judges Act.

There is also a provision in those pieces of legislation on marriage breakdown to allow for garnishment of salaries, as well as diversion of pension for support for children and spouses. The only thing I see in the Judges Act is that pension can be diverted; there is not a garnishment of salary for the purposes of support.

The next provision concerns what happens on death. In the public service plans there is what is called a supplementary death benefit pursuant to section 2 of the act. That is a declining term group life insurance benefit that is usually, with some exceptions, equivalent to two years' pay, paid out in a lump sum on the death of the member. That plan is contributory and the designation of the beneficiary is at the member's pleasure. It must be made, however, on a proper form. Situations have arisen where someone has designated a beneficiary in either a will or a separation agreement and it has not been upheld by the administrators of the plan.

It was originally designed to help defray the cost of funeral and other expenses when a person died. It has now been expanded to be much more than that. I relate this to section 46(1) of the Judges Act, but in the Judges Act it is only one-sixth of the pay, and that is to go to a surviving spouse on death. Under this amendment, there would not be a designation allowed. The beneficiary would be stipulated by the act.

There is also a provision for an annual allowance or a survivor benefit, which is generally 50 per cent of the pension benefit that is being paid or will be paid. That is to go to a surviving spouse, which does include a common-law spouse. However, the determination of who the surviving spouse is for the annual allowance, the monthly benefit, is also made by the administrator and not by the contributor. Contributors cannot designate who will receive the annual allowance or the survivor benefit. That is done totally at the discretion of Treasury Board, and we have been told that those decisions and the criteria that are used are governed by cabinet secrecy because, in essence, the legislation gives that power to the minister. We have had some difficulty trying to find out what the criteria are.

I will say, though, that everything is defined by marital status on the death of the contributor and there is actually a clause to prevent there being two spouses. The first spouse can actually be deemed to be dead, to have predeceased the contributor, in order to give the survivor benefit to the common-law or second spouse.

We have been told by Treasury Board that they do not apply that any more, but it used to be applied when the first spouse was separated and cohabiting with someone else herself. They would then give the whole benefit to the person who was cohabiting with the contributor. The law is still on the books. It is the subject of a challenge right now but it is still in the discretion of Treasury Board to do that.

Having said that, when deciding who the survivor is, they closely scrutinize who is living with whom and what the marital status is of the parties. Therefore, if a person is divorced, that person can never get the survivor benefit. If there is a separation, one of the criteria is the length of time the parties have been separated. If they have been separated for 10 years, no matter who was there during the contribution period they would decide in favour the common-law spouse.

There is also a definition of "surviving spouse" that is similar to the proposed new definition. There is no definition of "spouse" in the Judges Act and there is no definition of "surviving spouse." Under the amendment, the definition of "surviving spouse" includes "common-law spouse," but it really does not exclude "divorced spouse." There has been testimony before you that it has been interpreted that way and that divorced spouses can never receive the survivor benefit. That is the subject of an ongoing challenge. I will discuss the reasons for that once I have gone through the basic structure of the act.

There is also a minimum benefit to be paid out under all of these plans. That minimum guarantees that five years of contributions will be paid to the contributor. By that I mean that if a person dies after contributing to the plan for 20 years, but not yet having started to collect a pension, the estate can receive up to five years' worth of the benefit. If they were retired for two years, for example, their estate is still entitled to three years' worth of contribution, and that is integrated with any survivor benefits.

For example, if a spouse received a survivor benefit, or the children received a survivor benefit, that is deducted from the five-year minimum before the payout is actually given to the estate. As a further example, to clarify that, if there is no survivor, there are no children, and the person dies one day after retirement, the estate would get five years' worth of contributions.

This appears to be similar to section 51 of the Judges Act, but the judges receive only a return of their contributions into the plan, if that happens.

The Canada Pension Plan also allows for credit splitting. There is a distinction made in all of these plans between the pension benefit itself, which is deemed to die with the contributor, and the survivor benefit, which is seen to be an add-on, something extra that is different from the pension benefit itself. That is very important because it causes problems later on when spouses separate or divorce.

It is also a significant difference with the Judges Act, because when credit splitting is not allowed it makes a real difference in determining the fairness of who gets the survivor benefit.

Senator Moore: What do you mean by credit splitting?

Ms Laliberté: By that I mean that there is a lump sum paid directly out of the plan. In the case of CPP, there is a lump sum value placed on the benefit and it is prorated. That is put into an account for the non-member spouse on marriage breakdown once there is an agreement or order of the court on that marriage breakdown.

By credit splitting under the public service plan I mean that under the Family Law Act the value of the pension is an asset to be divided between the parties. In terms of a credit split, the Pension Benefits Division Act says that once the Family Law Act has been applied and there is an agreement or an order in place, then there is a enforcement mechanism.

Senator Moore: Which establishes the value of the asset to be distributed between the two individuals, the former spouse and the current spouse.

Ms Laliberté: That is right, and that includes the division of all of their property; the value of the pension, the value of severance pay, the value of houses, cars and RRSPs -- whatever they have. You come up with a number at the end. Then you can go to the pension plan itself and tell them to put a certain lump sum amount into a locked-in RRSP for the other spouse. That is what I mean by credit splitting.

The plan determines what the value of the plan is and, in order to maintain the viability of the plan, they say that there is a maximum amount allowed to be transferred out of it. If there is a shortfall, the spouses have to determine how that shortfall will be met if they reach the maximum allowed under the act.

That is what I mean by credit splitting. There is also another way of doing that, for which we argued previously but which was not done, and that is to impose a trust on the plan, separate out the spouse's portion and give it to her on a monthly basis when the pension comes into receipt. That has been systematically rejected, but it would still seem to be a viable option and not difficult administratively, because it is already done for purposes of support.

I should like to look quickly at the Family Law Act as well before I make the links with this legislation. There has been some talk in previous testimony that the common-law definition of "spouse" in the Family Law Act applies to property divisions. It does not. It only applies to support.

It is not just a definition of three years. It can be less than three years if there are children of the relationship and it is a relationship of some permanence. It can be less than three years in the Family Law Act.

This also happens in a number of pieces of legislation where you can have two different definitions. It happens in the Succession Law Reform Act as well, where there is an extended definition of spouse there, under the dependency provision that actually includes former spouse, as well as common-law spouse and legal spouse.

I believe I have defined how the property division occurs already due to that first question. I will move on to a concept of looking at pensions that is different from what I have also heard in previous testimony, and that is not looking at it as a dependency or as stereotypically something that is given as a gift to someone.

The family law legislation regarding property and pensions in Ontario was changed in 1986 to reflect the fact that marriage is a partnership and that a pension is something that is earned by both parties. It is a deferred savings plan that is earned by both of the parties throughout the contribution period. That view of it was also supported in a Supreme Court of Canada decision called Clark v. Clark, which said that Mr. Clark's pension was security for their retirement. The wife's contribution to the marriage partnership enabled Mr. Clark to maintain his employment and accumulate the pension benefits.

We are trying to have a shift in thinking. Pensions are earned over a long period of time and all the legislation only looks at a specific point in time, which is the contributor's time of death. In our view, that is where the unfairness comes in, because if we start looking at it as something that the spouse has earned throughout the partnership, then the way we view survivor benefits as well will be very different.

Those are also some of the arguments that we have for a Charter argument under section 15(6) discrimination because, in virtually all cases, it is the woman who is the non-contributing spouse, particularly in the Canadian Forces. In this, I am assuming with the judges, given the make-up of the courts right now.

If we are looking at it not as a dependency or as a gift but something that is earned, then it will help when I define some of the unfairness and inequities that still exist in the previous legislation that has been changed and that may be implemented again under Bill C-57.

I also submit that having that view removes any moral dilemma, if you will, as between common-law spouses and married spouses. If we look at it as something earned during the contribution period, then it may be fair to divide credits if a common-law spouse was there through the contribution period because she was contributing to the earnings and it was that particular group whose income was generating the pension ultimately.

I see problems in Bill C-57 in what is left out of it, as well as what is in it. The very first problem is that there is no method of credit splitting and, if there are no other assets on marriage breakdown, a divorcing spouse must take the pension on what we call an if-and-when basis. That becomes very hazardous to a divorced spouse. Previous witnesses have said that if spouses are divorced, the wife can never get the survivor benefit. Since the pension itself dies when the member dies, she loses her pension entitlements. If she does not have proper insurance in place to protect her, she has lost all of those benefits.

As an example, if you are looking at a high-ranking military officer, the value of the pensions I have seen can be as high as $800,000. You could be talking about $400,000 that should go to the ex-wife, and if he were to die the next day she has no way of enforcing her entitlements.

The other problem with that is when the spouses are divorcing, if there is no other way of enforcing that entitlement as between the two spouses, it causes a dilemma for them upon divorce. With a judge's pension you are probably looking at values of over $1 million if you have a long-term pension. If he cannot come up with $500,000 to give her and there are no other assets, or the assets only cover $250,000 of it, for example, in a matrimonial home, if he dies and she cannot get the survival benefit, she has lost $250,000. That severely affects her long-term viability financially, and it also shows why it would be unfair then to split the survivor benefits in the way that this bill is suggesting.

Prior to 1986, when there was no credit splitting, or early on into the legislation, sometimes the spouses were given the property entitlement as support. Today we have credit splitting and it is now the subject of litigation. Women either do not have the money to change their agreements to make it property so that they can now do the credit splitting, or they expect that they will be able to get the survivor benefit and they, sadly, find out when the contributor dies that they have lost their support entitlements.

We also have members who divorced, for example, in 1978. Their support is still intact but they were never given a share of the pension, though they were there through the contribution period. That is why I am saying it is important to look at it as something that was earned. In that case, you could look at it as what we call a constructive trust. There is an unjust enrichment that goes on. If she was there through the contribution period, she earned those pension entitlements, on our argument. Now, when he dies, she does not get the survivor benefits. That is an ongoing problem. There are fewer and fewer of those women, but it is still happening.

We also have a situation where we have a divorced spouse suing a second spouse -- right now there are several of them -- to get those survivor benefits. That is ongoing. In our view, it is really unfair. She may already be destitute; she has lost her support; she did not get the pension; she is often on social assistance at this point, and she must litigate to get the survivor benefit.

In this particular situation, the second spouse has already separated and she has her own pension as well, so she is getting the survivor benefit and her own pension. The first spouse of 30 years is getting nothing and living off the largess of her family actually, her children, at this point in time. That is in spite of the fact that we have credit-splitting legislation right now.

The reverse of that is if there is a split of credits, or if the parties have a way of splitting the pension between them. If that clean break has been made and all those assets could buy out that share of the pension, then I would say that the witnesses before you are correct. The apportionment through the contribution period between a common-law spouse and a separated spouse may be right, except that there is a problem in that there is a distinction. You can get divorced after living separate and apart for one year, but you can sever all the property and support issues. A divorced spouse who does not have her pension entitlements cannot get the survivor benefits when the contributing spouse dies.

However, if the parties are just separated and already have an agreement or a court order in place, the separated spouse can get an apportionment of survivor benefits. That is a serious inequity, which already exists in the previous legislation and will be put into this legislation as well, if it goes through the way it is now designed.

I want to make one other point in terms of the differences, and I am not absolutely positive on this particular point. I only found out that I was appearing yesterday and I did not really know that this was happening on survivor benefits until Friday. In terms of the interest rate for return of contributions for judges, I am reading that as 4 per cent compounded yearly. My understanding is that, in all the other plans, it is only 4 per cent simple interest. That may have changed since our previous presentation, but that is also a significant difference between the two plans. It does not directly have an impact here, but it could in terms of valuing pensions for the purposes of marriage breakdown.

The Chairman: We believe that has been aligned to changes in the public service, but that is a question we may have to ask.

Ms Laliberté: It should be checked.

Senator Murray: Ms Laliberté, have you turned your mind to the amendments that would be needed to correct the deficiencies which you have outlined in this bill? I do not mean a legal draft, but have you eyeballed the bill?

Ms Laliberté: First, we are trying to get a definition of "surviving spouse" for the other pieces of legislation.

We do not want to go with an interpretation by the administrators of the plan because, as I said, we do not have one. We have an extended definition of surviving spouse that included "former spouse," the way we have in the Ontario act regarding succession law reform.

It would be a start. You would still have a problem because you would have to link that to whether there had previously been a division of the pension credits.

There is something that I left out and it may be pertinent here. When a spouse gets a lump sum transfer out of the Pension Benefits Division Act, the act stipulates that she cannot get a survivor benefit. I would submit that is fair because she has already got a split of the pension credit. You would have to allow for that if you extended the definition of former spouse. It would have to exclude a spouse if all the splits had been done fairly and there had been a clean break between the spouses.

Senator Murray: As a layman, I have some difficulty with some of these terms. What is a "former spouse"? A spouse from whom one is divorced?

Ms Laliberté: Yes. Also, if we are looking at this as earned benefits between two people, which are shared on marriage breakdown, that could be a common-law spouse. The Pension Benefits Division Act itself allows for a credit split for common-law spouses and a period of cohabitation.

Senator Murray: Forgive me, but can you offer a definition of common-law spouse or common-law union?

Ms Laliberté: No. That is because it depends on which statute you are examining, if you want a statutory definition. If we are looking at "common-law," it is determined in each individual case. In determining who is a common-law spouse and who is the spouse who will get the survivor benefit, they will look at the bank accounts and whether they are shared. They ask if they take vacations together. Are they sleeping together? Do they have children together?

Generally, if the courts are making that determination, they are looking at the mode of living of the parties and how closely they fit a traditional definition of legal spouse. They look at all of those things.

Senator Murray: It does not matter whether the parties to the common-law union are both legally free to marry?

Ms Laliberté: No.

Senator Murray: That is not taken into account at all?

Ms Laliberté: No, it is not taken into account. That leads to all of the newspaper articles about harems and that sort of thing. I think we can bypass that by looking at the contribution period: Who was there through the contribution period? Where it is fair, one can look at the work that was done, the family funds that were used or of which the family was deprived.

If you always go back to that point and look at it as an earned benefit of both spouses, not just the contributing spouse, you can bypass some of that. However, you still must come up with definitions.

Senator Murray: It is not fair to ask you for free legal advice, but you have come here and possibly you would provide to the chairman or to the clerk a brief outline, without necessarily doing the drafting, of the changes that you think would be necessary in this bill?

Ms Laliberté: I practise family law and I do not do much legislative drafting. I draft agreements and that sort of thing. I believe Treasury Board has already grappled with this issue and either did not want to, or could not come up with, some definitions.

We are looking back historically over years, particularly with the Canadian Forces, because they have had pension plans for the longest period as they tried to recruit and retain personnel for brief periods of time. They would disenfranchise a spouse if she was independently wealthy, way back. We need to free ourselves from the old history on this, bring ourselves up-to-date in concept.

I am prepared to do some of that but it is really difficult when you are dealing with such an old concept, which still looks at who the spouses are and their marital status on the day the judge dies. We are really still looking at stereotypes. You are saying that the person he is with right now is the person who should get all the benefits. Why is that?

We are focusing on "him" and it almost makes it look like there are two women fighting over this. The reality is that we focus on the contributor. It is the judge's benefit and the judge should get to decide who will receive it.

We are trying to shift away from that. Those are basically section 15 arguments.

Senator Murray: Have you looked at this bill in this context?

Ms Laliberté: Yes, I believe there are some section 15 Charter challenges in Bill C-37 related to the survivor benefits. There is already one in process based on the other legislation. What you are doing here, especially as it relates to the definition of "surviving spouse," is entrenching that. Everyone has been focusing on "common-law spouse," but I say this relates to former spouses and the depriving of benefits from spouses who were there for the whole contribution period.

Senator Joyal: I cannot resist the temptation to propose to you a specific case and then to try to pin down the principles at stake. Examples are always easier to understand.

Let us make the following case. A judge has a common-law spouse for, say, ten years. He has children with the person and then they break up. He lives with a person for one year, in a common-law situation. Who gets the money?

Ms Laliberté: Who gets the survivor benefit? I always want to be very clear. We are not looking at the pension benefit. We are looking at the survivor benefit. Under this legislation, in my view, the person who was there for one year receives the survivor benefit.

Senator Joyal: The bill does not recognize the common-law situation while in fact the judge may have had a "family" with the first person for 10 or 15 years. Of course, they are not legally bound in the ordinary concept of marriage, even though they may have some financial responsibility to one another for the child. For instance, that person would be totally deprived of the benefit of the surviving spouse within the framework of this bill.

Ms Laliberté: Under family law legislation, she would not get a share of the pension either, unless she could make a constructive trust argument of her own that he would be unjustly enriched. That first person of 10 years could be deprived of the pension benefit under family law and also deprived of the survivor benefit under this bill, if it becomes law.

Senator Joyal: My point is well made. The principle now at stake is the one that you stated in your opening remarks, namely, the test of dependency versus the test of partnership.

This rang a bell in our ears because we heard from the minister last week. She said that the department is reviewing the concept of "spouse" in the family unit on the basis of dependency.

I am puzzled by that. I wonder if we are going backwards by returning to the principle of dependency and not partnership, the way you have outlined it to us. Could you expand on that so that we can profit from your experience in your practice of law in that regard?

Ms Laliberté: I believe that it is a step backwards to have an overview of the whole legislation based on dependency. Although you find that there is a financial dependency, that is built up on the fact that you do not recognize all the unpaid work that these spouses are doing throughout the contribution period. That is where we moved ahead with family law legislation across all the provinces to make that distinction. Although there was a financial dependency, you did not want the person who was being paid for their labour getting all the financial benefits of the marriage partnership when the marriage broke down. The Supreme Court of Canada has spoken clearly on that in relation to support. That is why the family law legislation was changed in the mid-1980s to divide the value of the pensions assets.

Part of the problem is that survivor benefits have not been determined to be an asset. There is one case where the judge declined to put a value on the survivor benefit. To a certain extent, I see the reasoning in that decision because the judge, in this case, will never see that benefit. They thought they could not make that a benefit for the judge. It is possible that they could make the argument that the survivor benefit is actually the property of the spouse who is there throughout the contribution period. That has not been done yet. It may not be something that will happen in the other pieces of legislation because we have credit splitting. But, with the judges, you might find women litigating that aspect of it in order to get the survivor benefit, particularly if they have been deprived of the actual pension benefits themselves.

Senator Joyal: For me, the question of dependency does not put the two persons on an equal footing. There is always someone who waits for someone else to do something. This is contrary to equality on the spousal relationship. A spousal relationship -- be it a same-sex relationship or a heterosexual relationship -- whether or not they have children or both of them are billionaires, is an equal kind of relationship. Anything that accrues to one partner should benefit the other in the context of pension, even if they do not need the pension, because the spouse might be richer than the person who has contributed to the pension.

The question of dependency touches upon something that I have a reluctance to envisage in the principles that I think are right. I might be wrong, but that is how I see the situation.

Ms Laliberté: It is only support that is based on need and the ability to pay. Assets are determined and equalized between the parties in family law. It used to be that pensions and survivor benefits were based on need, but that is not, and should not, be the case any more. That is what I see the minister saying. I briefly read her comments and I feel that same apprehension. That is a step in the wrong direction. We should be looking at an equal partnership and then looking at the survivor benefits after that.

Senator Joyal: Should we be looking at them as assets?

Ms Laliberté: That is right.

Senator Joyal: That is an important concept at stake in defining the surviving spouse. As you said, there is no definition of "surviving spouse" contained in the other legislation that you studied.

Ms Laliberté: There is no definition of "surviving spouse" in the Judges Act and they are adding something that already has no definition. That is problematic. There is no definition of "spouse" there, either.

When you leave the interpretation to Treasury Board or to the administrators, they have determined that the former spouse cannot be a surviving spouse. When you do not have the definition, it works both ways. Sometimes it is good, but in that case I think it is bad.

Senator Joyal: Do you think that the concept of assets underlined the principles of what you think a pension is?

Ms Laliberté: Yes, and it also leaves too much discretion to the administrators of the plan to decide who gets the benefits. That is what happens if you do not have a definition. The administrators of the plan will then decide who the surviving spouse is or what the rationale is behind it.

I did not say a lot about that lump sum benefit, but the judge has no right to designate that. If there is no method of credit splitting, the spouse is only protected, if he dies, through insurance and lump sum benefits. You then preclude the parties from making an agreement between themselves that would allow the wife to receive that benefit to protect her own pension interests. It certainly is much more than what is needed for funeral expenses. That adds to that.

Senator Lawson: It is obviously a complex question -- both the issue of benefits and survivor benefits. We must proceed quite carefully concerning how we deal with it.

Recently, I received a letter from the U.S. government that said, "You may be entitled to social security benefits. Please report to the office." So I did. I had lived partially in the U.S., so I was entitled to benefits under social security. They said that they had to ask me a number of questions. I said, "All right." They said, "Do you have any ex-wives?" I said, "Is there a minimum number that you need to qualify for benefits?"

I phrased that rather badly, but our rules provide that if you have any ex-wives who lived with you in marriage for more than 10 years, each one is entitled to 50 per cent of the benefit you are receiving. Assuming your benefit is $1,000 a month and you have four ex-wives, over a 40-year period each one of them would receive $500 a month.

Ms Laliberté: You could quickly bankrupt the plan.

Senator Lawson: That is what I am saying. We are engaging in a dangerous area here. We must examine it carefully. The issue of fairness that you raise is very important. This may be a broader question that involves more than the Judges Act.

You mentioned the Canada Pension Plan, which is similar to social security. I do not know if any of those rules apply. It is absent from any of the provisions dealing with fairness, division, assets and beneficiaries. It seems like a very complex question.

Ms Laliberté: This is a very complex question. Although the CPP is being lumped in by the minister, it is very different again, in that there is credit-splitting. Therefore, the first spouse can have her credit put into her own account. Then it does not seem so bad if the common-law spouse of one year receives the survivor benefit. However, it could be. I do not want to say whether it is or is not, however, there are challenges to the survivor benefits under the CPP going on right now as well.

Senator Lawson: Canada Pension limit the number of ex-wives that you can have? Should there be a limit?

Ms Laliberté: For credit-splitting they prorate it.

Senator Moore: When you were speaking with respect to apportioning the annuity, proposed section 44.1 (1) states that "... if there are two surviving spouses ... each surviving spouse shall receive a share of the annuity prorated in accordance with subsection (2) for his or her life."

Ms Laliberté: That is an addition, right. I would like to clarify that this proposed section refers to marriage after the contribution period.

The Chairman: I do not believe so.

Ms Laliberté: That is right, it is not.

Senator Moore: In your remarks, you said that this bill is written such that there is no apportionment for the first spouse.

Ms Laliberté: If they are divorced, the divorced spouse is out.

Senator Cools: Is excluded from this.

Ms Laliberté: That is what I meant. If they are just separated, there is an apportionment. If they are divorced, there is not.

Senator Moore: That presumes that there is no separation agreement. It also presumes that the court order dealing with the divorce action did not stipulate apportionment.

Ms Laliberté: I do not think that is the case. That is the case for a separated spouse.

If the parties are divorced, even if there is no agreement or order in place regarding the pension, that spouse cannot get the survivor benefit, whether or not they have an agreement in place. A spouse who is separated, however, whether or not they have an agreement in place, can get that apportionment of the survivor benefit.

Senator Moore: Why is that? I am confused.

Ms Laliberté: There is no definition of surviving spouse, and the administrators have determined that a divorced spouse cannot be a surviving spouse, which is the subject of ongoing litigation with the other legislation as well.

I am submitting that that could easily lead to a significant amount of litigation here or inequities if the spouse cannot pursue the litigation.

Senator Moore: If the definition of surviving spouse included a former spouse who has not received an apportionment under any other statute or a separation agreement or a court order and divorce action, that would help you.

Ms Laliberté: It would help, but there is still a problem if there is no credit-splitting and she is getting her share of the pension on a monthly basis. If the spouse is divorced, she will lose her entitlement as soon as the judge dies, and if she is divorced she cannot receive the survivor benefit. Therefore, it helps but it does not go far enough.

Senator Moore: You said in your closing remarks that with respect to the lump sum benefit the judge has no right to designate the beneficiary. Did you mean he should not have the right?

Ms Laliberté: I am saying he should have the right.

Senator Moore: If he does not have the right, why?

Ms Laliberté: Under this amendment he would. He may now, however, I can come back and clarify some points. On my reading of the amendment, the statute says that it will go to the common-law spouse of one year.

The previous legislation did not designate who it was; it just said "surviving spouse." I do not know if it was the judge who would designate it or if it was the administrator of the plan under the Judges Act. I know that under the Canadian Forces legislation, for example, it is up to the member to designate who receives the lump sum benefit but not the survivor benefit.

I know it gets confusing. The member designates not the monthly benefit but the lump sum life insurance one-time payment. That allows the parties, when they are negotiating their separation agreement, to protect a spouse vis-à-vis pension entitlements and support entitlements in the event of the death of the other spouse.

Senator Moore: Turning to page 6, clause 9, a surviving spouse is not entitled to receive an annuity under this section if the surviving spouse has waived his or her entitlement to the annuity under a separation agreement entered into in accordance with applicable provincial law.

Should we be adding there "or in accordance with a court order or a divorce action between the parties"? I do not see any references here to divorce orders in divorce actions. We see mention of separation agreements.

Ms Laliberté: If you refer to separation agreements, normally you also include court orders.

I have another problem with that. Generally, that is not a provision of orders, you do not even look at the survivor benefit. My experience has been that administrators of the Public Service plan do not give effect to agreements between parties, court orders or wills when people are dealing with their survivor benefits.

Therefore, I had some concerns when I read this clause that the administrators may have to, now that it has been included; however, it is not something that is generally looked at when parties are separating and drafting agreements. I am not sure where it comes from, but I would say that if you were doing it by agreement, you should include court orders, because the two go hand in hand.

Senator Moore: At the top of page 8, clause 11, which deals with one-sixth lump sum, you are calling this the survivor benefit, right?

Ms Laliberté: No, this is a lump sum benefit.

Senator Moore: I am getting confused with the pension benefit and survivor benefit.

Ms Laliberté: It is confusing. This one is a lump sum payment separate from the survivor benefit.

It says, "...if a judge dies while holding office." I do not know what happens if the judge is not holding office. There is a different death benefit in the Judges Act, which is not referred to here. This looks like a benefit of a lump sum if the judge dies while in office, and that is the one that is designated in the statute to go to a surviving spouse.

Senator Moore: Would it be helpful if that proposed section included a phrase whereby each surviving spouse would receive a share of that lump sum in a prorated manner similar to what is in section 44?

Ms Laliberté: I suggest that that would be better than what is here, but the wording of this should be changed to allow the judge to designate who would get that lump-sum benefit in order to allow for what I spoke of earlier, which is protection for reasons other than just funeral expenses.

Senator Sparrow: They should be allowed to designate an individual or his estate?

Ms Laliberté: Yes, and they could do that by contract. It would be left to the judge and the spouses to determine who that would be on a breakdown. That would allow them to order their agreements on marriage breakdown as well as to protect the person who needed the protection or who was entitled to the protection.

Senator Lawson: We receive a statement every year that talks about the death benefit and asks who the designee is. I do not know why it would be different here.

Ms Laliberté: On the survivors' death benefit, although you can designate, you can only designate it on the specific form. Treasury Board has overridden giving the supplementary death benefit to someone who has been designated in a will or in a separation agreement. I would think that you would want to avoid that.

Senator Cools: I was very impressed by this witness's testimony. I wish to thank her. Apparently she has been working on this subject matter in respect of wives of people in the military. I thought that on such short notice she put together a remarkable presentation.

The Chairman: You have certainly demonstrated your intimate knowledge of your field. I thank you for coming and sharing it with us. As a consequence, I believe we will have many more questions to consider.

Ms Laliberté: Thank you for inviting me.

The committee adjourned.

First Session
Thirty-sixth Parliament, 1997-98

Première session de la
trente-sixième législature, 1997-1998

SENATE OF CANADA

SÉNAT DU CANADA

Proceedings of the Standing Senate Committee on

Délibérations du comité sénatorial permanent des

Legal and Constitutional Affairs

Affaires juridiques et constitutionnelles

Chairman:
The Honourable LORNA MILNE

Présidente:
L'honorable LORNA MILNE

Thursday, October 22, 1998

Le jeudi 22 octobre 1998

Issue No. 37

Fascicule nº 37

Sixth and last meeting on:
Bill C-37, An Act to amend the Judges Act and to make consequential amendments to other Acts

Sixième et dernière réunion concernant:
L'étude du projet de loi C-37, Loi modifiant la Loi sur les juges et d'autres lois en conséquence

INCLUDING:
THE FOURTEENTH REPORT OF THE COMMITTEE (Bill C-37)

Y COMPRIS:
LE QUATORZIÈME RAPPORT DU COMITÉ
(projet de loi C-37)

34556

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable Lorna Milne, *Chairman*

The Honourable Pierre Claude Nolin, *Acting Deputy Chairman*

and

The Honourable Senators:

Balfour
Beaudoin
Buchanan, P.C.
Eyton
Fraser
Grafstein
* Graham, P.C. (or Carstairs)
Johnstone
Joyal, P.C.
* Lynch-Staunton (or Kinsella (acting))
Moore
Pépin

* *Ex Officio Members*

(Quorum 4)

Changes in membership of the committee:

Pursuant to rule 85(4), membership of the committee was amended as follows:

The name of the Honourable Senator Grafstein was added (*October 22, 1998*).

The name of the Honourable Senator Johnstone was substituted for that of the Honourable Senator Bryden (*October 22, 1998 — 11:25 a.m.*)

LE COMITÉ SÉNATORIAL PERMANENT DES AFFAIRES JURIDIQUES ET CONSTITUTIONNELLES

Présidente: L'honorable Lorna Milne

Vice-président suppléant: L'honorable Pierre Claude Nolin

et

Les honorables sénateurs:

Balfour
Beaudoin
Buchanan, c.p.
Eyton
Fraser
Grafstein
* Graham, c.p. (ou Carstairs)
Johnstone
Joyal, c.p.
* Lynch-Staunton (ou Kinsella (suppléant))
Moore
Pépin

* *Membres d'office*

(Quorum 4)

Modifications à la composition du comité:

Conformément à l'article 85(4) du Règlement, la liste des membres du comité est modifiée, ainsi qu'il suit:

Le nom de l'honorable sénateur Grafstein est ajouté (*le 22 octobre 1998*).

Le nom de l'honorable sénateur Johnstone est substitué à celui de l'honorable sénateur Bryden (*le 22 octobre 1998 — 11 h 25*).

Published by the Senate of Canada

Available from Canada Communication Group — Publishing, Public Works and Government Services Canada, Ottawa, Canada K1A 0S9

Also available on the Internet: http://www.parl.gc.ca

Publié par le Sénat du Canada

En vente: Groupe Communication Canada — Édition, Travaux publics et Services gouvernementaux Canada, Ottawa, Canada K1A 0S9

Aussi disponible sur internet: http://www.parl.gc.ca

The question being put on the motion by Senator Nolin, it was agreed.

After debate on the motion by Senator Joyal, it was moved by the Honourable Senator Joyal — That the motion be amended, in the English version, new subclause 1.1, paragraph *d*), to read:

"any other objective criteria that the Commission considers relevant."

After debate, the question being put on the motion, it was agreed.

It was moved by the Honourable Senator Joyal — That the motion be further amended, in the French version, new subclause 1.1, paragraph *d*), to read:

"tout autre facteur objectif qu'elle considère pertinent."

After debate, the question being put on the motion, it was agreed.

It was moved by the Honourable Senator Joyal — That Bill C-37 be further amended in clause 6, on page 4, by replacing line 14 with the following:

"a report of the Commission within six months after receiving it.".

The question being put on the motion, it was agreed.

It was agreed — That clause 6, as amended, carry.

It was agreed — That clause 7 carry.

It was agreed — That clause 8 carry.

It was agreed — That clause 9 not carry.

It was agreed — That clause 10 not carry.

It was agreed — That clause 11 not carry.

After debate, it was agreed — That clauses 12 to 20 carry.

It was moved by the Honourable Senator Joyal — That Bill C-37 be amended in clause 21, on page 13, by replacing lines 1 to 3 with the following:

"21. Sections 2, 3 7 and 14 to 20 come into force on a day or".

After debate, the question being put on the motion, it was agreed.

It was agreed — That clause 21, as amended, carry.

It was agreed — That the Title carry.

It was agreed — That the Bill, as amended, carry.

It was agreed — That the clauses be renumbered appropriately.

La question, mise aux voix par le sénateur Nolin, est adoptée.

Après discussion de la motion du sénateur Joyal, il est proposé par l'honorable sénateur Joyal — Que la motion soit modifiée dans sa version anglaise et que l'alinéa *d*) du nouveau paragraphe 1.1 soit le suivant:

«any other objective criteria that the Commission considers relevant.»

Après discussion, la question mise aux voix, est adoptée.

Il est proposé par l'honorable sénateur Joyal — Que la motion soit modifiée, dans sa version française, et que l'alinéa *d*) du nouveau paragraphe 1.1 soit le suivant:

«tout autre facteur objectif qu'elle considère pertinent.»

Après discussion, la question, mise aux voix, est adoptée.

Il est proposé par l'honorable sénateur Joyal — Que le projet de loi C-37, à l'article 6, soit modifié, à la page 4, par substitution à la ligne 13 de ce qui suit:

«(7) Le ministre donne suite au rapport de la Commission au».

La question, mise aux voix, est adoptée.

Il est convenu — Que l'article 6 ainsi modifié soit adopté.

Il est convenu — Que l'article 7 soit adopté.

Il est convenu — Que l'article 8 soit adopté.

Il est convenu — Que l'article 9 ne soit pas adopté.

Il est convenu — Que l'article 10 ne soit pas adopté.

Il est convenu — Que l'article 11 ne soit pas adopté.

Après discussion, il est convenu — Que les articles 12 à 20 soient adoptés.

Il est proposé par l'honorable sénateur Joyal — Que le projet de loi C-37, à l'article 21, soit modifié par substitution aux lignes 3 à 5, à la page 13, de ce qui suit:

«21. Les articles 2, 3, 7 et 14 à 20 entrent en vigueur à la date».

Après discussion, la question, mise aux voix, est adoptée.

Il est convenu — Que l'article 21 ainsi modifié soit adopté.

Il est convenu — Que le titre soit adopté.

Il est convenu — Que le projet de loi ainsi modifié soit adopté.

Il est convenu — Que les articles soient renumérotés en conséquence.

It was agreed — That Bill C-37 be reported to the Senate, as amended.

At 12:20 p.m., the committee adjourned to the call of the Chair.

ATTEST:

Il est convenu — Qu'il soit fait rapport au Sénat du projet de loi C-37 ainsi modifié.

À 12 h 20, le comité suspend ses travaux jusqu'à nouvelle convocation de la présidence.

ATTESTÉ:

La greffière du comité,

Heather Lank

Clerk of the Committee

REPORT OF THE COMMITTEE

THURSDAY, October 22, 1998

The Standing Senate Committee on Legal and Constitutional Affairs has the honour to present its

FOURTEENTH REPORT

Your Committee, to which was referred Bill C-37, An Act to amend the Judges Act and to make consequential amendments to other Acts, has, in obedience to the Order of Reference of Tuesday, September 22, 1998, examined the said Bill and now reports the same with the following amendments:

1. Page 1, Clause 1: Delete Clause 1 and renumber subsequent clauses accordingly.

2. In the French version, Page 3, Clause 6: Replace line 4 with the following:

"de la rémunération des juges chargée".

3. Page 3, Clause 6: Add after line 7, on page 3, the following:

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

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

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

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

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

4. *Page 4, Clause 6:* Replace line 14 with the following:

"a report of the Commission within six months after receiving it.".

5. Page 6, Clause 9: Delete Clause 9 and renumber subsequent clauses accordingly.

6. Pages 6, 7 and 8: Clause 10: Delete Clause 10 and renumber subsequent clauses accordingly.

7. Page 8, Clause 11: Delete Clause 11 and renumber subsequent clauses accordingly.

8. Page 13, Clause 21: Replace lines 1 to 3 with the following:

"21. Sections 2, 3, 7 and 14 to 20 come into force on a day or".

Respectfully submitted,

RAPPORT DU COMITÉ

Le JEUDI 22 octobre 1998

Le comité sénatorial permanent des affaires juridiques et constitutionnelles a l'honneur de présenter son

QUATORZIÈME RAPPORT

Votre comité, auquel a été déféré le projet de loi C-37, Loi modifiant la Loi sur les juges et d'autres lois en conséquence, a, conformément à l'ordre de renvoi du mardi 22 septembre 1998, étudié ledit projet de loi et en fait maintenant rapport avec les modifications suivantes:

1. Page 1, article 1: supprimer l'article 1 et faire les changements de désignation numérique qui en découlent.

2. Dans la version française, Page 3, article 6: substituer la ligne 4 par ce qui suit:

«de la rémunération des juges chargée».

3. Page 3, article 6: ajouter après la ligne 9, page 3, ce qui suit:

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

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

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

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

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

4. Page 4, article 6: substituer la ligne 13, par ce qui suit:

«(7) Le ministre donne suite au rapport de la Commission au».

5. Page 6, article 9: supprimer l'article 9 et faire les changements de désignation numérique qui en découlent.

6. Pages 6 et 7, article 10: supprimer l'article 10 et faire les changements de désignation numérique qui en découlent.

7. Page 8, article 11: supprimer l'article 11 et faire les changements de désignation numérique qui en découlent.

8. Page 13, article 21: substituer les lignes 3 à 5 par ce qui suit:

«21. Les articles 2, 3, 7 et 14 à 20 entrent en vigueur à la date».

Respectueusement soumis,

La présidente,

LORNA MILNE

Chair

EVIDENCE

OTTAWA, Thursday, October 22, 1998

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-37, to amend the Judges Act and to make consequential amendments to other Acts, met this day at 11:05 a.m. to give consideration to the bill.

Senator Lorna Milne (*Chairman*) in the Chair.

[*English*]

The Chairman: This meeting of the Standing Senate Committee on Legal and Constitutional Affairs is now in session. We will proceed to clause-by-clause consideration of Bill C-37, to amend the Judges Act and to make consequential amendments to other acts.

Senator Moore: Honourable senators, I move that the committee complete clause-by-clause consideration of Bill C-37.

Senator Cools: Before we move to clause-by-clause consideration, I wish to raise a question of privilege.

Senator Grafstein: To be fair, Senator Cools did declare her intention in advance of the motion. I would hope that Senator Moore could withhold his motion so that Senator Cools has an opportunity to make her statement.

The Chairman: That is quite right.

Senator Cools, the floor is yours.

Senator Cools: Thank you for your consideration. In any event, it has always been my understanding that questions of privilege take precedence.

We had an interesting situation yesterday where, as a committee, we engaged in some unusual methodology. In hearing from Department of Justice officials, certain senators indicated their intention to bring forward motions. The content and intent of the motions were worthy. However, I questioned the procedural technique that was being used. I have never really encountered a situation where there is a public discussion between department officials and members about their intentions to bring certain motions.

I will agree with the motions when they are actually brought forth.

Yesterday, we had a discussion, without the motion, to discuss the subject matter being before us. Those questions were raised briefly and not as sufficiently as I would have liked because I did not want to resort to the technique of formally making a point of order or any more strenuous procedural technique. I thought the appeal to common sense and to our customs would have prevailed.

My concern about the techniques used yesterday has been heightened. Information has come into my possession that many of the interested judges — those who would be affected by these provisions — have known for quite some time that these clauses — what I have learned to call the "spousal clauses" — will be deleted.

TÉMOIGNAGES

OTTAWA, le jeudi 22 octobre 1998

Le comité sénatorial permanent des affaires juridiques et constitutionnelles, auquel a été renvoyé le projet de loi C-37, Loi modifiant la Loi sur les juges et d'autres lois en conséquence, se réunit aujourd'hui à 11 h 05 pour en étudier la teneur.

Le sénateur Lorna Milne (*présidente*) occupe le fauteuil.

[*Traduction*]

La présidente: Je déclare ouverte cette séance du comité sénatorial permanent des affaires juridiques et constitutionnelles. Nous procéderons à l'étude article par article du projet de loi C-37, Loi modifiant la Loi sur les juges et d'autres lois en conséquence.

Le sénateur Moore: Honorables sénateurs, je propose que le comité procède à l'étude article par article du projet de loi C-37.

Le sénateur Cools: Avant de passer à l'étude article par article, j'aimerais soulever une question de privilège.

Le sénateur Grafstein: En toute justice, le sénateur Cools avait fait part de son intention avant le dépôt de la motion. J'espère que le sénateur Moore peut différer sa motion de manière à ce que le sénateur Cools puisse faire sa déclaration.

La présidente: C'est tout à fait juste.

Sénateur Cools, vous avez la parole.

Le sénateur Cools: Merci. De toute façon, j'ai toujours cru que les questions de privilège avaient préséance.

Il s'est passé quelque chose d'intéressant hier alors qu'à ce comité, nous avons fait quelque chose d'inhabituel. Lors de l'audition de hauts fonctionnaires du ministère de la Justice, certains sénateurs ont manifesté leur intention de déposer des motions dont le contenu et l'intention étaient louables. Cependant, je mets en doute la façon de procéder. Il ne m'est jamais vraiment arrivé d'assister à un débat public entre des hauts fonctionnaires du ministère et des membres d'un comité au sujet de leur intention de déposer certaines motions.

J'appuierai les motions lorsqu'elles seront bel et bien déposées.

Hier, nous avons parlé, sans la motion, de discuter du sujet du projet de loi qui nous a été confié. Ces questions ont été soulevées brièvement et pas autant que je l'aurais voulu parce que je ne n'ai pas voulu en venir à formuler officiellement une objection ou à recourir à une procédure beaucoup plus ardue. J'ai cru que l'appel à notre sens commun et à nos coutumes aurait prévalu.

Mon inquiétude au sujet des méthodes employées hier s'est accrue. Selon les renseignements dont je dispose, bon nombre des juges intéressés — ceux qui seraient visés par ces dispositions — savaient depuis un certain temps que ces articles — ce que j'appelle maintenant les «dispositions relatives au conjoint» — seront supprimées.

As far as I am concerned, when one has had a political victory, one never does complain. I am pleased that reason, common sense, and judiciousness have prevailed and that certain individuals have recognized that these clauses were indeed very questionable and suspicious, not to mention embarrassing, and that they were sadly in need of amendment. I am also pleased that, after several weeks of effort, the minister has finally conceded that something was very wrong and that she herself was prepared to accept changes, mainly the deletion of those clauses from Bill C-37.

However, having said that, I believe that some "impropriety", and perhaps that is not the appropriate word, but a less-than-parliamentary occurrence has taken place. That, I believe, should be brought to the attention of members of this committee. To me, it is most distressing and vexing that certain interested judges and other interested parties will have information about the deletion or amendment of these clauses far in advance of the members of the Senate themselves knowing, or far in advance of any formal, procedural, or parliamentary activity to implement those wishes.

As I said before, this is not the first time that I have worked on committees and encountered this situation. For example, last year before our committee reached its clause-by-clause consideration of Bill C-41, certain persons at the Department of Justice, or whoever, had already put certain information into the public domain.

Let me be clear so no one would, for a moment, suggest that I am opposed to freedom of the press: I am a great believer in freedom of the press. My concern is that this information has been made available to interested judges and that there are currently separation agreements, and whatever other agreements being entered into, based on information which certain people have received. I find that very questionable.

It seems to me that, if we are doing proper and judicious work, which we have been doing, the formal process of Parliament should be allowed to function without the unnecessary, inconvenient or inappropriate release of information to interested individuals. This question is usually raised quite publicly when the Minister of Finance is preparing a budget.

I raise this as a question of privilege. I believe that there has been an impropriety, that there has been a breach, and that it is indeed unfortunate that information is out and available before senators have been informed, or before any senator has moved a motion in this committee to basically delete those clauses.

An additional consideration is that, frequently in committee and in the chamber, I raise the issue of constant, ongoing, persistent, and insistent contact between certain persons, whomever they may be, at the Department of Justice and certain judges of this land. I find it extremely disturbing and unhelpful that this information is in the hands of certain parties prior to it being in my hands.

To that extent, I consider this to be a very serious breach of my privileges here. As I said before, I support the minister's agreement to these amendments and I would have appreciated it

À ce que je sache, quand quelqu'un remporte une victoire politique, il ne se plaint jamais. Je suis heureuse que la raison, le sens commun et la sagesse aient prévalu et que certaines personnes aient reconnu que ces dispositions étaient très discutables et très contestables, pour ne pas dire embarrassantes, et qu'elles avaient grandement besoin d'être modifiées. Je me réjouis aussi de voir que, après plusieurs semaines d'efforts, la ministre a finalement admis que quelque chose n'allait pas et qu'elle était prête à accepter des changements, plus particulièrement le retrait de ces articles du projet de loi C-37.

Cependant, cela dit, je crois qu'une «irrégularité», et ce n'est peut-être pas le mot qui convient, un événement moins que parlementaire s'est produit et devrait, selon moi, être signalé aux membres de ce comité. Quant à moi, je trouve très frustrant que certains juges et autres parties intéressées seront mis au courant du retrait de ces dispositions ou d'amendements qui pourraient y être apportés, et ce bien avant que le Sénat ou toute activité officielle, procédurale ou parlementaire s'en charge.

Comme je l'ai déjà dit, ce n'est pas la première fois qu'une telle situation se présente à un comité auquel je siège. Par exemple, l'année dernière, avant que notre comité entreprenne l'étude article par article du projet de loi C-41, certaines personnes du ministère de la Justice ou qui vous voulez avaient déjà divulgué certains renseignements.

Je veux bien me faire comprendre afin que personne ne laisse entendre le moindrement que je m'oppose à la liberté de presse en laquelle je crois fermement. Ce qui me laisse perplexe, c'est que cette information a été mise à la disposition des juges intéressés et qu'il y a à l'heure actuelle des ententes en matière de séparation et quelque autre entente conclue, qui sont basées sur l'information que certaines personnes ont obtenue. Je trouve cela très suspect.

Il me semble que, si nous accomplissons judicieusement notre travail, ce que nous avons fait, le processus parlementaire officiel ne devrait pas être entravé par la diffusion inutile, inopportune ou inappropriée d'information à des personnes intéressées. Cette question est habituellement soulevée assez publiquement lorsque le ministre des Finances prépare un budget.

Je soulève ce point en tant que question de privilège. Je crois qu'une irrégularité a été commise, qu'il y a eu un manquement et qu'il est en fait malheureux que de l'information soit diffusée avant que les sénateurs soient mis au courant ou avant qu'un sénateur propose une motion à ce comité portant pour ainsi dire retrait de ces dispositions.

En outre, il m'est arrivé fréquemment, en comité et à la Chambre, de soulever la question des contacts constants, permanents, persistants et insistants entre certaines personnes, peu importe de qui il peut s'agir, du ministère de la Justice et certains juges de ce pays. Je trouve tout à fait inquiétant et peu utile que cette information soit divulguée à certaines parties avant de m'être transmise.

Je considère qu'il s'agit d'une grave atteinte à mon privilège. Je le répète, je suis d'accord avec la ministre qui appuie ces amendements et j'aurais apprécié que les sénateurs aient l'honneur

had senators had the honour and the privilege of hearing this first, before the information was released into certain secretive circles.

Other persons may wish to speak to this point of privilege.

The Chairman: Before I open up the floor to discussion, Senator Cools, I should point out that this committee does not have the power to rule on a matter of privilege. If the committee so wishes, it must be reported to the Senate for decision.

I should also point out to you that, historically, the manner of proceeding in this committee has been to allow all members of the committee to know what was coming down the pike.

I think Senator Beaudoin will bear me out on this. I know that a similar situation happened when he was chair of this committee and I was sitting in as a member. This has been the custom of this committee, and I think we should proceed on those same grounds.

Senator Cools: That is not my question. My question is not on what you did yesterday. I accepted what you did yesterday. The question of privilege, the breach that I perceive, is the fact that other persons in this land, namely certain judges, are in possession of what we were to do as senators prior to any senator making statements about this in this committee and prior to senators having an opportunity to move motions to that effect. That is my concern, and I think it would behoove this committee to try to discover who has been making this information available to the judges of this land.

I am pleased that there has been progress made regarding these clauses but, frankly, I think we should have a chance to vote on it, or at least let the system move ahead.

The Chairman: We are about to have a chance to vote on it.

Senator Joyal: Following the statement made by Senator Cools, and since yesterday I was the member of the committee who notified my colleagues of my intention to move some amendments, I would like to bring a point of clarification. I would like to make a formal statement that I never, directly or indirectly, consulted any member of the bench, at any level, to get their opinion or reaction on my intention to move forward with any amendments and I never asked anyone in my office to do so.

I would like that point to be very clear on the record. If Senator Cools' statements happen to be true, it is certainly not because I was in any way part of an initiative that would have made my intentions known by any judge in this land.

The Chairman: I would further add — if I may, Senator Cools — that I want it made absolutely clear that any amendments that may be proposed today are not being proposed by the Minister of Justice. They are the Liberal senators' amendments.

Senator Cools: I accept that and I approve. I would like to be clear here. It was never my intention to question Senator's integrity in any form or fashion. I have known him for a long time. He is a man of outstanding character.

et le privilège d'être mis au courant avant que l'information soit diffusée dans certains cercles secrets.

Quelqu'un d'autre a peut-être quelque chose à dire au sujet de cette question de privilège.

La présidente: Avant de céder la parole à d'autres sénateurs, sénatrice Cools, je dois vous dire que ce comité n'est pas autorisé à se prononcer sur des questions de privilège. S'il veut le faire, il doit faire rapport au Sénat afin qu'il prenne une décision.

Je dois aussi vous dire que ce comité a toujours eu comme principe de permettre à tous ses membres de savoir ce qui va se passer.

Je crois que le sénateur Beaudoin confirmera ce qui suit. Je sais qu'une situation similaire s'est présentée lorsqu'il présidait ce comité et que j'y siégeais comme membre. Telle a été la pratique à ce comité et je crois que nous devrions poursuivre dans la même veine.

Le sénateur Cools: Ce n'est pas ce qui me préoccupe. Je m'interroge au sujet de ce que nous avons fait hier. J'ai accepté ce que vous avez fait hier. La question de privilège, l'infraction que je perçois, a à voir avec le fait que d'autres personnes dans ce pays, à savoir certains juges, ont été mises au courant de ce que nous nous apprêtions à faire en tant que sénateurs avant qu'un sénateur fasse une déclaration à ce sujet à ce comité et avant que les sénateurs aient l'occasion de proposer des motions à cet effet. C'est à ce sujet que je m'interroge et je crois qu'il incombe à ce comité d'essayer de déterminer qui a diffusé cette information aux juges de ce pays.

Je suis heureuse que des progrès aient été faits en ce qui concerne ces articles mais, en toute franchise, je crois que nous devrions avoir la chance de voter sur la question ou du moins de laisser le système suivre son cours.

La présidente: Nous sommes sur le point de voter sur ces motions.

Le sénateur Joyal: Pour faire suite à la déclaration du sénateur Cools et comme c'est moi qui ai informé hier mes collègues de mon intention de présenter certains amendements, j'aimerais éclaircir un point. J'aimerais dire officiellement que je n'ai jamais, directement ou indirectement, consulté un juge de quelque niveau que ce soit pour savoir ce qu'il pensait de mon intention de proposer des amendements. Je n'ai jamais non plus demandé à personne de mon bureau de le faire.

J'aimerais que ma déclaration soit consignée au compte rendu. Si les déclarations du sénateur Cools devaient s'avérer juste, ce n'est assurément pas parce que j'ai participé de quelque manière à une initiative qui aurait permis de révéler mes intentions à un juge de ce pays.

La présidente: J'ajouterais — si vous le permettez, sénateur — que je tiens à ce qu'il soit absolument clair qu'aucun des amendements qui seront proposés aujourd'hui n'émane du ministre de la Justice. Ils sont présentés par les sénateurs libéraux.

Le sénateur Cools: Je l'accepte et j'approuve. J'aimerais me faire bien comprendre. Mon intention n'a jamais été de remettre en question l'intégrité du sénateur d'aucune façon que ce soit. Je le connais depuis longtemps. C'est un homme remarquable.

The information that I was referring to is obviously being exchanged between certain individuals at the Department of Justice and other persons across this land. I do not believe that members of this committee divulged the information. Let me be clear, so that no one thinks I was questioning that point.

Madam Chair, you have said that you cannot rule on a question of privilege. I know the rules concerning this well. However, this committee can resolve to take some action to investigate the matter in order to discover how this sort of information has been received by certain people. Perhaps the minister could come here to explain or perhaps we could recall the departmental officials to explain. I believe there is something here that commands attention.

The Chairman: Thank you, Senator Cools. However, for this committee to proceed in such a manner, we would need an order to do so from the Senate.

Senator Cools: In that case, since I cannot move a motion on this committee to that effect, I would urge the chairman or a member of this committee to put forward a motion asking the Senate to study the matter.

Senator Grafstein: Since I am a voting member of the committee, perhaps I could suggest to Senator Cools that a question of privilege, first and foremost, must arise and be stated at the first possible moment. In other words, if somebody's privileges are impinged, the rules state that the senator whose privileges one believes are impinged or interfered with must raise the issue. I assume that is why Senator Cools has raised it here.

Having said that, since Senator Cools believes that this is a matter of her privileges being encroached upon — and, ultimately, it might affect others — the appropriate way to deal with this matter that she is contesting is for the committee to take note of it. I assume we have already done so because it is noted on the record. If the senator wishes to pursue it, she should do so before the full chamber at the appropriate time, which would be today. I have not looked at the questions myself, but I am always sensitive to the privileges of senators. I assume that is the appropriate practice, but I look to Senator Beaudoin and others who may be more familiar with the rules. I am having difficulty with Senator Cools' position that a privilege has been breached because she is a non-voting member of the committee. I am not sure how the privilege is breached. Unless I am told otherwise, I conclude that this is a matter for the full chamber.

I would ask Senator Beaudoin for his comments and then we can move on.

Senator Beaudoin: If a person wishes to raise a point of privilege, then he or she must be a member of the committee. If no member of the committee wishes to do so, then that is the end of it. Of course, the matter may be raised in the Senate. However, if no voting member of this committee wishes to raise the point, then I do not see how we can deal with it.

Senator Cools: That is rubbish!

Les renseignements dont je parlais ont manifestement été échangés entre des gens du ministère de la Justice et d'autres personnes dans tout le pays. Je ne crois pas que les membres de ce comité ont divulgué les renseignements. Je tiens à ce que ce soit clair, parce que je ne veux pas qu'on pense que c'est ce que je remettais en question.

Madame la présidente, vous avez dit que vous ne pouvez pas vous prononcer sur une question de privilège. Je connais très bien les règles à ce sujet. Quoi qu'il en soit, le comité peut décider d'examiner la question pour découvrir comment certaines personnes ont pu être en possession de ce genre de renseignements. Peut-être que le ministre pourrait venir nous l'expliquer, ou que des fonctionnaires du ministère pourraient revenir nous rencontrer pour le faire. À mon avis, des mesures s'imposent.

La présidente: Merci, sénateur. Cependant, le comité doit, pour procéder ainsi, en recevoir l'ordre du Sénat.

Le sénateur Cools: Dans ce cas, puisque je ne peux pas présenter de motion en ce sens, j'exhorte la présidente ou un membre du comité à proposer qu'on demande au Sénat d'étudier la question.

Le sénateur Grafstein: À titre de membre votant de ce comité, je pourrais peut-être signaler au sénateur Cools qu'une question de privilège doit d'abord et avant tout être soulevée et énoncée à la première occasion possible. Autrement dit, si les privilèges de quelqu'un sont lésés, la règle veut que ce soit le sénateur dont les privilèges auraient été lésés ou restreints qui soulève la question. Je suppose que c'est pourquoi le sénateur Cools nous a fait part du problème ici.

Cela dit, étant donné que le sénateur Cools a des raisons de croire que cette question porte atteinte à ses privilèges — et pourrait bien porter préjudice à d'autres personnes —, la manière appropriée pour le comité de traiter le problème qu'elle soulève est d'en prendre note. Je présume que nous l'avons déjà fait, puisque c'est inscrit au compte rendu. Si le sénateur tient à approfondir la question, elle devrait le faire devant l'ensemble des sénateurs au moment opportun, soit aujourd'hui même. Je ne me suis pas penché là-dessus, mais je suis toujours sensible aux privilèges des sénateurs. Je présume que c'est ainsi que se font les choses, mais je me fie au sénateur Beaudoin et à d'autres, qui connaissent peut-être mieux les règles que moi. J'ai quelque difficulté à comprendre le point de vue du sénateur Cools selon lequel un privilège a été enfreint parce qu'elle n'est pas un membre votant du comité. Je ne vois pas très bien en quoi cela porte atteinte à ses privilèges. À moins d'avis contraire, j'en conclus que cette question relève de l'ensemble des sénateurs.

J'inviterais le sénateur Beaudoin à faire des commentaires, puis nous pourrons poursuivre.

Le sénateur Beaudoin: Pour soulever une question de privilège, il faut être membre du comité. Si aucun membre du comité ne veut le faire, c'est fini. Bien sûr, la question peut être soulevée au Sénat. Cependant, si aucun membre votant du comité ne veut soulever la question, je ne vois pas comment nous pourrons en traiter.

Le sénateur Cools: Foutaise!

The Chairman: No. Order!

Senator Nolin: We do not accept "rubbish." If we are to decide on this, I want to hear all the evidence or I do not want to discuss it. I do not think we have the mandate to discuss it. It is your privilege to raise this matter in the chamber and to table all the evidence you have. You will have to produce something. You are accusing a lot of people without mentioning names and I do not wish to be part of that. It is your right to do so in the chamber, but do not do it here.

Senator Cools: I would like to respond to that.

Senator Beaudoin: One cannot call an explanation of our rules "rubbish."

Senator Nolin: No, you cannot.

The Chairman: Order. I agree with Senator Beaudoin's comments. I would hope that the senator would retract the word "rubbish."

Senator Cools: The word "rubbish" was an aside. It was not intended to be a formal statement.

Senator Balfour: Earlier you insisted on being on the record.

Senator Cools: Perhaps I should repeat that it was never my intention, in any way, to impugn the integrity of any individual member of this committee. If my use of a particular word as an aside was inappropriate, I will apologize. That is not a problem. Magnanimity comes very easily to me.

In response to the substance of what was said, I should like to say that the rule of "earliest opportunity" does not apply here. It is only applied when the Senate Speaker's role is being invoked in what we call a *prima facie* case in the chamber. It is only invoked in that instance and then, *prima facie*, that response is whether or not the Speaker of the Senate chooses to give priority over all other debate. This subject matter is becoming increasingly not only arcane but also unknown to the majority of senators.

The fact of the matter is that Senate privileges are not "my" privileges. Senators hold them collectively. It is my understanding that it is our duty to uphold the rules at all times. Those rules provide that senators must request information in a certain way. One of those ways, honourable senators, is to introduce a motion in the house. One cannot simply demand information.

What I am introducing here is a sense of discussion —

The Chairman: Senator Cools, I have the chair!

Senator Cools: You certainly do.

The Chairman: I believe that this subject has been explored in great depth. At this point, we will proceed to clause-by-clause consideration of Bill C-37.

It has been moved by Senator Moore that the committee complete clause-by-clause consideration of Bill C-37. Is it agreed?

Hon. Senators: Agreed.

The Chairman: Carried.

La présidente: Non. À l'ordre!

Le sénateur Nolin: Nous n'acceptons pas ici les termes comme «foutaise». Si nous devons prendre une décision à ce sujet, je tiens à entendre tous les faits, sinon je ne veux plus en entendre parler. Je ne crois pas que nous sommes mandatés pour discuter de ça. Vous avez le droit de soulever cette question au Sénat et de présenter toutes les preuves que vous avez. Il vous faudra en produire. Vous accusez des tas de gens sans donner de nom et je ne tiens pas à être mêlé à ça. Vous avez droit d'en parler au Sénat, mais pas ici.

Le sénateur Cools: J'aimerais répondre à ça.

Le sénateur Beaudoin: Personne ne peut qualifier de «foutaise» une explication de nos règlements.

Le sénateur Nolin: Non, personne.

La présidente: À l'ordre. Je suis d'accord avec le sénateur Beaudoin. J'espère que le sénateur voudra bien retirer le mot «foutaise».

Le sénateur Cools: C'était un aparté. Ça ne se voulait pas une déclaration officielle.

Le sénateur Balfour: Vous avez pourtant insisté plus tôt pour que votre intervention soit consignée au compte rendu.

Le sénateur Cools: Je devrais peut-être répéter que je n'ai jamais eu la moindre intention de mettre en doute l'intégrité d'aucun membre de ce comité. Si l'expression que j'ai utilisée en aparté n'était pas convenable, je m'en excuse. Ce n'est pas là qu'est le problème. Je sais me montrer magnanime.

Pour en revenir à ce qui a été dit, j'aimerais souligner que la règle de la «première occasion» ne s'applique pas ici. Elle ne s'applique que lorsque le Président du Sénat doit déterminer si la question paraît fondée à première vue. Ce n'est que dans ce cas que cette règle peut être invoquée et le Président peut, à première vue, décider de donner ou non la priorité à cette question sur toutes les autres. Cette règle devient de plus en plus obscure et même ignorée pour la majorité des sénateurs.

Le fait est que les privilèges du Sénat ne sont pas uniquement les miens. Ils sont ceux de tous les sénateurs. D'après moi, nous avons le devoir d'observer les règles tout le temps. Ces règles prévoient que les sénateurs doivent suivre une certaine procédure pour obtenir des renseignements. Ils peuvent notamment les obtenir par voie de motion au Sénat. On ne peut pas tout simplement les exiger.

Ce que je suggère ici est une discussion...

Le président: Sénateur, c'est moi qui occupe le fauteuil!

Le sénateur Cools: Ça ne fait pas de doute.

La présidente: Il me semble que cette question a été amplement approfondie. Nous allons maintenant passer à l'étude détaillée du projet de loi C-37.

Le sénateur Moore propose que le comité procède à l'étude article par article du projet de loi C-37. Êtes-vous d'accord?

Des voix: D'accord.

La présidente: Adopté.

Shall clause 1 carry? At this point, I should point out that the normal procedure, if we want to delete a clause, is to vote "No, it shall not carry."

Senator Beaudoin: Yes, when the clause is called.

The Chairman: The clause is now called. Shall clause 1 carry?

Senator Beaudoin: No.

Senator Nolin: No.

The Chairman: I declare the motion negatived.

Senator Cools: Usually when we move clause by clause, there is opportunity for discussion first.

The Chairman: Senator Cools, there was no offer for discussion on this one and the motion has been negatived.

Shall clause 2 carry?

Hon. Senators: Agreed.

The Chairman: All those opposed? Carried.

Shall clause 3 carry?

Hon. Senators: Agreed.

The Chairman: All those opposed? Carried.

Senator Cools: I was under the impression that when we move a clause we do it formally by motion. It takes more than to say, "Shall this carry? Carried." It seems to me that an individual moved it. I move that.

The Chairman: It has been moved by Senator Moore that we should go to clause-by-clause consideration of the bill, and that is what we are doing.

Senator Cools: I think the proper way to proceed is for Senator Moore to say, "I move that this clause carry" when we get to each clause. It should then be seconded. Otherwise, the bill is not properly voted on.

The Chairman: This is the format that we have traditionally been following in the committee.

Senator Beaudoin: When we have an omnibus motion, such as that moved by Senator Moore, we do not repeat ourselves 25 times.

Senator Nolin: It implies we are moving each and every clause.

Senator Beaudoin: That is right. It is up to the chair to call each clause separately but not each motion separately.

The Chairman: Precisely, and that is what I am doing.

We have now carried clause 3.

Shall clause 4 carry?

Hon. Senators: Agreed.

The Chairman: Carried.

Shall clause 5 carry?

Hon. Senators: Agreed.

The Chairman: Carried.

Est-ce que l'article 1 est adopté? Il convient de souligner que, selon la procédure, si nous voulons supprimer un article il faut voter «non, il n'est pas adopté».

Le sénateur Beaudoin: Oui, lorsqu'il est mis aux voix.

La présidente: L'article est maintenant mis aux voix. Est-ce que l'article 1 est adopté?

Le sénateur Beaudoin: Non.

Le sénateur Nolin: Non.

La présidente: Je déclare la motion rejetée.

Le sénateur Cools: Normalement, quand on fait une étude article par article, on peut d'abord discuter.

La présidente: Sénateur, personne n'a proposé de discuter de cet article, et la motion a été rejetée.

Est-ce que l'article 2 est adopté?

Des voix: Oui.

La présidente: Qui est contre? Adopté.

Est-ce que l'article 3 est adopté?

Des voix: Oui.

La présidente: Qui est contre? Adopté.

Le sénateur Cools: J'avais l'impression que, pour proposer un article, il fallait le faire formellement au moyen d'une motion. Ça devrait être plus que «est-ce que c'est adopté? Adopté». Il me semble que quelqu'un doit le proposer. C'est ce que je voudrais.

La présidente: Le sénateur Moore a proposé que nous fassions l'étude article par article du projet de loi, et c'est ce que nous faisons.

Le sénateur Cools: Je crois que pour faire les choses comme il se doit, le sénateur Moore devrait dire «je propose l'adoption de cet article» pour chaque article. Quelqu'un doit ensuite appuyer sa proposition. Autrement, le vote sur le projet de loi n'est pas fait selon les règles.

La présidente: Notre comité a toujours procédé de cette façon.

Le sénateur Beaudoin: Lorsqu'une motion générale, comme celle du sénateur Moore, est présentée nous ne nous répétons pas 25 fois de suite.

Le sénateur Nolin: Ça sous-entend que nous proposons chacun des articles.

Le sénateur Beaudoin: C'est exact. Il incombe à la présidente de mettre chaque article aux voix, mais pas chaque motion.

La présidente: Précisément, et c'est ce que je fais.

Nous avons donc adopté l'article 3.

Est-ce que l'article 4 est adopté?

Des voix: Oui.

La présidente: Adopté.

Est-ce que l'article 5 est adopté?

Des voix: Oui.

La présidente: Adopté.

Shall clause 6 carry?

Senator Joyal: Honourable senators, on clause 6, I move the following amendment. Members of the committee have copies in English in French.

That Bill C-37 be amended, in clause 6,

(*a*) on page 3, by adding the following after line 7:

"(1.1) In conducting its inquiry, the commission shall consider

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

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

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

(d) any other objective measure that the Commission considers relevant."; and

(*b*) on page 4, by replacing line 14 with the following:

"a report of the Commission within six months after receiving it."

[*Translation*]

In French, "Que le projet de loi C-37 soit modifié,

a) à la page 3, par adjonction, après la ligne 9, de ce qui suit:

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

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

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

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

d) tout autre facteur qu'elle considère pertinent.";

[*English*]

Of course, the rest of the article follows.

Senator Nolin: I have a subamendment. I do not have it in writing because I thought it would be included in the amendment just read. In the French version, section 26, or clause 6 of the bill, paragraph 1 —

[*Translation*]

The French version contains a reference to "juges fédéraux" in line 2, whereas the English version makes no mention whatsoever of federal judges. Federal judges do not exist in the legislation. The only reference is to judges. In my subamendment, I propose that the reference to "juges fédéraux" in clause 6, paragraph 1,

Est-ce que l'article 6 est adopté?

Le sénateur Joyal: Honorables sénateurs, à propos de l'article 6, j'ai un amendement à proposer. Les membres du comité ont reçu copie en anglais et en français de l'amendement.

Que le projet de loi C-37 soit modifié, à l'article 6,

a) à la page 3, par adjonction, après la ligne 9, de ce qui suit:

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

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

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

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

d) tout autre facteur qu'elle considère pertinent.»;

b) à la page 4, par substitution à la ligne 13, de ce qui suit:

«(7) Le ministre donne suite au rapport de la Commission au».

[*Français*]

En français, que l'article 6 soit modifié:

a) à la page 3, par adjonction, après la ligne 9, de ce qui suit:

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

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

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

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

d) tout autre facteur qu'elle considère pertinent.»;

[*Traduction*]

Bien entendu, le reste de l'article reste tel quel.

Le sénateur Nolin: J'aimerais proposer un sous-amendement. Je ne l'ai pas par écrit, parce que je croyais qu'il ferait partie de l'amendement qui vient d'être lu. Dans la version française, à l'article 26, ou à l'article 6 du projet de loi, au paragraphe 1...

[*Français*]

Dans la version française, on fait référence aux juges fédéraux à la deuxième ligne alors que dans la version anglaise, il n'y a aucune mention des juges fédéraux. Dans la loi, les juges fédéraux n'existent pas. Il existe des juges, point. Mon sous-amendement est de rayer du projet de loi C-37, article 6,

line 2 of the French version of Bill C-37 be deleted. Unfortunately, I do not have this subamendment in writing.

[*English*]

Senator Beaudoin: I support that.

The Chairman: We are discussing this, Senator Cools, and I will give you an opportunity to speak.

Senator Joyal: I have no objection to including the proposed subamendment to the amendment which I have just read. Senator Nolin is right, there is no such qualification of judges in the English version of the bill. If we maintain "juges fédéraux," it could lead to confusion that we are dealing only with members of the Federal Court and not the other courts. That is certainly not the intention of the bill. We are dealing with the salary of all the judges appointed by the federal government, not only the Federal Court judges, but the Superior Court judges, the Court of Appeal judges, and so forth. The point raised by Senator Nolin is appropriate. It will not change the scope of the bill.

Senator Nolin: If we are on the discussion part of our consideration, in English, you have the word "Judicial" in the name of the commission. That word is not used in the French version.

Senator Grafstein: What word do they use in French?

Senator Nolin: In the name of the commission, there is no word like "judiciaire."

Senator Joyal: It is "Commission d'examen de la rémunération".

Senator Nolin: All of our judges are federal, first.

Senator Joyal: There is no doubt that if we maintain "juges fédéraux" in the French version, it could lead to some confusion in the interpretation of the mandate of the commission.

Senator Beaudoin: There is another reason. Both texts are equal according to law and the Constitution, and I think that is a major reason to eliminate the redundant word. We are talking about judges appointed by federal authority, but the expression "juges fédéraux" is not the best translation.

The Chairman: Our clerk is writing madly here. Senator Cools?

Senator Cools: I would submit to this committee, in particular to Senator Joyal and to the Liberal senators here, that this amendment has not received substantial and sufficient discussion in the Liberal Senate caucus. I would ask Senator Joyal if he would impose a limitation on himself, difficult as it would be, and that is to consider submitting this proposed amendment to our caucus and then —

Senator Beaudoin: On a point of order.

Senator Cools: I have not finished my remarks, but that is quite all right.

Senator Beaudoin: We are sitting in committee. What is going on in your caucus or in our caucus is immaterial.

clause 6, paragraphe 1, à la deuxième ligne, les mots «des juges fédéraux» uniquement dans la version française. Malheureusement, je ne l'ai pas par écrit.

[*Traduction*]

Le sénateur Beaudoin: J'appuie cette proposition.

Le président: Nous allons en discuter, sénateur Cools, et vous pourrez prendre la parole.

Le sénateur Joyal: Je ne vois pas d'objection à incorporer le sous-amendement proposé à l'amendement que je viens de lire. Le sénateur Nolin a raison, la version anglaise de la loi ne qualifie pas les juges. Si nous conservons l'expression «juges fédéraux», ça pourrait prêter à confusion et donner à penser que nous ne parlons que des membres du tribunal fédéral et pas de ceux des autres tribunaux. Ce n'est certainement pas l'intention du projet de loi. Nous traitons des salaires de tous les juges désignés par le gouvernement fédéral, pas seulement de ceux des juges fédéraux, mais des juges du tribunal supérieur, de la Cour d'appel, et cetera. L'intervention du sénateur Nolin est donc pertinente. Ça ne changera pas la portée du projet de loi.

Le sénateur Nolin: Puisque nous discutons de ça, en anglais, il y a le terme «judicial» dans le titre de la commission. Il n'y a rien de tel dans la version française du titre.

Le sénateur Grafstein: Quel est le terme utilisé en français?

Le sénateur Nolin: On n'emploie pas, dans le titre de la commission, le mot «judiciaire».

Le sénateur Joyal: C'est la Commission d'examen de la rémunération.

Le sénateur Nolin: Tous les juges sont fédéraux, en premier lieu.

Le sénateur Joyal: Il n'y a pas de doute que si nous conservons les mots «juges fédéraux» dans la version française, ça pourrait porter à confusion dans l'interprétation du mandat de la commission.

Le sénateur Beaudoin: Il y a une autre raison. En vertu de la loi et de la Constitution, les deux textes sont égaux, et je crois que c'est une raison suffisante pour éliminer les mots inutiles. Nous parlons des juges désignés par le pouvoir fédéral, mais l'expression «juges fédéraux» n'est pas la meilleure traduction qui soit.

La présidente: Le greffier écrit à toute vitesse. Sénateur Cools?

Le sénateur Cools: Je voudrais signaler au comité, en particulier au sénateur Joyal et aux sénateurs libéraux ici présents, que le caucus libéral du Sénat n'a pas eu l'occasion de discuter suffisamment de cet amendement. Je demanderai donc au sénateur Joyal de freiner son élan, aussi difficile que ça puisse être, et d'envisager de soumettre l'amendement qu'il propose à notre caucus, et puis...

Le sénateur Beaudoin: Comme rappel au Règlement.

Le sénateur Cools: Je n'ai pas fini de parler, mais c'est exactement où je veux en venir.

Le sénateur Beaudoin: Nous siégeons à un comité, ce qui se passe dans votre caucus ou dans le nôtre importe peu.

The Chairman: I am not accepting that as a point of order, but I am accepting it as a valid point on this.

Senator Cools: My statement was cut off midstream. I was asking Senator Joyal to delay by a day or two, prior to proposing his amendment, so that this matter could be properly canvassed by the Liberal Senate caucus. I do not believe that I asked anything that was out of order. It is a very curious situation where the gentlemen across here are raising this as a potential point of order. I think I understand why. That is quite acceptable, because life unfolds as it does. I was making an appeal to Senator Joyal, since it is his amendment.

As I see it, it is not the government senators' amendment, because it has not been placed before us by the government sponsor of the bill. Thus, I must conclude that it is a personal amendment being moved by Senator Joyal. There is a big difference. Our government sponsors usually do certain things. If Senator Joyal wishes to comply with my request, I would submit, Senator Beaudoin, that it is no business of yours. I was putting it to Senator Joyal.

Senator Beaudoin: And my business is to point out that we are in committee. This committee does not need to know what is going on in your caucus or in my caucus.

Senator Cools: I am trying to ask a member whether he will consider delaying making a motion, and that is usually done at the point in time when that motion is made. I would like to hear Senator Joyal's response.

The Chairman: Order. Senator Joyal has heard your request. I do not believe that the caucus of any side of the Senate should be brought into discussions in this committee. It is up to Senator Joyal to decide whether he will agree to postpone these discussions, for whatever reason. Senator Cools, you did not have the floor.

Senator Joyal: Madam Chairman, we are now engaged in the process of voting on the proposed legislation clause by clause. I have suggested that we move forward, as that is our agenda for today. If there is any need for further discussion among certain members of this committee, that discussion will proceed outside the sitting this morning.

The Chairman: We shall proceed on the suggestions that have been made by Senator Nolin and Senator Joyal that Bill C-37 be amended, in the French version, by deleting, in clause 6 on page 3, line 4, the phrase "des juges fédéraux".

Senator Fraser: No, just the word "fédéraux".

Senator Joyal: That is right because the Judges Act defines which judges are covered by the Judges Act. Since it is an amendment to the Judges Act, the definition that is applied in that section is already contained in the Judges Act. Therefore, we should not create confusion. I feel that we should maintain the definition currently in the Judges Act. That is probably the most compelling argument in support of Senator Nolin's argument.

La présidente: Je n'accepte pas votre intervention comme un rappel au Règlement, mais j'admets que c'est un argument valable.

Le sénateur Cools: J'ai été interrompue dans ma lancée. Je demandais au sénateur Joyal de remettre sa proposition d'un jour ou deux afin de permettre au caucus libéral du Sénat de l'examiner de manière appropriée. Je ne pense pas demander l'impossible. Il est très curieux que ces messieurs, en face de moi, interprètent ça comme un éventuel rappel au Règlement. Je crois comprendre pourquoi. Ça se comprend très bien, parce que la vie suit son cours. Je m'adressais au sénateur Joyal, parce qu'il s'agit de son amendement.

Que je sache, cet amendement n'a pas été proposé par les sénateurs du parti ministériel, parce qu'il n'a pas été proposé par le parrain du projet de loi. J'en conclus donc qu'il s'agit d'un amendement que propose personnellement le sénateur Joyal. C'est très différent. Les parrains du parti ministériel procèdent généralement d'une certaine manière. Si le sénateur Joyal veut bien se plier à ma demande, je soutiendrais, sénateur Beaudoin, que ça ne vous regarde pas. C'est au sénateur Joyal que je m'adressais.

Le sénateur Beaudoin: Ça me regarde, cependant, de souligner que nous sommes en comité. Ce comité n'a nullement besoin de savoir ce qui se passe dans votre caucus ou dans le mien.

Le sénateur Cools: J'essaie de demander à un membre du comité s'il veut bien envisager de reporter le dépôt d'une motion, et ce genre de requête se fait généralement lorsque la motion est présentée. J'aimerais entendre la réponse du sénateur Joyal.

La présidente: À l'ordre. Le sénateur Joyal a entendu votre requête. Je ne crois pas que le caucus ou n'importe quel parti représenté au Sénat devrait être mêlé aux discussions de ce comité. Il incombe au sénateur Joyal de décider s'il veut ou non reporter ces discussions, pour une raison ou une autre. Sénateur Cools, je ne vous avais pas donné la parole.

Le sénateur Joyal: Madame la présidente, nous avons entrepris l'adoption article par article du projet de loi à l'étude. Je suggère que nous poursuivions, puisque c'est l'objet de notre rencontre d'aujourd'hui. Si certains membres du comité veulent continuer de discuter, ils devraient le faire en dehors de la séance de ce matin.

La présidente: Nous revenons aux propositions du sénateur Nolin et du sénateur Joyal qui ont demandé d'amender la version française du projet de loi C-37, à l'article 6, de la page 3, ligne 4, en supprimant les mots «des juges fédéraux».

Le sénateur Fraser: Non, seulement le mot «fédéraux».

Le sénateur Joyal: C'est exact, parce que la Loi sur les juges définit les juges qu'elle vise. Étant donné qu'il s'agit d'une modification de la Loi sur les juges, la définition qui s'applique à cet article figure déjà dans la Loi sur les juges. Par conséquent, nous ne devons pas semer la confusion. Je crois que nous devons nous en tenir à la définition qui figure dans la Loi sur les juges. C'est probablement l'argument qui donne le plus de poids à la proposition du sénateur Nolin.

[*Translation*]

Senator Fraser: Still with respect to the translation, point (d) in the English version refers to "any other objective measure", while the French version refers to "de tout autre facteur". Should the word "objectif" be added to the French version or does the word "facteur" imply objectivity?

[*English*]

Senator Joyal: That is a very important point. Would Senator Fraser care to explain why she raised it?

Senator Fraser: I suggest that we insert the word "objectif" after the word "facteur" .

Senator Beaudoin: Two words or just one?

Senator Fraser: Just one.

[*Translation*]

Senator Beaudoin: How would the amendment read then?

Senator Fraser: Right now, it reads "tout autre facteur qu'elle considère pertinent". I am proposing that it to be amended to read "tout autre facteur objectif qu'elle considère pertinent".

[*English*]

Senator Joyal: In the English version we say "any other objective measure". There is a qualification in English which does not exist in the French version.

[*Translation*]

Senator Nolin: "Objectif" is used as an adjective rather than as a noun. It would be inserted after the word "facteur".

[*English*]

The Chairman: Before we continue with amending clause 6, perhaps we should decide whether we will vote on the amendment to clause 1, in the French version, to delete the word "fédéraux".

Our researcher has something of interest to say on this.

Ms Nancy Holmes, Researcher: I should like to bring it to the attention of senators before they vote, that section 26 of the Judges Act does not use the reference "des juges fédéraux" with regard to establishing the commission.

Senator Beaudoin: What did they use?

Ms Holmes: They did not. They said:

[*Translation*]

> "Chargé d'examiner si les traitements et autres prestations prévues à la présente loi".

[*English*]

It continues in the same.

The Chairman: So the entire phrase is not there.

[*Français*]

Le sénateur Fraser: Toujours au niveau de la traduction, dans l'amendement *d*), en anglais on parle de «any other objective measure», et en français, il est écrit: «de tout autre facteur». Est-ce qu'on devrait insérer le mot «objectif» dans la version française ou est-ce que le mot «facteur» est lui-même un mot qui implique l'objectivité?

[*Traduction*]

Le sénateur Joyal: C'est certainement très important. Est-ce que le sénateur Fraser veut bien expliquer pourquoi elle a soulevé cette question?

Le sénateur Fraser: Je suggère que nous ajoutions le terme «objectif» après le terme «facteur».

Le sénateur Beaudoin: Deux mots ou un seul?

Le sénateur Fraser: Seulement un.

[*Français*]

Le sénateur Beaudoin: Comment cela se lirait-il?

Le sénateur Fraser: Présentement, nous avons: «tout autre facteur qu'elle considère pertinent». Je suggère que l'on devrait l'amender pour «tout autre facteur objectif qu'elle considère pertinent».

[*Traduction*]

Le sénateur Joyal: Dans la version anglaise, nous disons «any other objective measure». L'anglais comporte donc une qualification qui n'est pas dans la version française.

[*Français*]

Le sénateur Nolin: Le mot «objectif» est utilisé comme adjectif plutôt que comme nom. Alors on ajoute le mot «objectif» après le mot «facteur».

[*Traduction*]

La présidente: Avant de poursuivre avec l'amendement de l'article 6, nous pourrions peut-être décider si nous allons mettre aux voix l'amendement de l'article 1, qui vise à supprimer le terme «fédéraux» dans la version française.

Notre attachée de recherche à quelque chose à dire là-dessus.

Mme Nancy Holmes, attachée de recherche: J'aimerais signaler aux sénateurs, avant qu'ils passent au vote, que l'article 26 de la Loi modifiant la Loi sur les juges ne contient pas de référence à «des juges fédéraux», en ce qui a trait à la mise sur pied de la commission.

Le sénateur Beaudoin: Que dit-on?

Mme Holmes: On n'y fait pas référence. On dit:

[*Français*]

> «Chargé d'examiner si les traitements et autres prestations prévues à la présente loi».

[*Traduction*]

Et ça continue ainsi.

La présidente: Donc, on ne retrouve pas ces mots.

Senator Nolin: The act refers to the appointment of commissioners without naming the commission. Now we will have a name for that commission. In the English version of the name we have the word "judicial". In the French version we have "juges fédéraux". I am suggesting that we leave out the word "fédéraux". All our judges are "fédéraux".

The Chairman: At this point, I will put the question on the first amendment to clause 6, which is that Bill C-37 be amended, in the French version, by deleting, in clause 6 on page 3, line 4, the word "fédéraux". Will all those in favour of the amendment so indicate.

Hon. Senators: Agreed.

The Chairman: Will all those opposed so indicate.

The amendment is carried.

We shall move to the second amendment.

Senator Grafstein: May I ask a question of Senator Joyal on the substance of the drafting? I have no difficulty with the principles. I just query the placement of "(*a*)" as opposed to "(*b*)". One of the fundamental principles and one of our concerns is the principle of judicial independence. I wondered whether "(*b*)" should be "(*a*)" and "(*a*)" should be "(*b*)". I raise this in the context that general principles should follow with specifics, as opposed to specific and then general. The key principle here is to sustain the principle of judicial independence.

Having said that, I then look at the wording of "(*b*)". While I think I understand the principle, to which I do not object, I wonder whether we could redraft it slightly. Just to illustrate my point, instead of using the phrase, "the role of financial security of the judiciary in ensuring judicial independence", I would suggest we start with, "to ensure judicial independence, the role of financial security of the judiciary." I would make that the first principle that describes what we are doing here. We are really trying to establish an objective standard for judicial independence, yet political accountability. Those are the two principles.

I am not suggesting that we make that change. I am only asking Senator Joyal, who has looked at this longer than I have, to tell me if that meets with his view. If it does not, I will not move it as an amendment.

Senator Joyal: Madam Chair, we all know that one of the fundamental principles is, of course, the independence of the judiciary from the legislative and the executive. Those principles are at the root of our parliamentary and constitutional system. To maintain the separation of the three powers, there are elements that the independence of the judiciary should be asserting. One of them, of course, is security of tenure. The second one is financial security. It is important that those elements be stated when we are dealing with compensation of the judiciary.

I personally have no opposition to the suggestion put forward by Senator Grafstein, as such. However, since we are addressing only one aspect of the independence of the judicial system, which is financial security — we are not dealing with security of tenure in this bill — I suggest that, in bringing forward the importance of

Le sénateur Nolin: La loi fait référence à la nomination des commissaires sans nommer la commission. Cette commission aura un nom. Dans son nom en anglais, on retrouve le mot «judicial». Dans son nom en français, il est question des «juges fédéraux». Je propose qu'on enlève le mot «fédéraux». Tous nos juges sont «fédéraux».

La présidente: Je vais maintenant mettre aux voix le premier amendement de l'article 6 du projet de loi qui propose que le projet de loi C-37 soit modifié, dans sa version française, par suppression, à la ligne 4, du mot «fédéraux». Que tous ceux qui sont en faveur de l'amendement se manifestent.

Des voix: D'accord.

La présidente: Que tous ceux qui sont contre se manifestent.

L'amendement est adopté.

Nous passons au deuxième amendement.

Le sénateur Grafstein: Puis-je poser une question au sénateur Joyal sur la façon dont l'amendement a été rédigé? Je ne remets pas en question les principes de l'amendement. Je m'interroge seulement sur l'ordre des alinéas *a*) et *b*). Un des principes fondamentaux qui nous préoccupent est celui de l'indépendance judiciaire. Je me demande si l'on ne devrait pas inverser l'ordre des alinéas *b*) et *a*), étant donné que les principes généraux doivent être énoncés avant les particularités et non l'inverse. Ce qui compte ici, c'est de confirmer le principe de l'indépendance judiciaire.

Cela dit, je me demande si on ne pourrait pas modifier légèrement la formulation de l'alinéa *b*) même si j'en comprends le principe et que je ne m'y oppose pas. Au lieu d'écrire «le rôle de la sécurité financière des juges dans la préservation de l'indépendance judiciaire», je proposerais d'intervertir l'ordre des mots pour commencer par «dans la préservation de l'indépendance judiciaire, le rôle de la sécurité financière des juges». J'aimerais qu'on énonce en premier le principe que nous voulons assurer. Ce que nous voulons vraiment faire ici c'est établir un critère objectif d'indépendance judiciaire, sans négliger la responsabilité politique. Ce sont les deux principes à garantir.

Je ne suis pas en train de proposer ce changement. Je veux simplement demander au sénateur Joyal, qui a étudié la question plus à fond que moi, si mon point de vue concorde avec le sien. S'il ne concorde pas, je ne proposerai pas l'amendement.

Le sénateur Joyal: Madame la présidente, nous savons tous que l'indépendance du pouvoir judiciaire par rapport au pouvoir législatif et au pouvoir exécutif est un principe fondamental. Ce principe est à la base de notre régime parlementaire et constitutionnel. Pour assurer la séparation des trois pouvoirs, il y a des éléments que l'indépendance judiciaire doit affirmer, dont bien sûr la sécurité du mandat. Il y a aussi la sécurité financière. Il est important de mentionner ces éléments quand on parle de la rémunération des juges.

Je n'ai personnellement rien contre la proposition faite par le sénateur Grafstein. Cependant, comme il n'est question ici que d'un aspect de l'indépendance du système judiciaire, à savoir la sécurité financière — étant donné qu'il n'est pas question de la sécurité du mandat dans ce projet de loi — je pense qu'en

the financial security to the commission, as it is an essential element of their work, we not deal with the overall elements of the independence of the judiciary.

That, of course, involves security of tenure and so on. That is why it was phrased that way. Otherwise, we would need to enumerate the three elements that have been traditionally considered as the guarantees of judicial independence.

This is the best way we could find to state the principles which you just stated yourself and which are, in fact, at the root of any work of the commission. The commission works within the context of the independence of the judicial system and, in that context, it has a specific role to ensure that financial security is confirmed through the recommendation and the study that it makes. It gives the overall context in which the commission must work to prevent the discussion of the questions which were raised in the Supreme Court of Canada in the *P.E.I. Reference* case, which is: How do you define "financial security" versus "judicial independence"?

Of course, it brings forward the overall capacity of the commission to maintain a balance between that principle and the other prevailing economic conditions and so forth. In other words, there is not only the economic set of elements. There are also sets of elements which deal with the very structure of the independence of the judicial system, which, for instance, do not exist in compensation boards for the public service. The public service is not separated from the administration of the government, but the judicial system is totally separated from the administration of the government. It is important to state that principle when we are formally establishing a commission that has the responsibility to define how the element of financial security will be guaranteed in that context. That is why it is stated that way. I agree there are two ways to state the overall objective of the work of the commission, but I feel that the way it is stated now meets Senator Grafstein's preoccupation.

Senator Balfour: I do not wish to quibble over words with Senator Grafstein, but if I had been drafting the text, I think I would have stated "the necessity for" or "the need for" rather than "the role of", because that is what we are talking about. In order to have judicial independence, it is necessary that judges have financial security. We are not talking about a role; we are talking about a need.

The Chairman: I must say this clause has been the subject of a great deal of debate.

Senator Balfour: And I was not present for that.

Senator Joyal: I agree with Senator Balfour and Senator Grafstein. I should say, in a candid way, that the dictionary is full of words. That is the magic of language. Certainly we can state an objective and use a certain number of words to describe it without changing the very nature of what we want to say. My honourable colleagues will understand that I tried to draft a text which would meet the very point I was making in my remarks, that is, to be sure that this text is in conformity with our constitutional tradition

soulignant à la commission l'importance de la sécurité financière des juges dans l'exécution de leur travail, nous n'avons pas à traiter de tous les éléments qui assurent l'indépendance judiciaire.

Parmi ces éléments, on retrouve la sécurité du mandat évidemment. C'est pourquoi l'amendement a été formulé de cette façon. Autrement, il faudrait énumérer les trois éléments qui sont normalement censés garantir l'indépendance judiciaire.

C'est la meilleure façon que nous avons trouvée pour énoncer les principes dont vous venez de parler vous-même et qui sont à la base de tous les travaux de la commission. La commission fonctionne dans le contexte de l'indépendance du système judiciaire et, dans ce contexte, elle a pour rôle précis de s'assurer que la sécurité financière des juges est confirmée dans les recommandations et les études qu'elle fait. C'est le contexte global dans lequel la commission doit travailler pour empêcher qu'on ait à se poser des questions comme celles qui ont été soulevées à la Cour suprême du Canada dans le *Renvoi relatif aux juges de la Cour provinciale de l'Île-du-Prince-Édouard*, à savoir comment définir la «sécurité financière» par rapport à l'«indépendance judiciaire».

Bien sûr, ça suppose que la commission est capable de tenir compte à la fois de ce principe et de l'état de l'économie et le reste. Autrement dit, il n'y a pas seulement les aspects économiques qui entrent en ligne de compte. Il y a aussi des aspects qui ont trait à la structure même du système judiciaire indépendant et qui n'existent pas dans le cas des commissions de rémunération de la fonction publique. Contrairement à la fonction publique, le système judiciaire est complètement distinct de l'administration gouvernementale. Il est important d'énoncer ce principe quand nous créons officiellement une commission qui est chargée de définir comment la sécurité financière des juges sera garantie dans ce contexte. C'est pourquoi on a formulé ainsi la disposition. Je conviens qu'il y a deux façons de formuler l'objectif général du mandat de la commission, mais j'estime que celle qui a été utilisée répond à la préoccupation du sénateur Grafstein.

Le sénateur Balfour: Ce n'est pas que je veuille pinailler sur le choix des mots avec le sénateur Grafstein, mais si j'avais rédigé ce texte, j'aurais employé les mots «nécessité» ou «besoin» plutôt que «rôle», parce que c'est ce dont nous parlons. Pour assurer l'indépendance judiciaire, il est nécessaire que les juges aient une sécurité financière. Nous ne parlons pas d'un rôle, mais d'un besoin.

La présidente: Je dois dire que cette disposition a fait l'objet d'un long débat.

Le sénateur Balfour: Auquel je n'ai pas assisté.

Le sénateur Joyal: Je suis d'accord avec le sénateur Balfour et le sénateur Grafstein. Je dois dire, bien honnêtement, qu'il y a plein de mots dans le dictionnaire. C'est la magie de la langue. Il est certain qu'on peut formuler un objectif de différentes façons sans changer l'essence même de ce que nous voulons dire. Mes collègues comprendront que j'ai essayé de rédiger un texte qui respecte ce que j'ai souligné, c'est-à-dire qui soit conforme à la tradition et aux obligations de notre Constitution sur la séparation

and our constitutional obligations of separation of power. I was conscious of choosing the terms to be sure that they were acceptable in the context of our legal tradition.

At this point, while I know that those of us who are lawyers or who have discussed legal concepts can express principles in various ways, I would be tempted to maintain this one as it stands, taking into account the research and discussion I had with the legal adviser on the selection of these words.

I understand your point. It is part of the overall essential of judicial independence that we want to maintain through the capacity of the commission to ensure that judges have financial security.

Senator Beaudoin: I think we have discussed this *ad nauseam*, because it is only one point out of three in the *Valenti* case. I am ready to accept this as it is.

The Chairman: May I ask your opinions on point "(*d*)", Senator Joyal and others?

Senator Joyal: I would like to hear the opinion of my colleagues before I make my comments on that, Madam Chairman.

The Chairman: We are referring to the change suggested by Senator Fraser in the French version of "1.1(*d*)", that the word "objectif" be added after the word "facteur".

Senator Beaudoin: I have a problem with that. Look at this.

[*Translation*]

The French version reads "La Commission fait son examen en tenant compte des facteurs suivants", namely (a), (b), (c) and (d), "tout autre facteur qu'elle considère pertinent.

[*English*]

I think if we change any version, it should be the English version which states that the commission shall consider. There is no mention of the objective or the measure. It states, shall consider "(*a*), (*b*), (*c*), (*d*)" and any other objective measure. It has been translated as "tout autre facteur".

[*Translation*]

When you say "tout autre facteur", this implies objectivity.

Senator Joyal: No, not necessarily.

[*English*]

Senator Beaudoin: A factor is something that exists. It exists or it does not exist.

Senator Grafstein: That point is well taken. In the *P.E.I. Reference* case, one of the overlapping issues was the need for objective criteria. "Criteria" is better than "objective measures". I can bring a criterion to bear. I can say that I think everyone who has a certain colour of hair should be treated in a certain way. That, to my mind, is an arbitrary criterion. On the other hand, if I say judges who are disabled should be treated in a certain way, then I move from the arbitrary to the general. I think that "objectif" means those objective, non-arbitrary factors. We do not want the commission to say, "By the way, this was our

des pouvoirs. Je me suis employé à choisir des mots qui allaient être acceptables sur le plan juridique.

Même si je sais que ceux d'entre nous qui sont avocats ou discutent de concepts juridiques peuvent exprimer des principes de différentes façons, je serais tenté de défendre la formulation que j'ai choisie compte tenu des recherches que j'ai faites et des discussions que j'ai eues avec un conseiller juridique sur le choix des mots.

Je comprends votre point de vue. Ça fait partie du principe général de l'indépendance de la magistrature que nous voulons maintenir en permettant à la commission de s'assurer que les juges ont une sécurité financière.

Le sénateur Beaudoin: Je pense que nous avons discuté de cela *ad nauseam* parce que c'est seulement un des trois points traités dans l'affaire *Valenti*. Je suis prêt à accepter la disposition telle quelle.

La présidente: Puis-je vous demander votre avis sur l'alinéa *d*), sénateur Joyal et d'autres?

Le sénateur Joyal: J'aimerais d'abord entendre l'opinion de mes collègues avant de donner la mienne, madame la présidente.

La présidente: Je parle de la modification proposée par le sénateur Fraser à la version française de l'alinéa 1.1*d*) pour faire ajouter le mot «objectif» après le mot «facteur».

Le sénateur Beaudoin: J'y vois un problème. Regardez bien.

[*Français*]

«La Commission fait son examen en tenant compte des facteurs suivants, *a*), *b*), *c*) et à *d*), tout autre facteur qu'elle considère pertinent.»

[*Traduction*]

À mon avis, si on change l'une ou l'autre version, ce devrait être la version anglaise parce qu'il n'y est pas question de l'objectif ou de la mesure que la commission doit examiner. On dit que la commission examine *a*), *b*), *c*) et *d*), toute autre mesure objective. On a traduit ce passage par «tout autre facteur».

[*Français*]

Si vous dites tout autre facteur, le facteur est toujours objectif.

Le sénateur Joyal: Non, pas nécessairement.

[*Traduction*]

Le sénateur Beaudoin: Un facteur est quelque chose qui existe ou qui n'existe pas.

Le sénateur Grafstein: On en prend note. Dans le *Renvoi relatif aux juges de la Cour provinciale de l'Île-du-Prince-Édouard*, il est question de la nécessité d'avoir des critères objectifs. Le mot «critères» vaut mieux que les mots «objective measures» utilisés en anglais. Je peux établir un critère à prendre en considération. Je peux dire que tous ceux qui ont les cheveux d'une certaine couleur doivent être traités d'une certaine façon. D'après moi, c'est un critère arbitraire. En revanche, si je dis que les juges qui ont un handicap devraient être traités d'une certaine façon, je passe de l'arbitraire au général. Je pense que le mot

thought." If they have a thought, it must be a generally accepted criterion. It is almost like the notion of generally accepted accounting principles.

The Chairman: Before we go further, it may be of interest to you to note that, in the *P.E.I. Reference* case, they must make recommendations on judges' remuneration by reference to objective criteria. This is where the reference comes from.

Senator Beaudoin: Objective criteria is much better. I think we should change it to that expression.

Senator Grafstein: How would that be translated in French?

The Chairman: Senator Nolin has the floor.

Senator Nolin: Of course, we can change the word "measure" to "criteria", but the intent of Senator Fraser's amendment was to add —

[*Translation*]

— if you look at the three first factors or criteria listed, clearly, they are all objective. There is no need to qualify them. However, in subparagraph 4, because they are no longer defined, these factors need to be qualified. The commission has the flexibility to choose on its own those measures or criteria that it deems necessary. These criteria should be objective. It is quite appropriate to insert the word "objective", but only in subparagraph 4.

[*English*]

Senator Beaudoin: In the *P.E.I. Reference* case, they referred to objective criteria. That decision is also available in French. What does it say in French?

The Chairman: We do not have the French version of the *P.E.I. Reference* case here. We will try to get it off the Internet.

Senator Joyal: To continue on the point raised by Senator Nolin, I would remind you that the concept came from the *P.E.I. Reference* case. In my opinion, it was important. The basis of this amendment is that the mandate of the commission be circumscribed. The court clearly mentioned it had one element in mind when it stated that objective. In other words, it did not want to leave the commission with an open-ended mandate to make recommendations that could not be measured by objective criteria. That is my interpretation of the decision, and that is what I think we understand here.

When I was drafting the amendment, I thought it important that the word "objective" be maintained. It qualifies the various elements that the commission would take into consideration in making recommendations. I thought it was necessary to add a certain number of examples of criteria, such as the need to attract outstanding candidates to the judiciary. That idea came from the Scott commission. Honourable senators will remember that when Mr. Scott was here, he testified in that regard.

«objectif» qualifie les facteurs non arbitraires. Nous ne voulons pas que la commission exprime un avis sans y avoir vraiment réfléchi. L'avis qu'elle exprime doit être appuyé sur un critère généralement reconnu. C'est un peu comme les principes comptables généralement admis.

La présidente: Avant de poursuivre, il peut être intéressant de noter que, selon le *Renvoi relatif aux juges de la Cour provinciale de l'Île-du-Prince-Édouard*, la commission doit formuler des recommandations sur la rémunération des juges en s'appuyant sur des critères objectifs. C'est de là que viennent ces mots.

Le sénateur Beaudoin: Les mots «objectives criteria» valent beaucoup mieux. Je pense que nous devrions les employer à la place.

Le sénateur Grafstein: Comment les traduirait-on en français?

La présidente: La parole est au sénateur Nolin.

Le sénateur Nolin: Évidemment, nous pourrions changer le mot «measure» par «criteria», mais le changement proposé par le sénateur Fraser visait à ajouter...

[*Français*]

... en français, le mot objectif. Si vous regardez l'énumération des trois premiers facteurs ou critères, ils sont de toute évidence objectifs. On n'a pas besoin de les qualifier à ce moment. Mais au quatrième alinéa, il faut absolument le préciser parce qu'ils ne sont plus définis à ce moment. On laisse la Commission libre de choisir elle-même les facteurs ou critères qu'elle jugera nécessaire afin de l'influencer. On veut bien que ces critères soient objectifs. Il est à propos d'ajouter le mot objectif uniquement au quatrième sous-alinéa.

[*Traduction*]

Le sénateur Beaudoin: Dans le *Renvoi relatif aux juges de la Cour provinciale de l'Île-du-Prince-Édouard*, il est question de critères objectifs. La décision a été traduite. Que dit-on en français?

La présidente: Nous n'avons pas la version française du renvoi ici. Nous essayerons de nous la procurer sur Internet.

Le sénateur Joyal: Pour revenir à ce que disait le sénateur Nolin, j'aimerais vous rappeler que ce concept vient du *Renvoi relatif aux juges de la Cour provinciale de l'Île-du-Prince-Édouard*. À mon avis, c'est important. L'amendement vise à circonscrire le mandat de la commission. La cour a bien indiqué l'intention qu'elle avait en énonçant cet objectif. Autrement dit, elle ne voulait pas que la commission puisse formuler des recommandations qui ne pourraient pas s'appuyer sur des critères objectifs. C'est ainsi que j'interprète la décision et c'est aussi ce que nous en pensons ici, je crois.

Quand j'ai rédigé l'amendement, j'ai jugé qu'il était important de conserver le mot «objectif». Il qualifie les divers éléments que la commission examinerait pour formuler ses recommandations. J'ai cru bon d'énoncer certains critères, comme le besoin de recruter les meilleurs candidats pour la magistrature. J'ai tiré cet exemple de ce qu'a produit la commission Scott. Mes collègues se rappelleront que M. Scott a parlé en ce sens quand il est venu témoigner devant nous.

As well, the prevailing economic conditions in Canada, including the cost of living, must be taken into account. It is mentioned in the *P.E.I. Reference* decision as an objective criterion. The overall economic and current financial position of the federal government is also an objective criterion.

If we are to allow the commission the capacity to do its work, then it must be able to consider other criteria, but in an objective manner. In other words, it must consider criteria that are justified, ones that are measured on objective grounds. That is why the word "objective" is so important.

I certainly support the suggestion of Senator Fraser in that regard; the word "criteria" is part of the sense of that amendment.

The Chairman: It is in the French version of the P.E.I. decision as well.

Senator Joyal: We agree that we must ensure that the English and French versions are as similar as possible.

The Chairman: We cannot change the wording after we have passed it. Therefore, we should have the exact wording before us before we vote.

We can come back to it later. We will leave the staff to worry about it.

We will move on to part "(*b*)" of clause 6, on page 4. Do you have a further amendment, Senator Joyal?

Senator Joyal: Yes, Madam Chairman. It is essentially a matter of clarification.

I move that Bill C-37 be amended at paragraph "(*b*)", on page 4, by replacing line 14 with the following:

> "a report of the Commission within six months after receiving it.".

The French amendment would read:

[*Translation*]

Paragraph:

> *b*) à la page 4, par substitution à la ligne 13, de ce qui suit:
>
> "(7) Le ministre donne suite au rapport de la Commission au".

...within six months of receiving it. The six-month period remains in effect. We are talking here about the commission's report. This provision can be somewhat confusing, as it is not clear if we are talking about the commission's report or about Parliament's report.

Senator Beaudoin: Does the French version make no mention of this six-month period?

Senator Joyal: Yes, the text continues on line 14.

Senator Beaudoin: And that is where mention is made of the six-month period?

Il faut également tenir compte de l'état de l'économie au Canada, et notamment du coût de la vie. Dans la décision rendue dans le *Renvoi relatif aux juges de la Cour provinciale de l'Île-du-Prince-Édouard*, cet aspect est considéré comme un critère objectif. La situation économique et financière du gouvernement fédéral est aussi un critère objectif.

Pour pouvoir remplir son mandat, la commission doit pouvoir étudier d'autres critères, mais de façon objective. Autrement dit, elle doit examiner des critères qui sont justifiés, des critères qui peuvent être évalués sur une base objective. Voilà pourquoi le mot «objectif» est si important.

J'approuve tout à fait la proposition du sénateur Fraser à ce sujet; le mot «criteria» donne en partie son sens à cet amendement.

La présidente: Il est aussi employé dans la version française de la décision sur le renvoi de l'Île-du-Prince-Édouard.

Le sénateur Joyal: Nous convenons qu'il faut nous assurer que les versions anglaise et française se ressemblent le plus possible.

La présidente: Nous ne pouvons pas changer le libellé après l'avoir adopté. Nous devons donc avoir le libellé exact avant de nous prononcer.

Nous pouvons y revenir plus tard. Nous laisserons le soin au personnel de s'en occuper.

Nous passons à la partie *b)* de l'article 6, à la page 4. Avez-vous un autre amendement, sénateur Joyal?

Le sénateur Joyal: Oui, madame la présidente. Il s'agit simplement d'un éclaircissement.

Je propose que le projet de loi C-37 soit modifié, à la page 4, par substitution à la ligne 14 de la version anglaise de ce qui suit:

> «a report of the Commission within six months after receiving it.»

Voici le libellé de l'amendement en français:

[*Français*]

Paragraphe:

> *b*) à la page 4, par substitution à la ligne 13, de ce qui suit:
>
> « (7) Le ministre donne suite au rapport de la Commission au »

... plus tard six mois après l'avoir reçu. On maintient la période de six mois. C'est le rapport de la commission dont on parle. L'article peut porter à confusion si c'est le rapport de la commission ou le rapport du Parlement.

Le sénateur Beaudoin: C'est parce qu'en français, on ne parle pas du six mois?

Le sénateur Joyal: Oui, il y a un six mois. On continue avec le texte de la ligne 14.

Le sénateur Beaudoin: Et là, il y a le six mois?

Senator Joyal: Precisely. The only thing added to the French version is "de la Commission" because it is not clear which report is being referred to. It is purely a technicality.

[*English*]

I think we all understand the point.

The Chairman: At this point, rather than voting on part "(*b*)," we will go back to part "(*a*)" because we now have the wording.

Because there are changes to both the English and French versions, we will have to vote on both versions. We will start with the English version. Senator Joyal, will you restate the amendment?

Senator Joyal: The amendment to paragraph "(*d*)" states:

> "any other objective criteria that the Commission considers relevant.";

The Chairman: Shall the English version of clause 6, as further amended, carry?

Hon. Senators: Agreed.

The Chairman: Carried.

Rather than reading the entire clause, it has been moved by Senator Joyal that paragraph "(*d*)" read:

[*Translation*]

> Tout autre critère objectif qu'elle considère pertinent.

Senator Beaudoin: Perfect.

[*English*]

Senator Nolin: In the introduction of "1.1" we have the word "facteur". We must change that to "critère". I want to ensure that we are talking about the same thing.

Senator Joyal: Personally, I would prefer "facteur" in both paragraph "1.1" and in subparagraph "(*d*)".

Senator Nolin: My point is to use the same wording in both places.

Senator Beaudoin: But what will we use?

Senator Joyal: We will use the word "facteur".

[*Translation*]

Senator Joyal: "Facteur."

Senator Nolin: The correct word is "facteur."

Senator Beaudoin: However, in point *d*), we would use "critère objectif"?

Senator Joyal: No, we would use "facteur" to maintain agreement with paragraph 1.1.

Senator Beaudoin: And what do we do with the English version?

[*English*]

The Chairman: What Senator Joyal is moving is to change his amendment to read, in part "(*d*)":

Le sénateur Joyal: Oui, exactement. Ce qu'on ajoute tout simplement dans la version française c'est «de la Commission» parce qu'on ne sait pas de quel rapport on parle. C'est purement une technicalité.

[*Traduction*]

Je crois que nous comprenons tous le point.

La présidente: Maintenant, plutôt que de voter à l'égard de la partie «*b*)»,nous allons revenir à la partie «*a*)» vu que nous avons le libellé

Vu qu'il y a des changements et à la version anglaise et à la version française, il nous faudra voter sur les deux versions. Nous commençons par la version anglaise. Sénateur Joyal, auriez-vous l'obligeance de reformuler l'amendement?

Le sénateur Joyal: L'amendement proposé au paragraphe «*d*)» stipule:

> «any other objective criteria that the Commission considers relevant.»;

La présidente: La version anglaise de l'article 6 modifié est-elle adoptée?

Des voix: D'accord.

La présidente: Adoptée.

Plutôt que de lire l'article au complet, il est proposé par le sénateur Joyal que l'alinéa *d)* se lise comme suit:

[*Français*]

> Tout autre critère objectif qu'elle considère pertinent.

Le sénateur Beaudoin: C'est parfait.

[*Traduction*]

Le sénateur Nolin: Dans l'introduction de «1.1», nous avons le mot «facteurs». Nous devons le remplacer par «critères». Je veux être sûr que nous parlons de la même chose.

Le sénateur Joyal: Personnellement, je préférerais «facteurs» tant au paragraphe «1.1» qu'à l'alinéa «*d*)».

Le sénateur Nolin: Ce que je veux, c'est qu'on utilise le même mot aux deux endroits.

Le sénateur Beaudoin: Mais lequel utiliserons-nous?

Le sénateur Joyal: Nous utiliserons le mot «facteurs».

[*Français*]

Le sénateur Joyal: «facteur».

Le sénateur Nolin: Le vrai mot est «facteur ».

Le sénateur Beaudoin: Mais dans *d*) ce serait «critère objectif»?

Le sénateur Joyal: Non, «facteur», parce qu'on maintient la concordance avec le paragraphe (1.1).

Le sénateur Beaudoin: Et en anglais, qu'est-ce qu'on fait?

[*Traduction*]

La présidente: Ce que propose le sénateur Joyal, c'est de modifier son amendement pour que l'alinéa «*d*)» se lise comme suit:

[*Translation*]

Tout autre facteur objectif qu'elle considère pertinent.

[*English*]

All in favour?

Senator Beaudoin: If we leave the word "criteria" in, it is included in "facteur".

Senator Joyal: I totally agree with Senator Beaudoin that in the definition "criteria" is part of "facteur". To ensure that the concordance is maintained, we should include the word "facteur". One includes the other.

The Chairman: All those in favour of the amendment?

Hon. Senators: Agreed.

The Chairman: All those opposed?

Carried.

That clause 6 be further amended by substituting at line 14:

"a report of the Commission within six months after receiving it."

I am informed that the French works as well.

All those in favour of the amendment?

Hon. Senators: Agreed.

The Chairman: All those opposed?

Carried.

Shall clause 6, as amended, carry?

Hon. Senators: Agreed.

The Chairman: All those opposed?

Carried.

Shall clause 7 carry?

Hon. Senators: Agreed.

The Chairman: All those opposed?

Carried.

Shall clause 8 carry?All those in favour?

Hon. Senators: Agreed.

The Chairman: I declare clause 8 carried.

Shall clause 9 carry? All those in favour?

Hon. Senators: No.

The Chairman: All those opposed?

I declare clause 9 negatived.

Shall clause 10 carry?

Hon. Senators: No.

The Chairman: I declare clause 10 negatived.

Shall clause 11 carry?

Hon. Senators: No.

The Chairman: I declare clause 11 negatived.

[*Français*]

Tout autre facteur objectif qu'elle considère pertinent.

[*Traduction*]

Tous ceux qui sont en faveur de l'amendement.

Le sénateur Beaudoin: Le mot «facteur» traduit bien le mot «critère»,

Le sénateur Joyal: Je suis tout à fait d'accord avec le sénateur Beaudoin. Pour assurer la concordance, nous devrions utiliser le mot «facteur», l'un incluant l'autre.

La présidente: Tous ceux qui sont en faveur de l'amendement?

Des voix: D'accord.

La présidente: Tous ceux qui sont contre.

Adopté.

Que l'article 6 soit de nouveau modifié par substitution à la ligne 14 du texte anglais par ce qui suit:

«a report of the Commission within six months after receiving it.»

On m'informe que ça va aussi pour le texte français.

Tous ceux qui sont en faveur de l'amendement.

Des voix: D'accord.

La présidente: Quels sont ceux qui sont contre?

Adopté.

L'article 6 modifié est-il adopté?

Des voix: D'accord.

La présidente: Tous ceux qui sont contre?

Adopté.

L'article 7 est-il adopté?

Des voix: D'accord.

La présidente: Tous ceux qui sont contre.

Adopté.

L'article 8 est-il adopté? Tous ceux qui sont pour?

Des voix: D'accord.

La présidente: L'article 8 est adopté.

L'article 9 est-il adopté? Tous ceux qui sont pour?

Des voix: Non.

La présidente: Tous ceux qui sont contre.

L'article 9 est rejeté.

L'article 10 est-il adopté?

Des voix: Non.

La présidente: L'article 10 est rejeté.

L'article 11 est-il adopté?

Des voix: Non.

La présidente: L'article 11 est rejeté.

There are no changes to clauses 12 to 20. Shall we consider them en masse?

Hon. Senators: Agreed.

Senator Beaudoin: I wish to confirm one thing. Clause 12 refers to amending section 47. It mentions the word "enfant".

[*Translation*]

I trust it is not related to the question of the surviving spouse.

Senator Nolin: No, it has to do with the question of children.

Senator Beaudoin: Shall this clause carry?

[*English*]

Senator Beaudoin: My concerns have been addressed. I wanted to be sure.

The Chairman: Shall clauses 12 to 20 carry?

Hon. Senators: Agreed.

The Chairman: Opposed?

Carried.

Shall clause 21 carry?

Senator Joyal: Madam Chairman, taking into account that we have amended the previous clauses of the bill, I would like to move an amendment to ensure that we are consistent with the previous clauses of the bill. I would like to move that Bill C-37 be amended in clause 21, on page 13, by replacing lines 1 to 3 with the following:

"21. Sections 2, 3, 7 and 14 to 20 come into force on a day or"

[*Translation*]

In French, the amendment would read as follows:

Que le projet de loi C-37, à l'article 21, soit modifié, par substitution, aux lignes 3 à 5, page 13, de ce qui suit:

"21. Les articles 2, 3, 7, et 14 à 20 entrent en vigueur à la date".

And it goes on to say on line 6 "à la date fixée par décret".

Senator Nolin: The coming-into-force date is determined by an order of the Governor in Council. A question just occurred to me. I did not put any questions to the department's witnesses when they testified before the committee. Since the coming into force of these amendments affects remuneration, does this clause not put some power in the hands of the executive? Could this not be perceived as the executive branch exercising some control over remuneration? Why would the bill not come into force on the day it receives Royal Assent?

Senator Joyal: I would not venture to speak on behalf of the justice department or the Minister of Justice, but I do believe that some provisions have been put in place.

[*English*]

One of the main reasons this provision has been added is that there are elements in the bill which needed further consultation with the various levels of the judiciary. In particular, in Ontario,

Aucun changement n'est proposé aux articles 12 à 20. Les membres acceptent-ils de les étudier en bloc?

Des voix: D'accord.

Le sénateur Beaudoin: Je veux confirmer une chose. L'article 12 porte modification de l'article 7. On utilise le mot «enfant».

[*Français*]

J'espère que ce n'est pas relié au conjoint survivant.

Le sénateur Nolin: Non, c'est toute la question des enfants.

Le sénateur Beaudoin: Adopté?

[*Traduction*]

Le sénateur Beaudoin: Mes craintes sont apaisées. Je voulais être sûr.

La présidente: Les articles 12 à 20 sont-ils adoptés?

Des voix: D'accord.

La présidente: Tous ceux qui sont contre.

Adopté.

L'article 21 est-il adopté?

Le sénateur Joyal: Madame la présidente, étant donné que nous avons modifié ces articles du projet de loi, j'aimerais proposer un amendement qui en assurera la conformité avec les dispositions précédentes du projet de loi. J'aimerais proposer que le projet de loi C-37, à l'article 21, soit modifié par substitution, aux lignes 3 à 5, page 13, de ce qui suit.

«21. Sections 2, 3, 7 and 14 to 20 come into force on a day or»

[*Français*]

En français, l'amendement se lirait:

Que le projet de loi C-37, à l'article 21, soit modifié, par substitution, aux lignes 3 à 5, page 13, de ce qui suit:

« 21. Les article 2, 3, 7, 14 à 20 entrent en vigueur à la date».

Et le texte français se poursuit. C'est à la date fixée par décret, à la fin de la ligne six.

Le sénateur Nolin: Ce sera un décret du pouvoir exécutif. La question me vient à l'instant et je n'ai pas posé de questions aux témoins du ministère lorsqu'ils sont venus témoigner. Comme la mise en vigueur de ces amendements inclut la rémunération, est-ce qu'il n'y a pas, dans cet article de mise en vigueur, un pouvoir entre les mains du pouvoir exécutif? Cela ne pourrait-il pas être perçu comme un contrôle de la rémunération? Pourquoi le projet de loi ne viendrait-il pas en vigueur carrément au moment de sa sanction?

Le sénateur Joyal: Je pense qu'il y a des dispositions, enfin, je ne veux pas risquer de parler au nom du ministère de la Justice ou du ministre de la Justice, certainement pas.

[*Traduction*]

Cette disposition a été ajoutée en grande partie parce que le projet de loi comporte des éléments qui nécessitaient une consultation plus poussée avec divers paliers de l'appareil

there are discussions about the establishment of the new judges of the family court, and so forth. That is why there are elements that require further discussion with other parties and the necessity of clause 21.

Normally legislation comes into force on the day of its Royal Assent. However, because of the particular elements in the bill with respect to the provincial court, the coming into effect of the bill is fixed by an order of the Governor in Council.

Senator Beaudoin: Having regard to the complexity of the statute, I do not think it detracts from the independence of the judiciary. I understand your point because if the executive branch chooses to delay, the judges may interpret that as going against the independence of the judges." However, in my opinion, this is purely technical, and I would not worry about it.

Senator Nolin: My concern relates to clause 5. As I see it, clause 5 is not included in here. Therefore, I can backtrack on my earlier comments. Clause 5 is the remuneration clause.

Senator Joyal: However, it is not included.

[*Translation*]

The amendments pertain to clauses 2,3,7, 14 and 20.

Senator Nolin: I withdraw my comments in that case.

[*English*]

The Chairman: If I may clarify, these technical amendments are being put in because, in conjunction with Ontario's Bill 79, which would rename certain courts of Ontario, clauses 2, 3 and 7 and the transitional provisions of Bill C-37 would make corresponding amendments to various pieces of legislation, including the Judges Act.

Senator Nolin: I would ask members of this committee to forget my previous comments. The Constitution gives that power to Parliament, not to the executive branch of the government.

Senator Beaudoin: It is the power of the purse.

Senator Joyal: It is important that we know which parts of the bill are subject to a decree of the Governor in Council, taking into account the principle of the separation of power, which we discussed this morning. We must be clear that what we are doing is in strict conformity with the separation of power.

The Chairman: The question then is on the amendment to clause 21. All those in favour of the amendment?

Hon. Senators: Agreed.

The Chairman: All those opposed?

Carried.

Shall clause 21, as amended, carry?

Hon. Senators: Agreed.

The Chairman: Carried.

Shall the title carry?

judiciaire. Plus particulièrement, en Ontario, il est question de l'installation des nouveaux juges du tribunal de la famille, et cetera. C'est la raison pour laquelle il s'y trouve des éléments qui nécessitent une discussion plus poussée avec d'autres parties et l'ajout de l'article 21.

D'habitude la loi entre en vigueur au moment de la sanction royale. Cependant, étant donné les éléments particuliers du projet de loi en ce qui concerne la cour provinciale, l'entrée en vigueur est fixée par décret

Le sénateur Beaudoin: Étant donné la complexité de la loi, je ne crois pas qu'elle s'éloigne de l'indépendance du pouvoir judiciaire. Je comprends votre point étant donné que si le pouvoir exécutif choisit de reporter l'entrée en vigueur, les juges pourraient interpréter cela comme allant à l'encontre de leur indépendance. Cependant il s'agit selon moi d'une modification purement technique et je ne m'inquiéterais pas.

Le sénateur Nolin: Je m'interroge au sujet de l'article 5. De la façon dont je vois les choses, l'article 5 n'est pas inclus ici. Par conséquent, je peux retirer ce que j'ai dit. L'article 5 est celui où il est question du calcul du traitement.

Le sénateur Joyal: Cependant, il n'est pas inclus.

[*Français*]

Ce sont les article 2, 3, 7,14 et 20.

Le sénateur Nolin: Je retire mes commentaires.

[*Traduction*]

La présidente: Si je peux éclairer votre lanterne, ces amendements techniques sont présentés parce que, conjointement avec le projet de loi 79 de l'Ontario, qui renommerait certains tribunaux de l'Ontario, les articles 2, 3 et 7 de même que les dispositions transitoires du projet de loi C-37 apporteraient des modifications qui s'imposent à diverses mesures législatives, y compris la Loi sur les juges.

Le sénateur Nolin: Je demande aux membres du comité d'oublier ce que j'ai dit. La Constitution donne ce pouvoir au Parlement et non à l'exécutif.

Le sénateur Beaudoin: C'est le pouvoir du Trésor public.

Le sénateur Joyal: Il est important que nous sachions quelles sont les parties du projet de loi qui sont assujetties à un décret, en tenant compte du principe de la séparation des pouvoirs dont nous avons discuté ce matin. Nous devons nous assurer de respecter la séparation des pouvoirs.

La présidente: La mise aux voix porte sur l'amendement proposé à l'article 21. Tous ceux qui sont en faveur de l'amendement?

Des voix: D'accord.

La présidente: Quels sont ceux qui s'y opposent?

Adopté.

L'article 21 modifié est-il adopté?

Des voix: D'accord.

La présidente: Adopté.

Le titre est-il adopté?

Hon. Senators: Agreed.

The Chairman: Carried.

Shall the bill, as amended, carry?

Hon. Senators: Agreed.

The Chairman: Carried.

Is it agreed that the clauses of the bill be renumbered appropriately?

Hon. Senators: Agreed.

The Chairman: Carried.

Shall I report the bill, as amended, to the Senate?

Hon. Senators: Agreed.

The Chairman: That completes our agenda for today, honourable senators.

The committee adjourned.

Des voix: D'accord.

La présidente: Adopté.

Le projet de loi modifié est-il adopté?

Des voix: D'accord.

La présidente: Adopté.

Plaît-il aux membres du comité que les articles du projet de loi soient renumérotés correctement?

Des voix: D'accord.

La présidente: Adopté.

Dois-je faire rapport du projet de loi modifié au Sénat?

Des voix: D'accord.

La présidente: Hororables sénateurs, nous avons épuisé notre ordre du jour.

La séance est levée.

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

SUBMISSIONS

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

L. Yves Fortier, C.C., Q.C.
Pierre Bienvenu
Ogilvy Renault, S.E.N.C.
1981 McGill College Avenue
Suite 1100
Montréal, Quebec H3A 3C1

December 15, 2003

> judges' salaries and the remuneration of those senior federal public servants whose skills, experience and levels of responsibilities most closely parallel those of the Judiciary. We agree with the substance of the observation by both the Courtois and Scott Commissions (1990 and 1996) that the relationship between the remuneration of DM-3s and judges should be maintained, not as a precise measure of "value" but as a reflection of "*what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges.*" [32]

61. There are no circumstances or reasons that would justify this Commission to reach a different conclusion. The conclusion was valid then and it remains valid today.

62. It is noted that while previous judicial compensation commissions, including the Drouin Commission, have often referred to the notion of rough equivalence with the midpoint of the salary range of DM-3s, the correct expression of the principle is rough equivalence with the midpoint of the salary range of *the most senior level of deputy minister.*[33] That is because from 1975 until early 2001 the most senior level of deputy minister was the DM-3 and, therefore, the two formulations of the principle were synonymous.

63. Since the *Drouin Report* was submitted to the Minister of Justice on May 31, 2000, a higher level of deputy minister was created, the DM-4. The judiciary has been advised by the Government that the DM-4 level was created on the recommendation of the Advisory Committee on Senior Level Retention and Compensation (the "**Strong Committee**"), in recognition of the Government's view that certain DM-3 positions were larger in scope and clearly at a higher level of responsibility. According to the Government, it was felt that the creation of a more senior level, restricted to a very small number of people, would ensure equity with chief executive officers of some of the larger Crown corporations, and allow the Government to retain what was perceived as critical expertise at that level.

64. The judiciary has been informed that only two deputy ministers are currently paid at the DM-4 level. They are: the Clerk of the Privy Council and Secretary to the Cabinet, and the Deputy Minister of Finance.

---

32 *Drouin Report* (2000) at 30-31 [underlining added].

33 See *e.g. Guthrie Report* (1987) at 8.

65. As mentioned earlier in these submissions, judicial salaries have traditionally been compared with the midpoint of the salary range of the most senior level of deputy minister. The application of this benchmark would justify comparing judicial salaries either with the midpoint of the salary range of DM-4s, or, alternatively, with the midpoint of the salary range of the DM-3 and DM-4 levels taken together as a single category.

66. The creation of the DM-4 category is recent and its composition appears still to be in a state of flux. The Association and Council understand that initially, only the Clerk of the Privy Council and Secretary to the Cabinet was paid at this level, and that the Deputy Minister of Finance was only subsequently elevated from the DM-3 to the DM-4 level. The Association and Council do not know whether it is intended that, in the future, other civil servants will be paid at the DM-4 level.

67. In this period of transition, the judiciary is prepared to accept that this Commission compare judicial salaries with the midpoint of the remuneration (including at-risk pay) of DM-3s. However, the Association and Council expressly reserve their right to rely on the DM-4 compensation level as the relevant comparator on appearances before future Quadrennial Commissions.

68. The Drouin Commission quite appropriately rejected the notion, put forward by the Government, that when considering the DM-3 comparator, regard should be had only to the midpoint of the base salary range of DM-3s, without regard to at-risk awards.[34] The Commission chose to consider the average of actual at-risk awards as a percentage of the maximum awards available for DM-3s, an approach that is sound and that reflects the fact that the variable pay component of the remuneration of DM-3s was regarded by the Strong Committee as an integral part of the total compensation for DM-3s.[35] The Association and Council submit that this Commission should adopt this same approach.

---

34 *Drouin Report* (2000) at 25-26.

35 *Ibid.*

69. The Government has provided information to the judiciary concerning the base salary range and at-risk pay for DM-3s from April 1, 1999 to present. The judiciary was also provided with information concerning the percentage of at-risk awards made to DM-3s during the same period. This information is included in Appendix A to these submissions, with an analysis of the remuneration of DM-3s in recent years and a comparison of the remuneration of DM-3s with the salaries of puisne judges during the period 1993 to present.

70. The Association and Council seek a judicial salary for puisne judges as of April 1, 2004 in an amount equal to the *current* remuneration of deputy ministers at the DM-3 level even though it can be expected that DM-3s will enjoy a further salary increase as of April 1, 2004.

4. Annual increments

71. The Drouin Commission recommended, and the Government accepted in its response to the *Drouin Report*, that judicial salaries be subject to annual increments over and above statutory indexing.[36] The Association and Council urge this Commission to make a similar recommendation so as to minimize the adjustments to be made to judicial salaries every four years. The Association and Council will make submissions as to the amount of these annual increments at the oral hearing.

5. Salary differentials with justices of the Supreme Court of Canada, Chief Justices and Associate Chief Justices

72. For many years the differential between the salaries of puisne judges and those of Chief Justices and Associate Chief Justices of the federally appointed judiciary has been relatively constant. The Drouin Commission saw no reason to alter this differential and it is submitted by the Association and Council that it ought to remain unchanged. The same submission is made in respect of the salary differential between superior court judges and puisne judges of the Supreme Court of Canada.

73. The Association and Council take no position on the question of whether the Commission should recommend a salary differential between appellate and trial court judges.

---

36 *Ibid.* at 49.

House of Commons
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 024 • 1st SESSION • 39th PARLIAMENT

EVIDENCE

Tuesday, October 24, 2006

Chair

Mr. Art Hanger

The commission's report recommended a salary increase of $23,400 per year, retroactive to 2004. The government's position is $15,700 per year, retroactive to 2004. If we adopt one or the other, I don't think we're in danger of the judiciary falling into that temptation.

Mr. Roderick McLennan: Certainly not, and that's not what I've suggested.

The Chair: I wonder if Mr. McLennan would respond to that. I think it's important that he does.

Mr. Roderick McLennan: Yes.

Certainly there's no suggestion that corruption starts around the $220,000-a-year level. At either level, they're not likely to be corrupted. But I'm talking philosophically.

Why does our Constitution establish that Parliament sets the salary of judges? Judges are the third arm of the government and they have to be independent. In order to be independent, they have to have a standard of living that's commensurate with the job they do. And amongst other things, philosophically it prevents them from being subject to corruption. It has nothing to do with whether it's $220,000 or $240,000 or $180,000.

● (1710)

Mr. Rob Moore: Thanks for clarifying that.

Some of what we've heard is that in order to attract candidates, this has to be the amount. I know Mr. Bagnell had some questions on it. I know there's a recognition that the Supreme Court has been pretty clear that it is Parliament that has final authority on the public purse. We are ultimately responsible for how taxpayers' money is spent even in this current system.

When we hear about those who have put their names forward for judicial appointment, the number of vacancies that are available, and the number of applicants who are in there as either recommended or highly recommended, then with the government's proposed increase of 7.25%, I fail to see how someone is somehow being denied the opportunity or is being discouraged from seeking judicial appointment.

I know a great deal of weight was put on the commission's work, and I certainly respect the work the commission has done. But I don't see any evidence that somehow we wouldn't be able to attract highly qualified candidates if the wages that judges are currently paid were increased by 7.25% per year.

Mr. Roderick McLennan: First of all, the statistics that are referred to are statistics from 2000 and are not available to us. But there's no doubt that it has been the case for many years that there are many more applicants for judicial office than there are judicial offices. The question is, what is the appropriate level of compensation, and what do you do to ensure that the best and the brightest are in the pool from which candidates can be selected?

Mr. Rob Moore: Do you see evidence among the current pool of applicants that the best and the brightest are not in that pool? Are people of less than stellar qualifications applying? The individual committees provincially have to recommend or highly recommend these individuals, so do you see evidence that there's any shortage of anyone recommended or highly recommended? When we look at what the committees are putting forward, there seem to be many. The minister testified that there are many who are recommended and highly recommended.

Mr. Roderick McLennan: Of course, the minister's statistics are from 2006. I don't know what they were when this committee was sitting, but we obviously didn't have 2006 numbers.

It's just one of the factors in arriving at a number, but it's not *the* factor. With respect, if you're hunting for the new president of Canada Post, you don't put the job up for bid and describe its marvellous pension and the corporate jet and ask people to bid for it. If there are 100 qualified people, 25 of whom are really qualified, you don't have a Dutch auction to see what the lowest one is going to work for. You ought not to do that with judges either, in my submission.

The Chair: Thank you, Mr. Moore.

Ms. Barnes.

Hon. Sue Barnes (London West, Lib.): Thank you very much.

I would apologize for us not being here all the time. The government has chosen to call another piece of legislation at the same time, which necessitates some of us being in the House to speak on it.

I want to first of all put on the record how grateful most Canadians are for the work that you've done and the professional manner in which you have done it for us. I would also like to say that I think it's incredibly important that the concept of the independence of the judiciary is understood by Canadians.

Perhaps this has been canvassed on, but maybe I'll go to Mr. Cherniak to just do a bit of an education process for most Canadians who might be hearing this.

Why should we not be discussing the things we're being forced to discuss at this time?

Mr. Earl Cherniak: Well, the reason is that there was a constitutional process that came about because of the disaster that preceded, which resulted in the P.E.I. reference being necessary in the first place. The constitutional process was to appoint an independent, high-quality commission to work independently, not as an arbitration group but in the public interest, to hear input from the public, from the participants, and to come up with recommendations that, except with very good reason, would be accepted by Parliament to set judicial salaries.

Therein the process mandated not only the method of selecting the commission but the way in which the commission's report was to be addressed by Parliament. The commission had a mandate to report by May 31, 2004—and every fourth year on May 31—which we did. The government had an obligation, under the legislation, to respond in six months, which it did, and either accept the recommendations of the commission or give cogent reasons why it didn't and why the recommendations of the commission should not be accepted.

The government of the day did that, and with one minor exception, which isn't germane to what we're talking about, the government of the day accepted every one of the recommendations we made.

There is no provision in that constitutionally mandated process for what transpired after that. There's no provision for a second report after a new government comes in a year and a half or two years later. In my view, that politicizes the process, and it's extremely dangerous because it causes disrespect for the process among the judiciary, among the public, and it will make it more....

I say, immodestly, this was a very talented commission, and we thought what we were doing was very important to the public of this country. If a future commission's recommendations can be treated in the way that the process has transpired here, there will be a great deal of difficulty finding the kind of commissioners that this country needs to conduct this process every four years.

● (1715)

Hon. Sue Barnes: Thank you very much. So in your opinion there was no legal authority to place before Parliament a second report that differed in nature from the first report. Am I hearing you correctly?

Mr. Earl Cherniak: I don't think I should give a legal opinion. I can read the statute. You can read the statute. There's a provision for the response in six months. That happened. There's no provision for any further response.

Hon. Sue Barnes: Thank you. I think that does answer the concern there.

The Chair: You have time for one more question, Ms. Barnes.

Hon. Sue Barnes: Thank you.

One thing that concerned us at this table is that to increase the numbers, to put this provision back to the original report—as I know some of us would like to do—we need a royal recommendation. Without the royal recommendation of this government, we don't have the authority to spend more money. That puts us in a very difficult position. I just put that on the table so people understand that we can take it down under the rules, but we cannot increase without the government allowing us to do so. We will see how this plays out.

I know my colleague, the former Minister of Justice, wanted to be here, but he's now at another place doing this.

I want to say, at least from my party, and I think from all the opposition parties, with the respect we hold for the judiciary, this attack that seems to be coming from the current government is not only disrespectful, but it is harmful to the whole system of justice in this country. This is a hard-working system of justice. It's led by judicial officers who have been chosen for their talents, as you well know. The fact that we are put in this position today by the current government, I think is wrong. I believe we have sufficient case law on point telling us that.

The Minister of Justice stood in the House, when I responded to it the first time, saying to plead less money in the area, when we had the best surplus ever. To plead that we could get people for cheaper was just a spurious argument. I feel somewhat ashamed to be in this situation at the current time.

I hope that in the future we are able to have people of your calibre doing this work, because it's important for all of us.

If anybody would care to make a comment, I certainly would give my time to them.

● (1720)

The Chair: Thank you, Ms. Barnes.

Would the witnesses like to comment?

Mr. Roderick McLennan: The minister was inviting what would virtually be a free vote, wasn't he? As I understood the minister, I thought he invited the committee to do what they thought was appropriate.

Hon. Sue Barnes: With respect, the minister may have left out the fact that if we want to raise the moneys up, the government has to give its consent, because we don't have that power. That was what I put on the table seconds after he made his statement in the House originally. It's called a royal recommendation.

The Chair: Thank you, Ms. Barnes.

One comment that Ms. Barnes brought up was whether the commission looks at this settlement as an attack on the judiciary.

Mr. Roderick McLennan: I wouldn't say so, Mr. Chair. I don't think it's an attack on the judiciary. The judiciary are much more sensitive about these things than I am, so I don't know what the judiciary would think, but I wouldn't see it that way.

The Chair: Thank you very much.

Hon. Sue Barnes: Mr. Chair, I'd like to clarify. I don't think that's what I was saying at all. I was saying that the government is often attacking the discretion of the judiciary, and they do so with their bills, with certain points.

I do not want my words reinterpreted from the chair.

Thank you.

The Chair: Thank you for the point of clarification, Ms. Barnes.

I would like to thank the witnesses for their appearance.

I think this has been a valuable discussion. It's unfortunate we can't continue on a little longer. I know there are other points the members would like to question further, but time does not permit.

Thank you for your attendance.

I'm going to suspend the meeting for about one minute.

[*Proceedings continue in camera*]

SUBMISSION

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

to the

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

Pierre Bienvenu
Azim Hussain
Ogilvy Renault LLP

December 14, 2007

to public servants.[77] As noted by the Crawford Commission, rough parity of this nature between judges and top level public servants finds support in the comparative salary figures from a number of other common law democracies.[78]

96. While making clear that no one comparator should be determinative, the Drouin Commission endorsed the principle of a relationship between judicial salaries and the remuneration of DM-3s. It stated:

> While we agree that the DM-3 comparator should not be determinative of our recommendations concerning judicial salaries, in our view, it is an appropriate and useful comparator at this time. More particularly, we have concluded that the important aspect of the DM-3 comparator, for the purposes of our inquiry, is the maintenance of a relationship between judges' salaries and the remuneration of those senior federal public servants whose skills, experience and levels of responsibilities most closely parallel those of the Judiciary. We agree with the substance of the observation by both the Courtois and Scott Commissions (1990 and 1996) that the relationship between the remuneration of DM-3s and judges should be maintained, not as a precise measure of "value" but as a reflection of "what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges." [79]

97. In the time period between the report of the Drouin Commission in 2000 and the beginning of the mandate of the McLennan Commission in 2003, the Government created a category above the DM-3. The DM-4 category was created as a consequence of a recommendation of the Strong Committee in its third report, dated December 2000.[80] It is interesting to note that one of the factors behind the recommendation of the Strong Committee was the need to "[send] an important message in terms of the government's willingness to attract and retain qualified and experienced staff."[81]

98. At the time of the McLennan Commission, it was understood that there were only two DM-4s, the Clerk of the Privy Council and the Deputy Minister of Finance. The

---

77 See *e.g.* Crawford Report (1993) at 11.

78 Crawford Report (1993) at 11.

79 Drouin Report (2000) at 30-31.

80 Advisory Committee on Senior Level Retention and Compensation, *Third Report: December 2000* at 41, reproduced in the judiciary's Book of Cited Documents.

81 *Ibid.*

Association and Council have recently been informed by the Government that while there are still only two incumbents in the DM-4 category, the identity of their respective departments is now confidential on the ground that it would identify the particular individuals. The Government has advised that, in general, DM classification is personal to the incumbent and based on merit, and that it is not linked to particular departments.

99. It was explicitly stated before the McLennan Commission that, while the Association and Council reserved the right to use DM-4 as a comparator before subsequent Commissions, the judiciary was willing at that point to forego comparison with the compensation of DM-4s since the category was new and still in a state of flux. There is at present no indication that the DM-4 category will be phased out, and there is no reason to ignore it in the comparison between judicial compensation and the compensation of the most senior deputy ministers.

100. The McLennan Commission expressed some concern about confining the comparison to the DM-3 category,[82] and it also considered information relating to other DM categories. It seemed also to have drawn comparisons with other Governor-in-Council appointees, known as GC and GCQ categories, noting that some of these positions are quasi-judicial in nature.[83]

101. The Association and Council submit that judicial salaries should continue to be compared with the remuneration of the most senior deputy ministers. This comparator has withstood the test of time, and it is one that the Government itself submitted before the Crawford Commission as a formal comparator that should be adopted.[84]

102. To expand the comparative exercise would create the risk of diluting the comparator to a point where there would be no underlying principled logic justifying the comparison. The comparison of judicial salaries with the compensation of the most senior deputy ministers is required on the principled basis that the judiciary is not subordinate to the

---

82 McLennan Report (2004) at 28.

83 McLennan Report (2004) at 30.

84 The Government's submission on this point before the Crawford Commission is cited in the Drouin Report (2000) at 28.

executive. Members of the judiciary should earn at the same general level as the senior members of the executive since it would otherwise upset the political equilibrium between these two branches of the state.

103. Consideration of the DM-1 is an example of how the comparator risks being diluted if other Governor-in-Council appointees are considered. The Association and Council have been informed by the Government that the DM-1 is normally an Associate Deputy Minister reporting to a DM or to a Deputy Secretary to the Privy Council Office. DM-1s can therefore fairly be described as "DMs in training". It is submitted that any comparison between the judiciary and this category would be bereft of principle.

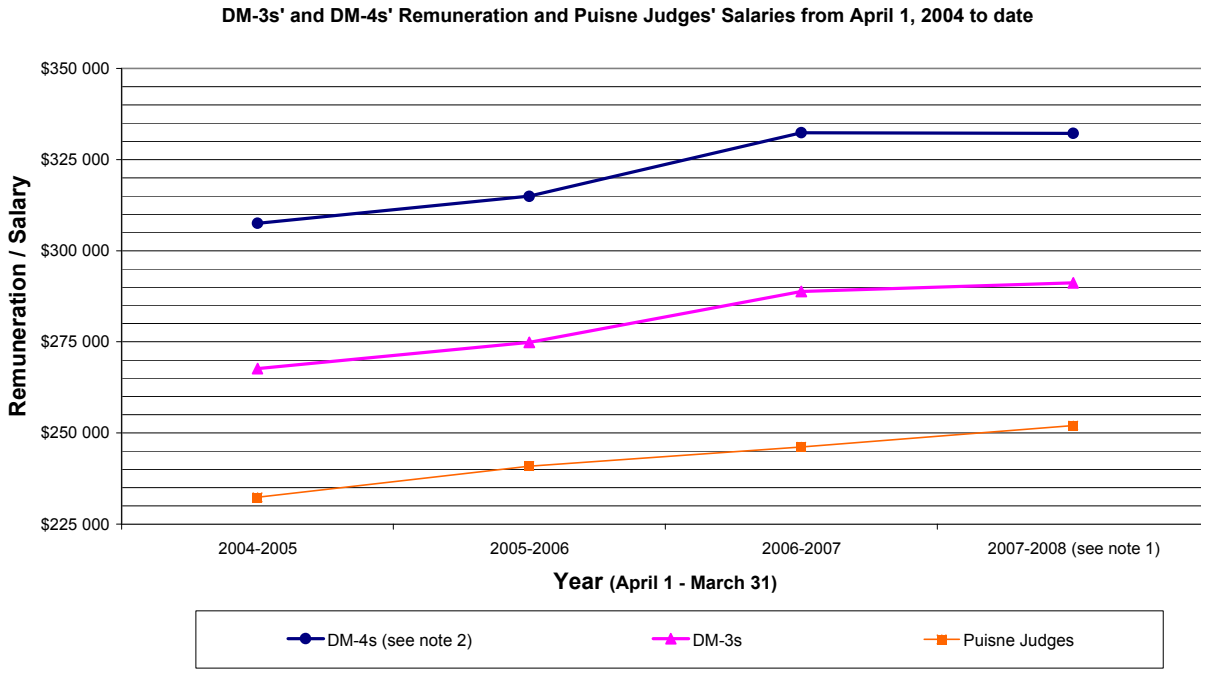
104. As stated above and by many successive compensation commissions, comparison between the remuneration of the most senior deputy ministers and that of judges should continue, not because it is a precise measure of "value", but as a reflection of what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by senior deputy ministers and judges. Just as the senior deputy ministers are outstanding professionals who must execute with excellence heavy responsibilities regarding the conduct of the affairs of the executive branch, judges are appointed because of their outstanding performance as lawyers and because they must impartially and independently adjudicate disputes that have significant ramifications in the public and private spheres.

ii) At-risk pay

105. In recent years, a variable component described as "at-risk pay" has become a significant component of the remuneration of DMs (and certain other Governor-in-Council appointees). That component arose out of the recommendations of the Strong Committee, which said the following about "at-risk" pay for deputy ministers:

> […]we are proposing a compensation system where the job rate, the fixed component of compensation that is paid for fully satisfactory performance, is adjusted at intervals using market comparisons of total compensation in appropriate comparator groups. The proposed compensation system would have no overtime payments or automatic annual increments. It would, however, include a considerable amount of pay "at risk"—a variable component of compensation that is tied to

120. Since April 1, 2004, the salary of puisne judges and the average compensation of DM-3s and DM-4s have evolved as set out in the graph below (and also in Appendix G).



Note 1
The "at risk" portion of the 2007-2008 DM-3 salary is currently unavailable and has been projected based on the immediately preceding 3-year average calculated as a percentage of average base salary, being 11.7%.

Note 2
The average salary and the "at risk" portion of the DM-4s' salaries are not made available due to confidentialityconcerns. Accordingly, the total average compensation of the DM-4s, including the "at risk" portion, has been estimated for each annual period based on the assumption that the DM-4 incumbents received average salaries and average "at risk" paythat bear the same relation to the DM-3s' average pay to mid-point salary and average "at risk" pay to maximum at risk pay, respectively.

121. As illustrated in Appendix G and above, the gap between judicial remuneration and that of the most senior deputy ministers is persisting. The longer this situation is allowed to persist, the more difficult it will be to narrow the gap. Yet, there is no comparator that embodies the democratic principle of equilibrium between the branches of the state the way this comparator does.

b) Private-sector lawyers' income

i) Introduction

122. The incomes of private practitioners have been considered by all judicial compensation commissions as an important comparator in the setting of adequate judicial salaries. As noted earlier in these submissions, this comparator has particular relevance in view of the third criterion provided in subsection 26(1.1) of the *Judges Act*, namely, "the need to attract outstanding candidates to the judiciary".

123. Lawyers in private practice have long been the primary source of candidates to the Bench. The Drouin Commission noted that in the years 1990 to 1999, 73% of those appointed to the Bench came from the private Bar, a proportion that increases to 82% if judges elevated from the provincial or territorial Bench are excluded from the calculation.[96] As the McLennan Commission reported in May 2004, based on information from the Judicial Appointments Secretariat, approximately 73% (268/368) of appointees during the period from January 1, 1997 to March 30, 2004 came from private practice.[97] For the period April 1, 2004 to March 31, 2007, a majority of 78% (110/141) continued to be appointed from the private sector. This proportion increases to 84% (110/131) if judges elevated from the provincial Bench and masters are excluded.[98] In short, it has been and will continue to be the case that the overwhelming majority of judges come from the private Bar.

124. Among the judges appointed between April 1, 2004 and March 31, 2007, 61.7% came from the ten largest urban centres.[99] In order to ensure that outstanding candidates from

---

96 Drouin Report (2000) at 36-37.

97 See McLennan Report (2004) at 17, Table 2.

98 Information provided to Justice Canada and the Association by the Judicial Appointments Secretariat, Tables 7 and 8: "Appointees in Private Practice, Predominant Area of Practice, April 1, 2004 to March 31, 2007" and "Appointees Not in Private Practice, Predominant Area of Practice, April 1, 2004 to March 31, 2007", reproduced in the judiciary's Book of Cited Documents.

99 The following are the 10 largest Census Metropolitan Areas, according to the 2006 census: Toronto, Montreal, Vancouver, Ottawa-Gatineau, Calgary, Edmonton, Quebec City, Winnipeg, Hamilton, and London. See Table 4, "Place of Practice/Employment at Time of Appointment, City/Province/Territory, April 1, 2004 to March 31, 2007", provided by the Judicial Appointments Secretariat, and reproduced in the judiciary's Book of Cited Documents.

the private Bar will continue to seek judicial appointments, judicial salaries must be fixed taking into account the higher level of earnings that such practitioners enjoy as well as the higher cost of living that prevails in such centres.

125. The McLennan Commission found that the income of self-employed lawyers in the larger Canadian cities exceeded the current level of judicial compensation, even when the value of the judicial annuity is factored in.[100] Observing that many appointees come from higher-income brackets, the McLennan Commission expressed the view that it is important "to establish a salary level that does not discourage members of that group from considering judicial office."[101]

126. The *Judges Act* speaks of the need to attract "outstanding" candidates to the judiciary. Accordingly, it has long been acknowledged that what matters is not to count the numbers of applications for appointment but, rather, to create conditions that will encourage applications from outstanding candidates. While there are no doubt exceptions, the income derived from private practice by lawyers whom one would categorize as "outstanding" will almost always exceed the judicial salary. The Association and Council submit that Quadrennial Commissions must be forward-looking in establishing judicial salaries so as to ensure that outstanding candidates will be willing to seek judicial appointment throughout the four-year period covered by a Commission's salary recommendations.

127. Income is of course not the only measure of the quality of candidates from the Bar. It is also clear that the judicial annuity is a substantial benefit to judges which is not enjoyed by private practitioners. In addition, as the Lang Commission noted some twenty-four years ago, there is real value to be placed upon the opportunity for public service which is offered to members of the judiciary.[102] Nevertheless, judicial compensation, including

---

100 McLennan Report (2004) at 48. The McLennan Commission estimated, based on the advice of its experts, that the value of the government-paid portion of the judicial annuity could be set at 22.5% of salary (see McLennan Report (2004) at 58).

101 McLennan Report (2004) at 49.

102 See Lang Report (1983) at 2-3.

IN THE MATTER OF THE JUDGES ACT, R.S.C. 19985, c. J-1, as amended.

QUADRENNIAL JUDICIAL COMPENSATION AND BENEFITS COMMISSION

REPLY SUBMISSIONS OF THE GOVERNMENT OF CANADA

ATTORNEY GENERAL OF CANADA
Department of Justice
234 Wellington Street
East Tower
Ottawa, Ontario
K1A 0H8

Per: Donald J. Rennie
Michael H. Morris

Tel.: (613) 957-4841 (DJR)
Fax: (613) 941-1972
email: donald.rennie@justice.gc.ca

Tel.: (416) 973-9704 (MHM)
Fax: (416) 952-0298
Email: michael.morris@justice.gc.ca

Counsel for the Government of Canada

46. The Government considers this novel, indeed unprecedented, assertion to be not only wrong in law by irrelevant to the Quadrennial Commission exercise. To the degree that senior public servants are relied on as comparators, the analysis is about relative capacity and quality. It has nothing to do with the relationship between the Executive – that is the Prime Minister and his Cabinet - and the judiciary.

47. Moreover the implications of this assertion for the other branch of government, Parliament, must also be considered. Would the judiciary also assert that its compensation must maintain an "equilibrium" with Parliamentarians? That equilibrium would currently be retained by limiting judicial salary increases to annual statutory indexing, which is what Parliamentarians, including Ministers of the Crown, currently receive.[25] The Government submits that introducing this irrelevant consideration simply muddies the waters and diverts the Commission from its primary focus on adequacy in light of the statutory criteria.

---

[25] As explained in the Government's Opening Submission at paragraph 14, all judicial salaries are indexed automatically pursuant to s. 25 of the *Judges Act*. Judicial salaries are increased by the percentage change in the Industrial Aggregate from one year to the next year. Parliamentarians' salaries, on the other hand, are indexed automatically by reference to another index:

> The index…for a calendar year is the index of the average percentage increase in base-rate wages for the calendar year, resulting from major settlements negotiated with bargaining units of 500 or more employees in the private sector in Canada, as published by the Department of Human Resources and Skills Development within three months after the end of that calendar year.

Parliament of Canada Act, R.S.C. 1985, c. P-1, as amended, s. 67.1; *Salaries Act*, R.S.C. 1985, c. S-3, as am., s. 4.2. See *Reply Appendices*, Appendix 11.

ii. Midpoint of the DM Salary Range

48. In addition to rejecting the proposed focus on DM3-4 as the exclusive public sector comparator, the Government does not accept the judiciary's assertion that it would be "more accurate" to reply upon the *average* salary, as opposed to the *midpoint* of the DM salary range. The average salary figure will fluctuate depending upon the seniority of the complement. This is significant, particularly where the pool is relatively small.[26]

49. For example, when the DM-3 complement is composed of officials with long standing experience, the average salary will tend to be higher because all the individuals have progressed well through the salary range. The addition of just one new appointee to the complement with a salary at the lower end of salary band will lower the average salary of the whole DM-3 complement. Thus, it preferable to use the midpoint of the salary range because it provides a comparison point that does not shift depending on composition of DM complement.

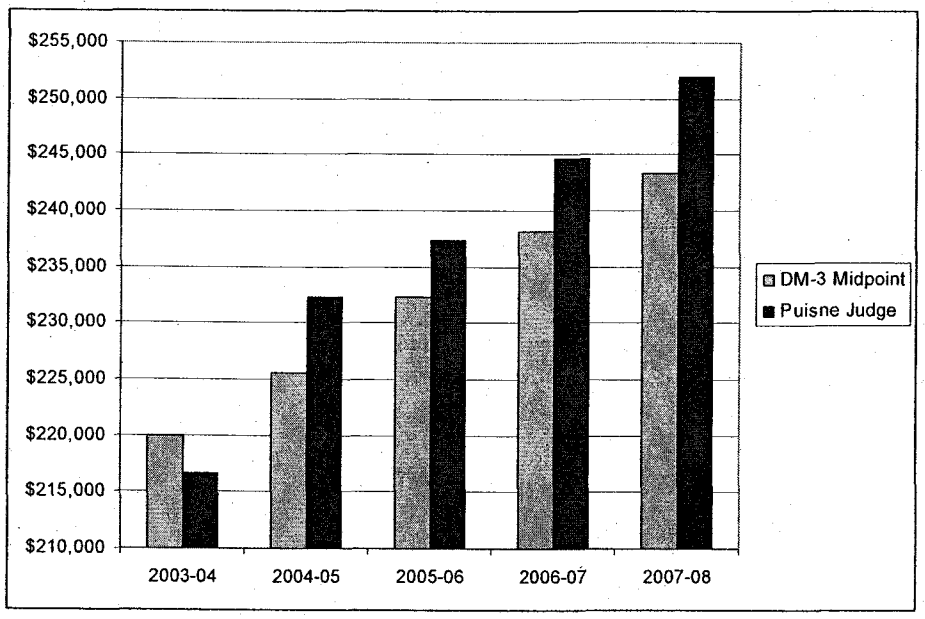
50. The Government made reference to the salary midpoint in its submissions concerning the range of senior level executives who are suitable comparators for the judiciary.[27] The Government submits that reference to the midpoint of the salary range maintains the objectivity of the public sector comparator.

---

[26] In 2006-07 there 10 DM-3s and 2 DM-4s. See *Submission of the Government of Canada Appendices*, Vol. II., Appendix 13.
[27] Government's *Opening Submission*, p. 19, para. 50.

51. It should also be noted that the graph at paragraph 119 and Appendix F of the Joint Submission purports to illustrate DM-3 midpoint salaries. In fact this graph actually demonstrates DM-3 midpoint salaries plus estimated average at-risk pay awards.

52. And finally, the statement in the Joint Submission that there is an increasing disparity between the salary of *puisne* judges and the midpoint of the DM-3 salary range is not correct. As the graph below illustrates, the judicial salary actually surpasses the DM-3 midpoint ($252,000 vs. $243,300).



iii. At-risk Pay

53. The Government once again rejects the judiciary's claim to entitlement to the equivalent of at-risk pay for senior public servants. At-risk pay is an amount that senior public servants, including lawyers, "re-earn" in each year based on the

SUPPLEMENTARY REPLY SUBMISSION

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

to the

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

in respect of

THE CRA PRE-APPOINTMENT INCOME DATA OF JUDGES

Pierre Bienvenu
Azim Hussain
Ogilvy Renault LLP

February 12, 2008

TABLE OF CONTENTS

PREFACE

1. The present Supplemental Reply Submission of the Association and Council relates to data collected by the Canada Revenue Agency ("**CRA**"), at the request of the Department of Justice, regarding the pre-appointment income of judges appointed between 1995 and 2007 (the "**pre-appointment income data**" or "**PAI data**").

2. The Government agreed to redact the portions of its principal Reply Submissions dealing with the pre-appointment income data so as to give the Association and Council an opportunity to address the issue before either party's submissions in respect of this question would be released to the Commission and the public, including the members of the federal judiciary whose income had been inquired into by the Government. The unredacted version of the Reply Submissions of the Government was released only to the Association and Council pending the present Supplemental Reply Submission.

3. It was agreed between the principal parties that the unredacted version of the Reply Submission of the Government and the Supplemental Reply Submission of the Association and Council relating to the pre-appointment income data would be filed simultaneously on February 12, 2008. The Association and Council consented to the Government having the option of filing a rejoinder to the present Supplemental Reply Submission by February 19, 2008.

OVERVIEW

4. The Association and Council have serious concerns about the manner in which the Government has proceeded in obtaining the pre-appointment income data, and the appropriateness of gathering such data.

5. The Association and Council also submit that serious due process concerns arise from the Government's reliance on this data in view of the judiciary's inability, because of the need to preserve confidentiality, to test the validity of the underlying raw data.

6. In addition to these concerns, the following significant methodological and other problems are readily apparent and undermine the reliability and relevance of the data:

- significant variations in the year-to-year income of certain lawyers prior to appointment;
- unlikely low income levels for certain lawyers prior to appointment;
- conflation of different kinds of income inquiries;
- width of the pre-appointment income window of five years; and
- limitations of median values for pre-appointment information broken down by year.

These problems are discussed further below.

7. Even if it were assumed that the pre-appointment income data is reliable, which it is not, it would be of very limited relevance to the Commission. This is so because the pre-appointment data relates not to the income level of eligible candidates for appointment to the Bench in the four years of the Commission's mandate, but to the income level of lawyers appointed during the mandates of previous Commissions, going back to 1990.

I. DESCRIPTION OF THE PAI DATA

8. The Navigant Report on the Canada Revenue Agency's Pre-Appointment Income Data (the "**Navigant PAI Report**"), in paragraphs 2 to 13, contains a description of the PAI Data which it is useful to reproduce herein.

CRA provided three sets of data:

a) the original PAI data consisting of the ratio of the five-year income average to the salary earned as a judge for around 90% of the lawyers who were appointed as judges between 1995 and 2007;

b) an amended PAI data set (the original PAI data set was amended because CRA found that it had applied a defective methodology to calculate the net-present-value adjustment); and

c) data concerning the year-to-year income variations over the five-year period for each lawyer.

The CRA amended PAI data set and the data concerning the year-to-year income variations over the five-year period for each lawyer are reproduced, respectively, in Appendices A and B to the Navigant PAI Report.

9. The Government gave to CRA a list of 627 judges who were appointed after 1994. CRA was able to match 567 of those judges (around 90%) with tax filings in its records and it proceeded to collect and report upon their pre-appointment income based on their tax returns.

10. The PAI data is broken down into two employment categories: employed and self-employed. This categorization is based on the employment status of the lawyer in the year prior to appointment. Therefore, if, in the previous four years, there was a change in status from employed to self-employed, or vice versa, this change would not be reflected in the data.

11. Appendix A to the Navigant PAI Report contains the ratio for each judge, the median ratio (as calculated by CRA) for appointees in each year between 1995 and 2007, technical notes provided by CRA in respect of the ratios, and the methodology used by CRA to generate the data. It should be noted that the ratio represents the proportion of the five-year average to the judicial salary one year after appointment. For example, a ratio of 100% means that the lawyer had a five-year pre-appointment average income that was 100% of what he/she went on to make as a judge in the first year after appointment.

12. It is important to understand that there are two steps that lead to the calculation of the ratio about which the parties have no information. The first step is identifying the actual dollar values for each of the five years that served to generate the five-year average. Disclosure of these values was refused due to confidentiality concerns. The second step is arriving at the dollar-value five-year average. This dollar-value average for each of the lawyers was also withheld because of confidentiality concerns. What is available is only the third step: the ratio of that average to the first-year salary earned as a judge.

13. The ratio for each judge is not correlated to the year of appointment. The only information given based on years of appointment is the *median* ratio. The median ratio is the ratio of the individual judge whose ratio falls in the middle of the range of ratios for all appointees for the given year of appointment. Half of the ratios in that range are less than the median and half are more.

14. As explained by Navigant, a median value gives no sense of the kind of values that come before and after it. A far better measure than a median ratio would be an average ratio. CRA refused disclosure of that information on the basis that providing average ratios for each year would compromise anonymity.

15. Appendix B contains the percentage year-to-year income variations for each lawyer prior to appointment over the five-year period. While indicative of income variations over the five-year period, the percentages are still far removed from the actual annual income figures for the lawyers in question.

II. NON-DISCLOSURE AND INAPPROPRIATENESS

16. The Association and Council were first informed by the Government about the existence of the PAI data on November 21, 2007, less than one month before the filing deadline of December 14, 2007 for first-round submissions. The judiciary was never consulted about the proposed methodology to be applied by CRA. When concerns were raised in this regard, the judiciary was told – on two occasions – that the Government had only approached CRA about the possibility of collecting this information after June 8, 2007. Upon further inquiry by the judiciary, the Association and Council learned that the request to gather pre-appointment income data was made at a high-level meeting between CRA and representatives of the Department of Justice on March 7, 2007.

17. The Association and Council submit that the Commission should decline to consider the PAI data on the basis that the Government ought to have disclosed to the judiciary that it would be seeking to collect this data for use before the Commission, so as to give the judiciary an opportunity to comment on the proposed data collection and the methodology applied by CRA.

18. The judiciary also submits that it is inappropriate for the Government to collect and rely upon pre-appointment income data of sitting judges obtained from CRA without their consent in the context of the Quadrennial Commission process. The data relates to a small identifiable group of sitting judges. It is derived from individual tax returns, filed with an expectation of privacy, which reflect the personal financial affairs of the individuals in question.

III. DEFECTS UNDERMINING THE DATA

A. RELIABILITY

1. No access to underlying data

19. Due to confidentiality concerns, CRA refused to disclose the underlying PAI data to the judiciary or its experts. As a consequence, the data could not be tested directly for reliability or validity. For example, it is not possible, without the underlying raw data, to determine whether the income data sought to be captured is actually captured in the data provided, or whether extraneous elements unwittingly affect the data.

20. The data provided by CRA does not allow a correlation to be made between lawyers and their geographic provenance, gender, or age. Such correlation would greatly assist in analyzing and testing the data.

21. As pointed out in their PAI Report, Navigant would have needed to review and analyze the underlying data to test its validity and reliability.[1]

22. Accordingly, since the judiciary is prevented from comprehensively testing the underlying data provided by CRA, its use by the Government in the Commission process raises serious due process concerns.

---

[1] Navigant PAI Report at paras. 5, 14.

2. Significant variations in annual income within the five-year period

23. As noted above, CRA has produced, at the request of the judiciary, a table indicating the percentage year-to-year income variations for each lawyer prior to appointment over the five-year period.[2] Based on that information, Navigant has produced a table, reproduced in Appendix D of the PAI Report, setting out the percentage variance of the annual percentage changes in pre-appointment income for each lawyer over the five-year period prior to appointment.[3]

24. According to Navigant, the significant percentage variations in annual income within the five-year period prior to appointment for certain lawyers suggest some kind of problem in the data. Whatever the cause of the problem, it seems that those lawyers' actual income has not been captured.

25. In addition, there are two noticeable, and sometimes contradictory, trends in the income of certain lawyers who were appointed to the Bench: significant increases or decreases from year to year and consistent losses over the period in question.

26. For example, 75 of the 389 (19%) self-employed lawyers had an average negative income growth over the five-year period prior to appointment. Similarly, 25 of the 178 (14%) employed lawyers had an average negative income growth.[4] This is at odds with what is generally known about income change with increased seniority at the bar, whether in the employed or self-employed category.

27. Some of the negative income trends need to be explicitly depicted in order to understand fully the oddity of the data. One lawyer had a 10% increase at the outset of the five-year period, but then proceeded to suffer a 69.7% drop in income, followed by a further

---

[2] See Appendix B to Navigant PAI Report.

[3] Navigant PAI Report, Appendix D.

[4] Navigant PAI Report at para. 21.

154.5% drop, and then a colossal 728.4% drop in the year prior to appointment.[5] This defies logic.

28. A more extreme example is that of a lawyer who posted a 16.4% loss at the outset of the five-year period, then lost another 8.2%, then lost 448.1%, and finally, lost 625.7% in the year prior to appointment.[6] Seemingly, this lawyer consistently lost income over the five years prior to appointment. The Commission should not use this kind of data to make recommendations as to adequate compensation.

3. Improbable income levels for self-employed lawyers

29. Putting aside trends for individual lawyers over the five-year period, it strains credibility that the data presented for certain lawyers is actually representative of their income. For example, one self-employed lawyer had a five-year pre-appointment average income of approximately 10% of the judicial salary.[7] If one assumes that the judicial salary of this lawyer was the 2006 level of $244,700, it means that the average pre-appointment income of this lawyer was approximately $24,470, and this in the private sector. This is either incorrect or reflects extraordinary factors that this data fails to take into account such as income splitting, maternity leaves, sabbaticals or the like.

30. The CRA data does not allow verification of the impact of these factors, even though they are known to be present. To take one example: the use of management companies of which a practising lawyer's spouse, a personal corporation or a family trust is the shareholder has been prevalent in the legal profession as an income-splitting method throughout the period covered by the PAI data.[8] As confirmed by Deloitte, as much as $60,000 of a self-employed lawyer's income can be directed to the lawyer's family

---

[5] See line 33, Navigant PAI Report, Appendix B.

[6] See line 246, Navigant PAI Report, Appendix B.

[7] See i.d. 4405, Navigant PAI Report, Appendix A.

[8] See Deloitte's letter of January 25, 2008, attached as Appendix C to the Reply Submission of the Association and Council dated January 28, 2008.

members using this method. CRA's PAI data does not capture that income even though it is generated by the lawyer's practice, since it is paid to the lawyer's family members.

31. It will be noted that when the Government states that "19% of all appointees were earning less than half of a judicial salary,"[9] included in that figure is an appointee who had an average income of approximately 10% of judicial salary. The Commission must ask itself whether this makes any sense in the context of determining adequate compensation for the judiciary.

4. Conflation of different kinds of income inquiries

32. The Government relies on the figure of 19% of all appointees earning less than half of a judicial salary to conclude that this

> displaces the methodological assumption used by past Commissions and still advanced by the judiciary that no one who earns less than $60K [*sic*] per annum would apply for or be considered qualified to be appointed a judge.[10]

33. Putting aside the improbability that any appointee actually practising earned less than $60,000, and the probability that figures like the 10% ratio are defective or simply unreflective of actual income, the Government neglects one critical fact. When the Government states that 19% of all appointees were earning less than half of a judicial salary, this includes both employed and self-employed lawyers. Yet, the $60,000 exclusion has only been applied to self-employed lawyers.

34. The Government's comment, however, is indicative of a more profound misconception about the distinction between various kinds of inquiries to be made in determining adequate compensation. The application of first principles dictates that appointees to the Bench should continue to come largely from the ranks of self-employed lawyers. To the extent that a certain diversity of the makeup of the Bench is required, employed lawyers must also be appointed. Of necessity, the parameters to be applied to delineate an

---

[9] Reply Submissions of the Government of Canada at para. 21, second bullet.

[10] Reply Submissions of the Government of Canada, footnote 13.

appropriate comparator will be different when dealing with employed lawyers since the scale of compensation for these lawyers is generally lower compared to self-employed lawyers.

35. However, for the Government to use the fact of the lower pay scale in the *employed* category as a justification for including those who earn less than $60,000 in the *self-employed* category is an example of the proverbial mistake of comparing apples and oranges.

5. Pre-appointment window is too wide

36. Another methodological problem noted by Navigant is that the five-year period prior to appointment is too wide.[11] It is really the last year prior to the year of appointment, perhaps in tandem with the year of appointment, that would be determinative in a lawyer's decision to accept an appointment to the Bench. Common sense suggests that only in rare circumstances would one consider what one earned five years ago in order to decide whether to accept an appointment to the Bench.

37. Moreover, according to Navigant a five-year window is more likely to capture outlier years like maternity leaves, personal leaves, sabbaticals, secondments, etc.[12], none of which is taken into account in the Government's methodology. Any of these would obviously bring about a distortion in the data.

6. Limitations of median values

38. For each year of appointments, CRA has only given the median ratio, to the exclusion of the average ratio for that year. The median is simply the mid-point in a range of values from highest to lowest. The values before the median are lower than the median and the values after the median are higher. However, as Navigant points out, a median can easily be the watershed before a spike in the income levels. In other words, the ratios might rise significantly after the median value. The fact that values after the median are higher does

---

[11] Navigant PAI Report at paras. 15-16.

[12] Navigant PAI Report at para.15.

not reveal the magnitude of those values. There is no way of knowing if the ratios after the median are significantly higher than the median when all that is available is the median value. CRA withheld average values out of concern for confidentiality.

7. Conclusion as to reliability

39. By reason of the foregoing, and of the Navigant PAI Report, the Association and Council submit that the PAI data is uninformative, should not be relied upon by the Commission or, alternatively, that it should not be given much weight.

B. RELEVANCE

40. Assuming that reliable PAI data could be generated by a survey or through CRA data (provided that the latter would take account of the impact of income splitting, maternity leaves and other such factors), such PAI data would nonetheless be of little value to the Commission. The reason is that the PAI data relates not to the income level of eligible candidates for appointment to the Bench in the four years of the Commission's mandate, but rather to the income level of lawyers appointed during the mandates of previous commissions. To illustrate the point, the PAI data contains five-year pre-appointment income data of lawyers appointed in 1995, hence of income dating back to 1990.

41. The purpose of the Government in relying on the PAI data is unclear. On the one hand, it asserts that compensation "is not the only, or even the predominant, attraction of judicial office".[13] On the other hand, it highlights from the PAI data that 62% of appointees among self-employed lawyers received a "significant increase" in income upon appointment.[14] If the Government's figure of 62% is to be relied upon, which it should not, the inference to be drawn would be that judicial salaries are an incentive to attracting judges who enjoyed low pre-appointment incomes and that compensation does play a salient role in attracting candidates to judicial office.

---

[13] Reply Submission of the Government of Canada at para. 24.

[14] Reply Submission of the Government of Canada at para. 21, first bullet.

42. If the intention of the Government is to influence the Commission's determination of an adequate salary level for 2008-2011, which is the period under consideration, the PAI data is not relevant. The PAI data cannot function as a comparator. It has neither the detail and currency of the Navigant survey or that of the 2005 CRA data on the income levels of self-employed lawyers, nor does it have the normative character of the comparison with the most senior DMs.

The whole respectfully submitted.

Montréal, February 12, 2008

Pierre Bienvenu
Azim Hussain
Ogilvy Renault LLP
1981 McGill College Avenue
Suite 1100
Montréal, Québec H3A 3C1

SUBMISSION

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

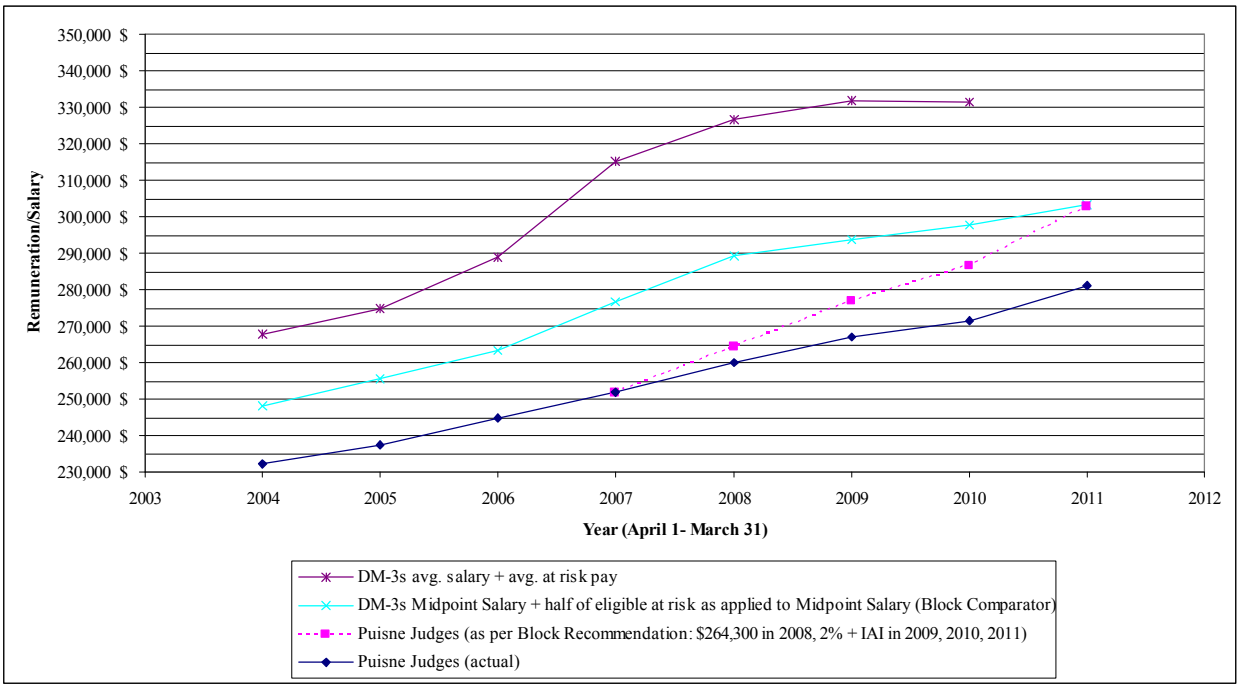
to the

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

December 20, 2011

Pierre Bienvenu, Ad. E.
Azim Hussain
Norton Rose OR LLP

Graph B
Comparison of DM-3s salaries with "at risk" pay
vs. Puisne Judges salaries



139. As can be seen in this graph, the salary recommendation of the Block Commission, had it been implemented, would have effectively closed the gap between judicial salaries and the DM-3 comparator, as calculated by the Block Commission, even though judicial salaries would have remained well below the average compensation actually received by DM-3s.

140. The Block Commission considered the issue of the DM-3 comparator to be settled. It should no longer be necessary to explain why the comparison with the DM-3s is a principled one and why the comparison is of central importance. The present Commission should rely on the rationale that led the Block Commission to make its salary recommendation as support for its endorsement of this recommendation.

ii) Self-employed lawyers' income

- Introduction

141. The incomes of private practitioners have been considered by all judicial compensation commissions as an important comparator in the setting of adequate judicial salaries. As

noted earlier in these submissions, this comparator has particular relevance in view of the third criterion provided in subsection 26(1.1) of the *Judges Act*, namely, "the need to attract outstanding candidates to the judiciary".

142. Lawyers in private practice have long been the primary source of candidates to the Bench. The Drouin Commission noted that in the years 1990 to 1999, 73% of those appointed to the Bench came from the private Bar, a proportion that increases to 82% if judges elevated from the provincial or territorial Bench are excluded from the calculation.[102] As the McLennan Commission reported in May 2004, based on information from the Judicial Appointments Secretariat of the Office of the Commissioner for Federal Judicial Affairs ("**OCFJA**"), approximately 73% of appointees during the period from January 1, 1997 to March 30, 2004 came from private practice.[103] For the period April 1, 2004 to March 31, 2007, the period at issue before the Block Commission, a majority of around 78% continued to be appointed from private practice. This proportion increases to 84% if judges elevated from the provincial/territorial Bench and masters are excluded from the pool.[104]

143. Based on the data provided for the period of April 1, 2007 to March 31, 2011 by the OCFJA, around 70% of appointees came from private practice during that period,[105] 80% if judges elevated from the provincial/territorial Bench, masters, and members of administrative tribunals are excluded from the pool.[106] As can be seen, judges have been,

---

[102] Drouin Report (2000) at 36-37.

[103] See McLennan Report (2004) at 17, Table 2.

[104] Information provided to Justice Canada and the Association by the OCFJA, Tables 7 and 8: "Appointees in Private Practice, Predominant Area of Practice, April 1, 2004 to March 31, 2007" and "Appointees Not in Private Practice, Predominant Area of Practice, April 1, 2004 to March 31, 2007", reproduced in the JBD.

[105] One appointee was an in-house counsel in the private sector and therefore strictly speaking would not fall within the category of private practice. Another in-house counsel was classified as being in the public sector since that appointee was an in-house lawyer at a Crown corporation..

[106] For the 2007-2011 period, there were 23 provincial/territorial judges, 2 masters, and 3 members of administrative tribunals appointed.

and should continue to be, appointed in the main from the private practice of law in Canada.[107]

144. Among the judges appointed between April 1, 2004 and March 31, 2007, 67% came from the ten largest urban centres,[108] and among those appointed between April 1, 2007 and March 31, 2011, 60% came from the ten largest urban centres.[109] In order to ensure that outstanding candidates from the private Bar will continue to seek judicial appointments, judicial salaries must be fixed taking into account the higher level of earnings that such practitioners enjoy as well as the higher cost of living that prevails in such centres.

145. The McLennan Commission found that the income of self-employed lawyers in the larger Canadian cities exceeded the current level of judicial compensation, even when the value of the judicial annuity is factored in.[110] Observing that many appointees come from higher-income brackets, the McLennan Commission expressed the view that it is important "to establish a salary level that does not discourage members of that group from considering judicial office."[111]

146. The *Judges Act* speaks of the need to attract "outstanding" candidates to the judiciary. Accordingly, it has long been acknowledged that what matters is not to count the numbers of applications for appointment but, rather, to create conditions that will encourage applications from outstanding candidates. The Association and Council

---

[107] The Block Commission took note of the shift in the provenance of American appointees when judicial salaries were allowed to lag behind lawyer compensation in the private sector. The majority of appointees in the U.S. now comes from the public sector even though in the 1950s a majority came from the private sector (Block Report at paras 71-72); see also American College of Trial Lawyers, "Judicial Compensation: Our Federal Judges Must Be Fairly Paid", March 2007, at 1. Online:http://www.actl.com

[108] The following are the 10 largest Census Metropolitan Areas, according to the 2006 census: Toronto, Montreal, Vancouver, Ottawa-Gatineau, Calgary, Edmonton, Quebec City, Winnipeg, Hamilton, and London. See Table 4, "Place of Practice/Employment at Time of Appointment, City/Province/Territory, April 1, 2004 to March 31, 2007", provided by the OCFJA, and reproduced in the JBD.

[109] Data received from the OCFJA.

[110] McLennan Report (2004) at 48. The McLennan Commission estimated, based on the advice of its experts, that the value of the government-paid portion of the judicial annuity could be set at 22.5% of salary (see McLennan Report (2004) at 58).

[111] McLennan Report (2004) at 49.

submit that Quadrennial Commissions must be forward-looking in establishing judicial salaries so as to ensure that outstanding candidates will be willing to seek judicial appointment throughout the four-year period covered by a Commission's salary recommendations.

147. Income is of course not the only measure of the quality of candidates from the Bar. It is also clear that the judicial annuity is a substantial benefit to judges which is not enjoyed by private practitioners. In addition, as the Lang Commission noted some twenty-four years ago, there is real value to be placed upon the opportunity for public service which is offered to members of the judiciary.[112] Nevertheless, judicial compensation, including judicial annuities, remains a factor of significant importance in the need to attract outstanding candidates to the judiciary.

148. In sum, the income level of senior lawyers in the private practice of law in Canada should continue to serve as a comparator by this Commission, and judicial salaries must be at a level sufficient to ensure that outstanding practitioners will continue to be prepared to consider judicial appointment.

- ***The 2006-2010 CRA data***

149. As in the past, the Canada Revenue Agency ("**CRA**") was mandated by the Government and the judiciary to assemble a database consisting of the 2006 to 2010 tax returns of self-employed individuals who identified themselves as lawyers on forms T2032, "Statement of Professional Activities", or T2124, "Statement of Business Activities".[113] This database was then used to generate statistics based on specific parameters.

150. CRA was asked by the Association and Council to produce data of net professional income of all self-employed lawyers in Canada for the years 2006 to 2010, according to

---

[112] See Lang Report (1983) at 2-3.

[113] According to the methodology used by CRA, filers who incorrectly filed a business income tax return form instead of a professional form were re-assigned to a professional income return form.

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

2011 JUDICIAL COMPENSATION AND BENEFITS COMMISSION

SUBMISSION OF THE GOVERNMENT OF CANADA

BLAKE, CASSELS & GRAYDON LLP
199 Bay Street
Suite 4000, Commerce Court West
Toronto, ON M5L 1A9

Catherine Beagan Flood (LSUC#: 43013U)
Tel: 416-863-2269
Fax: 416-863-2653
Email: cbe@blakes.com

Counsel for the Government of Canada

a perception that judges were not shouldering their share of the burden in difficult economic times."[9]

6. The global economy has recently experienced the deepest and most synchronized recession since the Great Depression. That recession has had a seriously detrimental effect on Canada's finances. Global recovery from the recession has been slow. Recently, the global economic situation has deteriorated, particularly as a result of the sovereign debt and banking crisis in Europe and concerns over the sustainability of the U.S. fiscal situation.

7. In 2009, the Government exempted judges from wage restraint measures that were applied generally to the public sector due to the recession. However, the effects of the recession have been deeper and more protracted than expected at that time. The Government is of the view that continued exemption of the judiciary from the fiscal measures applying to others who are paid from the public purse is not sustainable or fair, and would be inconsistent with the guidance provided in the *PEI Judges Reference*.

8. Accordingly, to maintain public confidence in the judiciary and ensure that increases in judicial salaries reflect the constraint on public sector spending, the Government proposes that salary increases as a result of statutory indexation in s. 25 of the *Judges Act* be capped at a maximum of 1.5% annually for the quadrennial period.[10] The Government notes that the adequacy of the resulting salary will be reviewed again by the 2015 Quadrennial Commission.

---

[9] *Ibid.* at para. 196.

[10] Indexation under the *Judges Act* is based on the "Industrial Aggregate" index ("IAI") published by Statistics Canada: *Judges Act*, s. 25. The IAI is the percentage change in average weekly earnings ("AWE") across all industries, including overtime, as calculated by Statistics Canada on the basis of monthly labour income surveys of employers. IAI is applied to judicial salaries on a fiscal-year basis, so it is the change in AWE over the most recently available 12-month period, which is the previous calendar year. That is, the IAI increase applied on April 1, 2012 will be the increase in the AWE over the course of 2011.

The IAI projections of Canada's Chief Actuary that would be applied to judicial salaries for 2012-16 are 2.2%; 2.6%; 2.8% and 2.9% respectively: Letter from M. Mercier, Office of the Chief Actuary, Office of the Superintendant of Financial Institutions, dated December 8, 2011 (to be included in the Joint Book of Documents to be submitted by the parties).

The most recent projections of IAI by the Department of Finance are 2.4% for 2011 (applied to judges in 2012) and 1.3% for 2012 (applied to judges in 2013): Letter from B. Robidoux, Assistant Deputy Minister, Economic and Fiscal Policy Branch, Department of Finance, dated December 16, 2011 ("Department of Finance Letter"), Annex D to this submission.

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

SUBMISSION

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

February 29, 2016

Pierre Bienvenu, Ad. E.
Azim Hussain
Norton Rose Fulbright Canada LLP
Counsel for the Canadian Superior Courts Judges Association and the Canadian Judicial Council

they would be with IAI adjustments alone. This would leave judicial salaries at $23,517, or 6.1%, less than the projected total average compensation of DM-3s by the end of the current quadrennial cycle.

Table 4
Comparison of Judicial Salary with proposed increases and Total Average Compensation, 2015-2019 (Projected)

Date	Judicial Salary	Total Average Compensation	Difference between Judicial Salary and Total Average Compensation	
			Percentage	$
April 1, 2015	$308,600	$356,538	-13.4%	-$47,938
April 1, 2016	$320,300	$363,312	-11.8%	-$43,012
April 1, 2017	$333,700	$370,215	-9.9%	-$36,515
April 1, 2018	$346,700	$377,249	-8.1%	-$30,549
April 1, 2019	$360,900	$384,417	-6.1%	-$23,517

112. The above projections assume that the statutory indexation based on IAI as provided for in s. 25 of the *Judges Act* will remain unchanged through the present quadrennial cycle. The IAI adjustment in the *Judges Act* is, along with the judicial annuity, one of the cornerstones of judicial financial security and an integral part of the "social contract"[57] that the Government and lawyers appointed to the Bench have entered into. In view of the constant risk of the politicization of the setting of judicial compensation, IAI adjustments have long been recognized as an essential tool to preserve judicial independence through financial security for the judiciary.

113. Before the Levitt Commission, the Government submitted that the annual IAI adjustments should be capped at 1.5% (a percentage below the expected IAI figures for that quadrennial cycle). The Levitt Commission rejected the Government's submission as inconsistent with the history and purpose of the IAI adjustment:

> The Government submissions characterized the IAI Adjustment as inflation protection without making any mention of its legislative history. In light of this history, the Drouin Commission made it clear that the IAI "is intended to, and in many years does, encompass more than changes in

[57] This is the expression used in the Scott Report (1996) at 14 to describe the expectations arising from the salary indexation provided by the *Judges Act* [BED at tab 28].

> the cost of living as reflected in the consumer price index". In the Commission's view the legislative history indicates that the IAI Adjustment was intended to be a key element in the architecture of the legislative scheme for fixing judicial remuneration without compromising the independence of the judiciary and, as such, should not lightly be tampered with.[58]

114. Despite the Levitt Commission's urging that the IAI adjustment "should not lightly be tampered with", the Government has now advised that it intends to ask the Commission to recommend that the statutory indexation in the *Judges Act* be changed from IAI to the Consumer Price Index ("**CPI**"). The Association and the Council are surprised by this position and will submit that changing the statutory indexation in the *Judges Act* to the CPI would be inconsistent with the history and purpose of the IAI adjustment. The Association and the Council reserve their right to respond to any such proposal in their Reply Submission.

ii) Self-employed lawyers' income

115. The incomes of self-employed private practitioners have been considered by nearly all judicial compensation commissions as an important comparator in the setting of adequate judicial salaries. This comparator has particular relevance in view of the third criterion provided in s. 26(1.1) of the *Judges Act*, namely, "the need to attract outstanding candidates to the judiciary", since lawyers in private practice have long been the primary source of candidates to the Bench.[59]

116. As in the past, the Canada Revenue Agency ("**CRA**") was mandated by the Government and the judiciary to assemble a database consisting of the 2010 to 2014 tax returns of individuals identified by CRA as self-employed lawyers. This database was then used to generate statistics based on specific parameters.

117. The table below shows the relevant data for the 44-56 age group (52 remains the average age of appointment[60]), at the 75th percentile, with a low-income exclusion of

---

58 Levitt Report (2012) at para. 46 (citation omitted) [JBD at tab 31].

59 Between 2011 and 2015, 36% of the 226 judicial appointees were from the public sector, which includes government, academia, legal aid clinics, in-house counsel for corporations or other organizations and provincial courts, based on data compiled from information provided by the Commissioner for Federal Judicial Affairs to the principal parties for 2007 to 2011, and 2011 to 2015 [JBD at tab 5].

60 Based on data found in the Appointees Age at Date of Appointment – April 1, 2011 to March 30, 2015 [JBD at tab 5(a)].

$60,000, for Canada as a whole and the top 10 CMAs, where the majority of judges reside. The table compares this data with the salary of puisne judges:

Table 5
Comparison of salary of puisne judges with net professional income of self-employed lawyers at 75th percentile
(Net professional income ≥ $60,000, Age group – 44-56)
Canada and top ten CMAs, 2010 to 2014

Year	75th Percentile Income		Salary of Puisne Judges		
				% Difference from	
	Canada	Top ten CMAs	$	Canada	Top ten CMAs
2010	$372,005	$471,330	$271,400	-27.0%	-42.4%
2011	$361,610	$450,845	$281,100	-22.3%	-37.7%
2012	$365,305	$457,880	$288,100	-21.1%	-37.1%
2013	$364,340	$437,055	$295,500	-18.9%	-32.4%
2014	$373,290	$454,915	$300,800	-19.4%	-33.9%

118. The parameters set out in this table, namely 44-56 age band, 75th percentile, low-income exclusion, top 10 CMAs, have all been endorsed by previous Commissions.[61]

119. The rationale behind the low-income exclusion is that lawyers in private practice who earn below a certain threshold are not suitable candidates for the judiciary since that low income reflects a lack of success or time commitment that is incommensurate with the demands of a judicial appointment.[62]

120. While the amount of $60,000 has been the traditional low-income cut-off since 2000, it appears that after fifteen years, an adjustment for inflation is now required. The Association and the Council are advised that it would be appropriate that this figure be adjusted to $80,000, to account for inflation since the year 2000, the year in the data when the level of $60,000 was first applied.

---

61 Drouin Report (2000) at 38-40 [JBD, tab 28]; McLennan Report (2004) at 40 [JBD, tab 29]; Levitt Report (2012) at para. 43 [JBD at tab 31].

62 See *e.g.* Annex B to the Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council before the Levitt Commission entitled "Report of Robert Levasseur and Larry Moate" dated January 27, 2012 at 3: "[…] as the exclusion selection criteria implies, lawyers who are not really committed to their profession or are not successful should not be candidates to join the judiciary" [BED at tab 9].

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

REPLY SUBMISSION

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

March 29, 2016

Pierre Bienvenu, Ad. E.
Azim Hussain
Norton Rose Fulbright Canada LLP
Counsel for the Canadian Superior Courts Judges Association and the Canadian Judicial Council

101. While the Government does refer to two studies that were commissioned in the United Kingdom in 2005 and 2010 as studies that are similar to the proposed quality-of-life study, neither of these studies involved a comprehensive examination of the non-monetary aspects of judicial life. The researchers in the 2005 and 2010 studies (found at tabs 47 and 48 of the Government's Book of Documents) simply asked judges what the main reasons were that had led them to taking up a judicial post, and barristers and advocates the main reasons why they would or would not consider taking up a judicial post. Both surveys included salary considerations.

102. The Association and the Council question whether there is any value to a quality-of-life study, or whether it would produce any useful information.

103. To the extent the Government is proposing something other than what was done in the United Kingdom in 2005 and 2010, it is not clear that a survey into judges' current view on the non-monetary aspects of their position is relevant to the Commission's inquiry into the adequacy of judicial salaries. This Commission is not tasked with inquiring into the judicial quality of life, but rather inquiring into salary and benefits that will guarantee judicial independence and continue to attract outstanding candidates. The Government needs to explain how the proposed quality-of-life study would provide the Commission with reliable and useful data that would assist it to fulfil its mandate.

104. Ms. Haydon characterizes such a study as "unheard of", and observes:

> Quality of life is a highly personal experience, and as the Government notes, intangible, and as such should not be a consideration in compensation determination.[91]

G. Methodological issue in the CRA self-employed lawyers data

105. One of the tables that CRA provided to the parties in advance of the Commission process shows the net professional income of self-employed lawyers in all of Canada split into 20 percentile rows (from 5% to 100%).

106. In the tables that CRA produced during previous quadrennial cycles, the income shown on any specific percentile row showed the actual percentile income. That is, the income on the x^{th} percentile row showed the x^{th} percentile income. CRA changed the way it

---

91 *Ibid.* at 5 [Appendix B].

presented the data in the tables it provided for this quadrennial cycle in response to new confidentiality standards. Whereas the x^{th} percentile row previously showed the actual x^{th} percentile income (i.e. the 75^{th} percentile row showed the actual 75^{th} percentile income), the x^{th} percentile row now shows the mean of the incomes falling between the $(x-5)^{th}$ and the x^{th} percentiles (i.e. the 75^{th} percentile row now shows the mean of all incomes between the 70^{th} and 75^{th} percentile).

107. The Association and the Council continued to rely on the income shown in the x^{th} percentile row to show the x^{th} percentile income when they prepared the tables in their main Submission. In light of CRA's different presentation of its data, a calculation must be done to arrive at the income at a certain percentile. Instead of using the x^{th} percentile row as a substitute for the actual x^{th} percentile income, one arrives at the actual x^{th} percentile income by taking the average of the x^{th} percentile row and the $(x+5)^{th}$ percentile row. That is, in order to provide an estimate for the 75^{th} percentile income, one takes the average of the 75^{th} percentile row (the mean of the incomes falling between the 70^{th} and 75^{th} percentile) and the 80^{th} percentile row (the mean of the incomes falling between the 75^{th} and the 80^{th} percentiles).

108. Counsel for the Government brought the difference in the methodology of CRA to the attention of counsel for the Association and the Council. A discussion was then had with a representative of CRA to obtain some clarification on this point. The Association and the Council have now revised Tables 5 and 6 to show the percentile incomes for Canada as calculated according to the new methodology:

[Tables on next page]

Table 5 - REVISED
Comparison of salary of *puisne* judges with net professional income of self-employed lawyers at 75th percentile
(Net professional income ≥ $60,000, Age group – 44-56)
Canada and top ten CMAs, 2010 to 2014

Year	75th Percentile Income		Salary of *Puisne* Judges		
				% Difference from	
	Canada	Top ten CMAs	$	Canada	Top ten CMAs
2010	$403,953	$471,330	$271,400	-32.8%	-42.4%
2011	$392,188	$450,845	$281,100	-28.3%	-37.7%
2012	$395,660	$457,880	$288,100	-27.2%	-37.1%
2013	$390,983	$437,055	$295,500	-24.4%	-32.4%
2014	$404,025	$454,915	$300,800	-25.5%	-33.9%

Table 6 - REVISED
Comparison of salary of *puisne* judges with net professional income of self-employed lawyers at 75th percentile
(Net professional income ≥ $80,000, Age group – 44-56)
Canada and top ten CMAs, 2010 to 2014

Year	75th Percentile Income		Salary of *Puisne* Judges		
				% Difference from	
	Canada	Top ten CMAs	$	Canada	Top ten CMAs
2010	$438,378	$501,590	$271,400	-38.1%	-45.9%
2011	$428,035	$484,310	$281,100	-34.3%	-42.0%
2012	$430,363	$491,575	$288,100	-33.1%	-41.4%
2013	$419,010	$465,230	$295,500	-29.5%	-36.5%
2014	$435,450	$482,380	$300,800	-30.9%	-37.6%

109. As can be seen from the above revised tables, there is in fact a greater discrepancy between the judicial salary and the income of self-employed lawyers than initially set out in the Judiciary's Submission.[92] Specifically, in revised Table 6 there is a 30.9% difference between the 2014 judicial salary and the income of self-employed lawyers at the 75th percentile across Canada. The figure in the original Table 6 was 25.8%.

92 Judiciary's Submission at para. 121.

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

JOINT SUBMISSION

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

March 29, 2021

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

Azim Hussain
NOVAlex Law Firm Inc.

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

> such policy. Salary depends upon responsibility, individual performance and comparability with relevant markets. Typically, standard practices and techniques are used to evaluate each of these objectively and transparently.[37]

61. While adequate compensation is required to attract outstanding candidates to the Bench, there are particularities in the setting of judicial compensation that the Commission must take into account. In the words of the McLennan Commission:

> The considerations that go into the setting of judicial compensation and benefits are unique, in that so much of the usual process of determining compensation does not apply. Judges cannot speak out and bargain in the usual way. Compensation incentives usual in the private sector, such as bonuses, profit sharing, stock options, at-risk pay, recruitment and performance bonuses, together with the prospect of promotion, do not apply in the judicial context, although many of these financial incentives are increasingly common in the public sector.[38]

62. The need to attract outstanding candidates to the Bench, coupled with the fact that appointees have traditionally predominantly come from private practice, explain the importance of self-employed lawyers' income as a comparator in the determination of judicial salaries. The McLennan Commission made the point succinctly when it said that "it is in the public interest that senior members of the Bar should be attracted to the Bench, and senior members of the Bar are, as a general rule, among the highest earners in private practice."[39]

---

37 Advisory Committee on Senior Level Retention and Compensation, First Report: January 1998 at 7 [BED at tab 12].

38 McLennan Report (2004) at 5 [JBD at tab 10].

39 McLennan Report (2004) at 32 [JBD at tab 10].

63. Although self-employed lawyers have traditionally been the source of the vast majority of appointments to the Bench, there has been in recent years a declining proportion of appointments from private practice, as illustrated by the following table:

Years	Percentage of appointees from private practice[40]
1990-1999	73%[41]
1997-2004	73%[42]
2004-2007	78%[43]
2007-2011	70%[44]
2011-2015	64%[45]
2015-2020	62%[46]

64. This is a worrisome trend, and all indications are that the decline in appointments from private practice reflects a drop in interest in judicial appointment among lawyers in private practice. A major cause of that drop in interest is necessarily the income gap between what outstanding candidates earn in private practice and the judicial salary.

65. If there were to be an argument seeking to justify the declining trend of appointments from private practice based on the need for greater diversity, it should be noted that at least as far as gender diversity is concerned, the decline evidenced in the above table

---

40 The decline in the percentage of appointees from private practice is of the same order if appointments from the provincial bench are excluded, going from 82% in the period 1990 to 1999 to 71% in the period 2015 to 2020.

41 Drouin Report (2000) at 37 [JBD at tab 9].

42 McLennan Report (2004) at 17 [JBD at tab 10].

43 Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated December 14, 2007 at para. 123 [BED at tab 5].

44 Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated December 20, 2011 at para. 143 [BED at tab 6].

45 Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated February 29, 2016 at 35, footnote 59 [BED at tab 10].

46 This figure includes five individuals who are described as coming from the “private sector”, which is distinct from “private practice” since the former denotes in-house counsel. The total number of appointees stated to be from private practice for April 1, 2015 to October 2, 2020 was 189, for “sole practice” it was 38, and for private sector it was 5. The latter figure is not material. It was decided to include the “private-sector” lawyers in this category because the larger distinction is with appointments from the public sector. [JBD at tab 21(i)]

does not reflect any commensurate gains in that form of diversity.[47] In the 2015-2020 period, women constituted 54% of appointees from the public sector, but they constituted 56% of appointees from private practice.[48] Therefore, it is not the case that gender diversity has been served by a greater proportion of appointees coming from the public sector.

66. The apparent drop in interest in judicial appointments among highly qualified lawyers in private practice is reflected in the statistics on applicants made available to the parties by the Office of the Commissioner for Federal Judicial Affairs. According to these statistics, between March 2017 and October 2020, a large percentage of assessed applicants (63%) fell in the category of "unable to recommend" for a judicial appointment.[49] There has been a noticeable drop in interest in judicial appointment among highly qualified lawyers in private practice. In many provinces, the data shows a pool of applicants with a very large proportion falling into the category of "unable to recommend". For example, British Columbia, Alberta, Saskatchewan, Newfoundland and Labrador, and the Tax Court of Canada have respective percentages of 70%, 65%, 71%, 65%, and 67% for the category of "unable to recommend".[50] In British Columbia, only one of 64 assessed applicants was assessed as "highly recommended". Out of a total of 106 assessed applicants in Alberta, the number of highly recommended applicants was 12.

67. The significant gap between the judicial salary and compensation in private practice is cited by some chief justices as one of the main reasons for the drop in interest among private sector practitioners in applying for a judicial appointment. The Association and Council will invite a member of the Council to appear before the Commission in order to elaborate on these trends.

---

47 The data currently available to the parties does not provide correlations between other forms of diversity (ethnic, cultural, linguistic, disability) among appointees and their practice background.

48 As set out in footnote 46, this figure includes five individuals who are described as coming from the "private sector", which is distinct from "private practice" since the former denotes in-house counsel. [JBD at tab 21(j)]

49 Based on applications and appointments data provided by the Commissioner for Federal Judicial Affairs for March 30, 2017 to October 23, 2020 [JBD at tab 20]. The last two columns on the right, related to appointments, do not include anyone who is found in the "Status of applicants" column. Applicants for the Federal Court and Federal Court of Appeal are assessed by the relevant provincial Judicial Advisory Committee (JAC), whereas the Tax Court of Canada has its own JAC, hence explaining why the latter court has its own statistics in the table.

50 *Ibid.*

> few very high performers or low performers in a year could significantly affect the average performance pay.[77]

101. The Association and Council did not ask the Levitt Commission to use the total average compensation as the DM-3 comparator, their position in principle being that the Levitt Commission should recommend the prospective implementation of all of the Block Commission salary recommendations. However, the judiciary noted that "there is a significant disparity between the midpoint and actual average figures over the years",[78] adding the following proviso:

> If DM-3 compensation continues to be at the upper end of the salary range and eligible at-risk percentage, future Quadrennial Commissions will likely decide to revisit the Block Commission's use of the midpoint figure rather than the average.[79]

102. The Association and Council submitted before the Rémillard Commissions that the relevant figure for the DM-3 comparator should be the total <u>average</u> compensation of DM-3s – that is, the average base salary plus the average at-risk pay. However, the Rémillard Commission did not accept the Association and Council's submission, reiterating the Block Commission's concern that moving to average salary and performance pay would not "provide a consistent reflection of year over year changes in compensation":

> 50. The difficulty with that proposal is that DM-3s constitute a very small group – currently eight – the compensation of which is subject to considerable variation depending on the exact composition of the group at any given point in time. Previous Commissions have used the DM-3 reference point as "an objective, consistent measure of year over year changes in DM-3 compensation policy". Moving to the total average compensation of a very small group would not meet those criteria. We agree with the Block Commission (2008), which rejected moving to average pay and performance pay because it would not "provide a consistent reflection of year over year changes in compensation".
>
> 51. Any merit in comparing total average compensation would come from a comparison with a much larger group that could provide objectivity

---

77 Block Commission (2008) at para. 106 [emphasis added] [JBD at tab 11].
78 Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated December 20, 2011 at para. 117 [BED at tab 6].
79 *Ibid* at footnote 90.

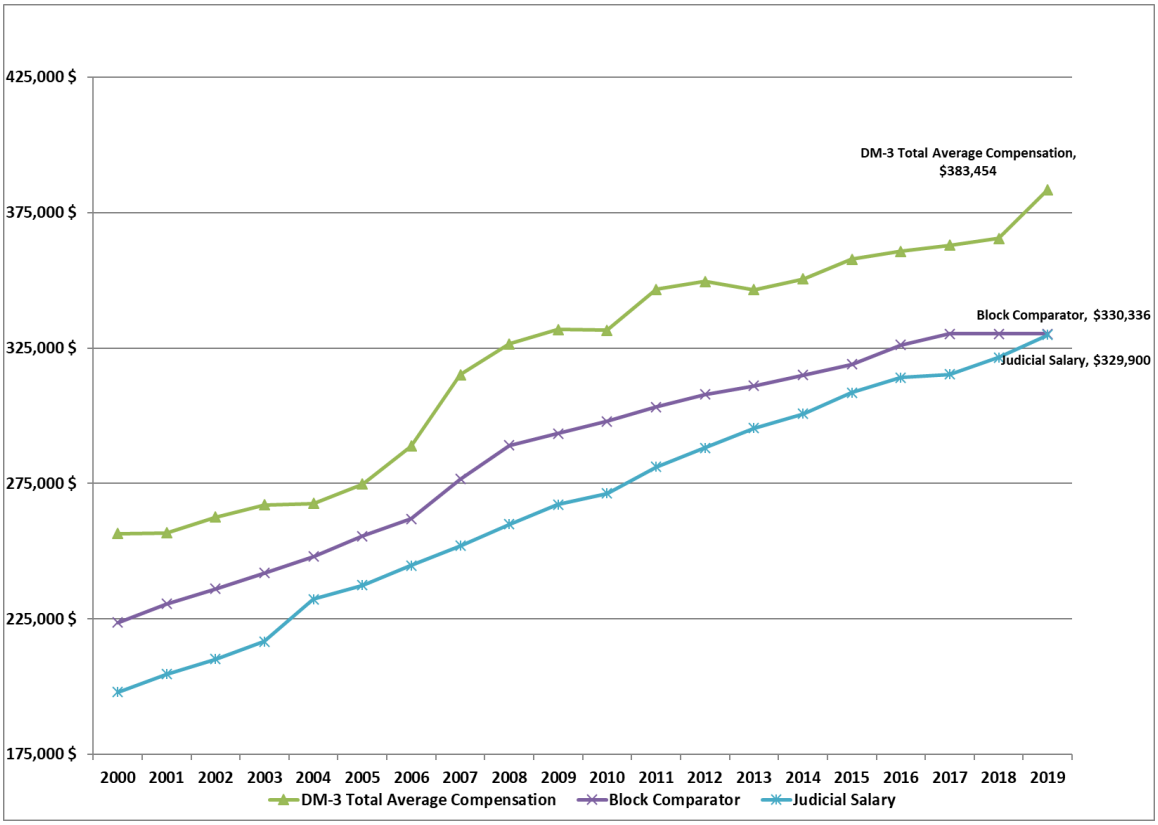
> and consistency, without being inordinately influenced by the individual members of the group at any given time.[80]

103. The circumstances that oblige the Association and Council to raise this question anew are the following. Since 2017, and for the first time since this metric is tallied, the salary portion of the compensation of DM-3s, and, as a result, the Block Comparator, has remained unchanged while the actual compensation of DM-3s has steadily increased. The consequence is that judicial salaries no longer retain a relationship with the actual compensation of DM-3s if the Block Comparator is used as the point of comparison.[81] In 2019, DM-3 total average compensation was $383,454, or $53,554 greater than the judicial salary for the same year.

104. Two discernable trends are illustrated in the following graph: a disparity between the Block Comparator and the actual average DM-3 compensation figures, which disparity has persisted through the past three quadrennial cycles; and second, an increasing delta between the total average compensation of DM-3s and the judicial salary.

[80] Rémillard Commission (2016) at paras. 50-51 [JBD at tab 13].
[81] Block Commission (2008) at para. 106 [JBD at tab 11].

Graph 1
Comparison of DM-3 Total Average Compensation, Block Comparator and Judicial Salary (2000-2019)



105. These trends have become much more pronounced since the last cycle because of the unprecedented and quite uncharacteristic flat-lining of the Block Comparator since 2017. The tables below show how both the DM-3 and DM-4 salary ranges (and therefore the mid-point) have remained static for the last four years.

DM-3 Salary Information

Date	Salary Range	Mid-Point Salary	Average Salary	Total Average Compensation
April 1, 2004	$207,200 - $243,800	$225,500	$239,980	$267,670
April 1, 2005	$213,500 - $251,200	$232,350	$248,644	$274,844
April 1, 2006	$218,800 - $257,500	$238,150	$255,178	$288,848
April 1, 2007	$223,600 - $263,000	$243,300	$260,730	$315,233
April 1, 2008	$228,000 - $268,300	$248,150	$268,011	$326,580
April 1, 2009	$231,500 - $272,400	$251,950	$269,910	$331,866
April 1, 2010	$235,000 - $276,500	$255,750	$274,992	$331,557
April 1, 2011	$239,200 - $281,400	$260,300	$280,221	$346,654
April 1, 2012	$242,900 - $285,700	$264,300	$285,700	$349,623
April 1, 2013	$245,400 - $288,600	$267,000	$287,354	$346,507
April 1, 2014	$248,500 - $292,300	$270,400	$288,709	$350,518
April 1, 2015	$251,600 - $296,000	$273,800	$291,950	$357,825
April 1, 2016	$257,300 - $302,700	$280,000	$298,200	$360,778
April 1, 2017	$260,600 - $306,500	$283,550	$298,900	$363,010
April 1, 2018	$260,600 - $306,500	$283,550	$298,143	$365,514
April 1, 2019	$260,600 - $306,500	$283,550	$303,545	$383,454
April 1, 2020	$260,600 - $306,500	$283,550	$304,450	Currently unavailable

DM-4 Salary Information

Date	Salary Range	Mid-Point Salary	Average Salary*
April 1, 2004	$232,100 - $273,100	$252,600	-
April 1, 2005	$239,100 - $281,300	$260,200	-
April 1, 2006	$245,100 - $288,400	$266,750	-
April 1, 2007	$250,300 - $294,500	$272,400	-
April 1, 2008	$255,300 - $300,400	$277,850	-
April 1, 2009	$259,200 - $305,000	$282,100	-
April 1, 2010	$263,100 - $309,600	$286,350	-
April 1, 2011	$267,900 - $315,100	$291,500	-
April 1, 2012	$272,000 - $319,900	$295,950	-
April 1, 2013	$274,700 - $323,100	$298,900	-
April 1, 2014	$278,200 - $327,200	$302,700	-
April 1, 2015	$281,700 - $331,300	$306,500	-
April 1, 2016	$288,000 - $338,800	$313,400	-
April 1, 2017	$291,700 - $343,100	$317,400	-
April 1, 2018	$291,700 - $343,100	$317,400	-
April 1, 2019	$291,700 - $343,100	$317,400	-
April 1, 2020	$291,700 - $343,100	$317,400	

* Due to the sample size, DM-4s average salary has been supressed by the Government.

106. Since the Block Comparator tracks the mid-point salary range and half of the eligible at-risk pay, regardless of the actual compensation received by DM-3s, the unprecedented flatlining of these components while the actual compensation progressed appears to have subverted the very purpose of the comparator. As a result of the static nature of the DM-3 salary range and Block Comparator, the gap between the Block Comparator and the DM-3 total average compensation (average salary plus total average performance pay) has grown to -13.9% ($53,118) in 2019, the largest reported difference since 2000 (see table below).

beneficial.[111] Needless to say, the higher the income, the greater the benefit in having that income retained in a corporation. Relatedly, higher income is correlated with seniority and expertise.

140. As such, the CRA data fails to capture income earned by the senior members of entire firms, or indeed of the entire legal profession in certain regions such as metropolitan areas where the profession's members earn high incomes.

141. Before the Rémillard Commission, the Association and Council took the position that the gap between self-employed lawyer incomes as shown by the CRA data and judicial salaries would be even greater if the income of lawyers practising through professional corporations were taken into account.[112] This view is supported by the expert evidence provided by Mr. Leblanc and Mr. Pickler.[113]

142. Other evidentiary elements further corroborate the fact that the CRA data under-reports the actual income of self-employed lawyers.[114] For example, in the context of a recent inquiry into gender disparity at major law firms in Canada, the *Globe and Mail* cited <u>average</u> compensation levels at a national law firm. At the firm in question, female partners earned on average 25% less than male partners, that percentage translating into an average of $200,000 less. This means that male partners earned on average $800,000 and female partners earned on average $600,000.[115]

143. In light of the significant gap between self-employed lawyer incomes as represented in the CRA data and the judicial salary, and considering the increasing number of high-earning lawyers excluded from this data given their use of professional corporations, it is unsurprising that the judiciary is experiencing difficulty, in some regions, in attracting outstanding candidates from private practice to the Bench.

---

111 Report of Stéphane Leblanc and André Pickler at 1-3 [Appendix B].

112 Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated February 29, 2016 at para. 122 [BED at tab 10].

113 Report of Stéphane Leblanc and André Pickler at 3 [Appendix B].

114 We note that given competitive and privacy reasons, it is difficult to obtain compensation information for senior lawyers in private practice, as has recently been confirmed by the Globe and Mail. R. Doolittle, "Major Canadian law firms willing to release wage-gap data", *Globe and Mail* (25 February 2021) [BED at tab 31].

115 R. Doolittle & C. Dobby, "Female partners earned 25 percent less than their male colleagues at a major Toronto law firm, document shows", *Globe and Mail* (9 February 2021) [BED at tab 30].

144. Moreover, although self-employed lawyers have been the source, traditionally, of the vast majority of appointments to the Bench, there is a declining proportion of appointments from private practice (approximately 75% between 1990 and 2007, 70% between 2007 and 2011, and approximately 63% between 2011 and 2020), as set out in the section above regarding the need to attract outstanding candidates to the judiciary.

145. It follows from the foregoing that the real gap between the incomes earned by self-employed lawyers and the judicial salary is significantly greater than that reflected in the CRA data. The CRA data does not form a reliable basis, in that it is not complete, to calculate the appropriate comparator from private practice. The real gap between the incomes earned by self-employed lawyers and the judicial salary is an obstacle to garnering interest in a judicial appointment from outstanding members of the Bar. This trend strikes at the heart of the criterion set out in the *Judges Act* regarding the need to attract outstanding candidates to the judiciary.

d) Salary recommendation sought by the Association and Council

146. Based on the comparators, whether it be the DM-3 comparator or the income of self-employed lawyers, the current judicial salary is inadequate and must be increased. The statutory criterion of attracting outstanding candidates to the Bench demands it.

147. The judicial salary lags significantly behind the total average compensation of DM-3s, which most accurately reflects the actual compensation of DM-3s, on average. As of April 1, 2019, the gap between total average DM-3 compensation and the salary of a puisne judge was $53,544, a difference of -14%. Assuming the judicial salary is adjusted in accordance with the projected IAI, it is projected to reach $378,687 by April 1, 2023. The projected total average compensation for DM-3s will by then be $413,725. A gap of $35,038 (-8.5%) will remain. This is higher than the already significant 7.3% gap that the Levitt Commission said "tests the limits of rough equivalence".[116]

148. In such circumstances, the Association and Council submit that based on the statutory criteria, the Commission should, at a minimum, recommend an increase of the judicial salary to partially bridge the significant gap that exists between the judicial salary and the DM-3 comparator. This gap will continue to exist for the foreseeable future. It bears

[116] Levitt Report (2012) at para. 52 [JBD at tab 12].

IN THE MATTER OF THE *JUDGES ACT*, RSC 1985, c J-1, as amended

2020 JUDICIAL COMPENSATION AND BENEFITS COMMISSION

SUBMISSIONS OF THE GOVERNMENT OF CANADA

Christopher Rupar
Kirk G. Shannon
Samar Musallam
Department of Justice
500-50 O'Connor Street
Ottawa, ON K1A 0H8

Tel: 613-670-6290
Fax: 613-954-1920

Counsel for the Government of Canada

3) Third Criterion: No Difficulty Attracting Outstanding Candidates

a) Consider the Pools from which Judges Drawn

41. As noted by the Rémillard Commission, all parties agree that Canada has an outstanding judiciary. That report also pointed out that while it is necessary to set judicial salaries at a level that will not deter outstanding candidates from applying to the judiciary, financial factors are not the only, or even the major, factor in attracting outstanding candidates. Other factors, such as the desire to serve the public, security of tenure and availability of supernumerary status and the quality of life associated with judicial office, are all important incentives for accepting appointment to the judiciary.[45]

42. The statistics collected by the Commissioner for Federal Judicial Affairs show that there is no shortage of interested and highly qualified candidates for judicial positions. For example, as of October 23, 2020, Judicial Advisory Committees across Canada had 925 fully-assessed applications. Of these, 140 appointments were made, 183 other individuals were "recommended" but not appointed, and 105 other candidates were "highly recommended" but not appointed.[46] Put another way, for every individual appointed to the bench, there were approximately two other candidates who are fully qualified, recommended and awaiting possible appointment.

43. Further, as set out by the Block Commission, "the issue is not how to attract the highest earners; the issue is how to attract outstanding candidates" from both private and public sectors, from large and small firms, and from large and small centres.[47] Or as the

---

[45] Rémillard Commission Report, *supra,* p 23, paras 80-83, **Joint Book of Documents**, **Tab 13;** see also Report of the Fourth Quadrennial Judicial Compensation and Benefits Commission, dated May 15, 2012 [Levitt Commission Report], p 15, para 42, **Joint Book of Documents**, **Tab 12**

[46] Applications for Appointment, Statistics, provided by the Commissioner for Federal Judicial Affairs, March 30, 2017 to October 23, 2020, **Joint Book of Documents, Tab 20**

[47] Report of the Third Quadrennial Judicial Compensation and Benefits Commission, dated May 30, 2008 [Block Commission Report], p 37, para 116, **Joint Book of Documents**, **Tab 11**

Drouin Commission noted, "no segment of the legal profession has a monopoly on outstanding candidates".[48]

44. Based on the evidence heard by the Standing Senate Committee on Legal and Constitutional Affairs, the third criterion, "the need to attract outstanding candidates to the judiciary", was prescribed when the *Judges Act* was amended in 1998.[49] This criterion was intended to address recruitment—what was necessary in order to "attract" senior members of the Bar to judicial office.

> However, taking the point about the criteria, we do always have to be measuring how we compensate our judges against that body of people from which we are drawing to ensure that we are competitive. [50]

45. The first Quadrennial Commission, the Drouin Commission, understood that subsection 26(1.1) of the *Judges Act* expressly mandates consideration of this relationship:

> The criterion identified in subsection 26(1.1)(c), for example, is directed expressly to the issue of recruitment of suitable candidates for the Bench. Traditionally, most judges in Canada are appointed from the ranks of private legal practitioners. Accordingly, those factors constituting incentives or disincentives to the seeking of judicial office by private legal practitioners are relevant to recruitment of judicial candidates.[51]

46. The analysis below shows that the majority of judicial appointments continue to be from the private sector and that there is no evidence that there is any difficulty in attracting high quality candidates from the private sector.

---

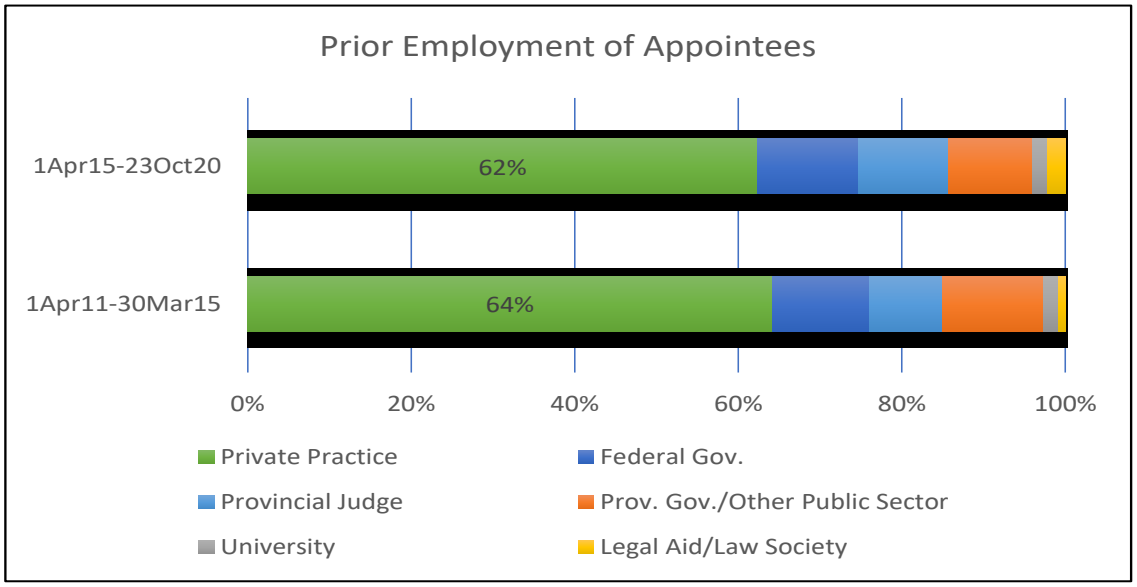
[48] Report of the First Quadrennial Judicial Compensation and Benefits Commission, dated May 31, 2000 [Drouin Commission Report], p 36, **Joint Book of Documents**, **Tab 9**

[49] Hansard November 6, 1998, *supra*, p 1025, **Government's Book of Documents**, **Tab 2**; Senate Committee October 22, 1998, *supra*, p 37:20, **Government's Book of Documents**, **Tab 3**

[50] Senate Committee September 30, 1998, *supra*, pp 32:18-32:19, **Government's Book of Documents**, **Tab 1**

[51] Drouin Commission Report, *supra*, p 23, **Joint Book of Documents**, **Tab 9**. See also: Drouin Commission Report, *ibid*, p 35-36; Report of the Second Quadrennial Judicial Compensation and Benefits Commission, dated May 31, 2004 [McLennan Commission Report], pp 31 & 41, **Joint Book of Documents**, **Tab 10**

47. Between 2015 and 2020, of the 372 lawyers appointed to the judiciary, 62% were from private practice and 38% from other sectors—federal and provincial government lawyers, legal aid lawyers, academics and the provincial court judiciary. This is consistent with the percentages from the last Quadrennial Commission process, where 64% of appointees were from the private sector and 36% of appointees were from other sectors. Indeed, the small drop in private sector appointees appears to be as a result of more provincial court judges being appointed to the federal bench.[52]



	Time Period	
Prior Employment	1Apr11-30Mar15	1Apr15-23Oct20
Federal Gov.	12%	12%
Prov. Gov./Other Public Sector	12%	10%
University	2%	2%
Legal Aid/Law Society	1%	2%
Provincial Judge	9%	11%
Private Practice	64%	62%
Total	100%	100%

[52] Statistics derived from CFJA Data, *supra,* **Joint Book of Documents**, **Tabs 19**

Compensation Review of Federally Appointed Judges

Department of Justice regarding the 2020 Judicial Compensation and Benefits Commission

26 March 2021

JDM Actuarial Expert Services Inc. 313 Powell Road, Whitby, Ontario L1N 2H5
Telephone: 905-999-4763 Email: PGorham@JDMActuarial.com

Table of Contents

A. Purpose of Report

1. I am president and actuary with JDM Actuarial Expert Services Inc. I regularly provide actuarial consulting services as well as actuarial expert testimony. I am a fellow of the Canadian Institute of Actuaries and of the Society of Actuaries. I received my Actuarial Fellowship in 1980 and have provided pension, benefits and actuarial consulting services for approximately 43 years. A copy of my curriculum vitae is attached as Appendix 1.

2. I understand and acknowledge that as an expert, I have a duty to provide evidence in this proceeding as follows:

   a. to provide opinion evidence that is fair, objective and non-partisan;

   b. to provide opinion evidence that is related only to matters that are within my area of expertise; and

   c. to provide such additional assistance as the 2020 Judicial Compensation and Benefits Commission (the "**Quadrennial Commission**") may reasonably require.

3. I acknowledge that the duty referred to above prevails over any obligation that I may owe to any party by whom or on whose behalf I am engaged.

4. This report has been prepared for the Department of Justice of the Government of Canada.

5. The purpose of this report is to:

   a. review and provide my opinion on data provided by Canada Revenue Agency about self-employed earnings of lawyers in Canada;

   b. provide comments about issues to consider regarding the total compensation (earnings, benefits, pension and any other remuneration) of self-employed lawyers, deputy ministers and similar positions of the Government of Canada and federally appointed judges;

   c. provide cost estimates of the judicial annuity that provides a lifetime pension to federally appointed judges upon their retirement as well as providing a pension in the event of permanent disability; and

   d. provide comments and my opinion about future changes in the Industrial Aggregate Index.

6. The intended users of this report are the Department of Justice, the Quadrennial Commission, and the various parties appearing before the Commission. The report should not be provided to anyone who is not an intended user except as may be required by law. The findings herein should not be relied upon by any party other than an intended user.

B. Executive Summary

7. This report takes a look at the income and total compensation of various jobs with the goal of assisting the Department of Justice prepare their submission to the Quadrennial Commission and also assist the Quadrennial Commission in their review of compensation for federally appointed judges.

8. In this report,

   a. I determine the value of the Judicial Annuity that is available to federally appointed judges upon retirement from the bench;

   b. I review recent compensation for self-employed lawyers, deputy ministers and government appointments to senior roles in government agencies;

   c. I establish a total compensation for each of these positions so that compensation can be viewed on an "apples to apples" basis; and

   d. I present the results of my analyses along with comments on a number of compensation issues related to these positions, but I make no recommendations.

9. There are many ways to compensate someone for performing work. It starts with salary or wages. Adding to that is commissions, overtime, vacation, bonuses (also referred to as performance pay, at-risk pay, etc.), health and welfare benefits, pension plan, stock options, etc. The sum of all these forms of compensation is referred to as total compensation.

10. Not every job comes with the same components of compensation and even when they do, each of the components are likely worth different amounts. To provide a fair basis for any comparisons, I determine a total compensation for each of the jobs referenced herein. Total compensation allows us to compare like with like.

11. Two jobs may have different salaries, but the total compensation may be the similar. Two jobs may have similar salaries, but the total compensation may be very different. If we compare two jobs on the basis of salary only, it devalues potentially large differences in other aspects of compensation.

12. The *Judges Act* sets out a number of judicial positions and annual salaries, including prothonotaries, puisne judges, and judges of the Supreme Court. I understand that the salary for each of these positions can be expressed as a percentage adjustment to the salary or a puisne judge. In this report, I refer to the salary of a puisne judge as the **Base Judicial Salary**. For the year beginning 1 April 2020, the salary for puisne judges is $338,800. The salary for a prothonotary is currently set at 80% of the Base Judicial

Salary, which is $271,000 beginning 1 April 2020. Similar calculations can be performed for other positions.

13. Base Judicial Salary is not appropriate for comparison with other jobs. For a fair comparison, we need to use total compensation. In this report, I have focussed on the total compensation for puisne judges. But, for federally appointed judges, the value of their pension varies based on their age at appointment and therefore their total compensation will vary based on their age at appointment. To simplify matters and to provide a reasonable basis for any comparisons of compensation, I calculate an average amount of total compensation for puisne judges that reflects the age distribution of all judges when appointed. I refer to that as **Base Judicial Total Compensation**. To determine the total compensation of the other judicial positions, one can apply the same percentage as we would apply to the Base Judicial Salary to obtain the base salary of that other position[1].

14. In this report, I review the salaries of the federally appointed judges and of deputy ministers and calculate their total compensation. I was also provided with the net income amounts for self-employed lawyers in Canada between 2015 and 2019 by the Canada Revenue Agency. I have reviewed it and present summaries of that data from various perspectives. The net income of the self-employed lawyers is their total compensation[2].

15. The goal is to provide a series of total compensation amounts with a fair relationship to each other. Those amounts are set out in Tables 280, 281 and 282.

Increase in Base Judicial Salary as of 1 April 2021

16. Base Judicial Salary is $338,800 for the year 1 April 2020 to 31 March 2021. Under the *Judges Act*, and subject to any adjustments recommended by the Quadrennial Commission, it will be adjusted effective 1 April 2021 by changes in the Industrial

---

1 The result of using the same percentage as one would apply to Base Judicial Salary will actually result in a small understatement of the total compensation of prothonotaries and a small overstatement of total compensation for all other judicial positions. Those over and understatements are each less than $1,000 and are not material for the purposes of this report.

2 Normally, the cost of health and welfare benefits form part of total compensation. Self-employed lawyers can provide health and welfare benefits for themselves as part of their business expenses that are paid out of gross income prior to the calculation of net-income. Health and welfare benefits also would normally form part of both judicial and deputy minister total compensation. To avoid having to make hundreds of adjustments to the income amounts herein for each of lawyers, judges and deputy ministers, I have chosen to simply ignore it since its value is not materially different between these positions.

Aggregate, a data series maintained by Statistics Canada that measures changes in the average earnings of Canadians.

17. I have estimated that increase will be 6.74%, raising the Base Judicial Salary to $361,600 effective 1 April 2021.

Effect on Base Judicial Total Compensation[3]

18. I determined that on average, the Base Judicial Total Compensation for 2019 to 2020 (based on the $329,900 Base Judicial Salary effective April 2019) is $496,000. If a self-employed lawyer had a net income of $496,000 in 2019, I estimate that would be about the 88th percentile for all self-employed lawyers in Canada.

19. I determined that on average, the Base Judicial Total Compensation for 2020 to 2021 (based on the $338,800 Base Judicial Salary) is $509,400. If a self-employed lawyer had a net income of $509,400 in 2020, I estimate that would be about the 88th percentile for all self-employed lawyers in Canada.

20. I also determined that on average, the Base Judicial Total Compensation for 2021 to 2022 (based on the $361,600 I estimated above) will be $543,800. If a self-employed lawyer had a net income of $543,800 in 2021, I estimate that would be about the 89th percentile for all self-employed lawyers in Canada.

Effect on Total Compensation of Prothonotaries

21. For April 2019 to March 2020, the base salary of a prothonotary was $263,900, from April 2020 to March 2021 it is $271,000 and I estimate beginning April 2021 it will be $289,200 (80% of the Base Judicial Salary).

22. I determined that the total compensation of a prothonotary for 2019 to 2020 (based on 80% of the Base Judicial Total Compensation and adjusting for a $600 understatement (see footnote 1)) is $397,300. If a self-employed lawyer had a net income of $397,300 in 2019, I estimate that would be about the 82nd percentile for all self-employed lawyers in Canada.

23. I determined that the total compensation of a prothonotary for 2020 to 2021 (using the same basis as for 2019-2020) is $408,100. If a self-employed lawyer had a net income of $408,100 in 2020, I estimate that would be about the 82nd percentile for all self-employed lawyers in Canada.

---

3 Details of these calculations are at paragraphs 153 and following.

24. I also determined that the total compensation of a prothonotary for 2021 to 2022 (using the same basis as for 2019-2020) is estimated to be $435,500. If a self-employed lawyer had a net income of $435,500 in 2021, I estimate that would be about the 86th percentile for all self-employed lawyers in Canada.

C. Introduction

25. I was retained by the Department of Justice to prepare a report to assist the Quadrennial Commission in their review of judicial compensation.

26. In preparing this report, I have assumed that the most appropriate perspective is to look at total compensation and the individual components that comprise total compensation.

27. As with past reports for prior Quadrennial Commissions, I have reviewed data regarding net income for self-employed lawyers to provide one comparator for compensation. I also have reviewed compensation of senior deputy ministers within the Government of Canada and appointments to senior government agencies as another objective factor.

28. I have approached the report in the following order:

    a. General comments and opinions on compensation topics.

    b. Review of the current situation for federal judges with respect to salary, the Judicial Annuity, disability income and health and welfare benefits.

    c. Review of compensation for lawyers in private practice with respect to net income, retirement savings, disability and health and welfare benefits.

    d. Review of compensation for senior deputy ministers with respect to the same components.

    e. Relationship of current judicial compensation to that of lawyers and deputy ministers.

29. In this report, where I refer to a lawyer, it should be taken as meaning a self-employed lawyer unless the context clearly indicates otherwise.

30. In this report, where I refer to a judge, it should be taken as meaning a federally appointed judge. There are no exceptions.

D. Comments and Opinions on Relevant Compensation Topics

Total Compensation vs Cash Compensation

31. There are many ways that a person can be compensated for work. In almost all situations, compensation starts with salary, base pay, hourly wage rate or some similar measure (herein referred to as "salary"). An individual may also be entitled to other forms of compensation[4], such as bonuses, commissions, performance incentives, stock options, benefits, retirement savings, health club membership, etc.

32. When comparing compensation between jobs, it is rare that looking only at cash compensation provides a true picture of any differences.

33. Total compensation is a measure that looks at all forms of pay, including cash compensation, and determines a total value. In comparing the compensation between two organisations, total compensation provides a more accurate result. For example, Acme Company might provide their employees with a full suite of health and welfare benefits as well as a generous pension plan. Boden Corporation might prefer to forego the health, welfare and pension plans and instead pay salaries that are about 25% larger. An employee at Acme who discovers the higher salaries at Boden may be led to change employers – at least until finding out about the difference in the other forms of compensation. Presumably they would only change employers if they determine that the total compensation from Acme is less than the total compensation from Boden.

34. Comparing two jobs on the basis of salary only is to devalue potentially large differences in other aspects of compensation.

Retirement Savings

35. One component of compensation is retirement income accumulation. While many Canadians[5] enjoy an employer-sponsored retirement plan, most Canadians are left to

---

4 Some of these other forms of compensation may also be paid in cash, but they do not form part of "salary" since there is normally an element of risk, or uncertainty regarding the amount to be received or there is a delay before any amount will be payable.

5 Obtaining data about membership in an employer-sponsored pension plan is very difficult. Many references are made to the Report on Trusteed Pension Plans published periodically by Statistics Canada. But that report does not include the many pension plans that are not trusteed. It also ignores the organisations that do not sponsor a registered pension plan but rather provide retirement savings through a group RRSP. Statistics Canada publishes a report on registered pension plan membership (but that also ignores group RRSPs) that shows 37.5% of paid workers are members of a registered pension plan in 2018. [https://www150.statcan.gc.ca/n1/daily-quotidien/200813/t002b-eng.htm].

look after their personal retirement saving on their own, generally through contributing to a personal Registered Retirement Savings Plan ("**RRSP**").

36. There are many different types of retirement plans in Canada. Most retirement plans provided by an employer require part of the annual contribution to be paid by the employees and the balance by the employer. A few plans are funded entirely by the employer with no contribution required from employees[6]. Where there is no retirement plan offered by the employer, the entire cost of retirement savings is borne by the individual employee.

37. For the vast majority, if not all self-employed lawyers, retirement savings are funded entirely out of the individual's earnings. Under the *Income Tax Act*[7], self-employed persons are not permitted to sponsor or earn benefits under a registered pension plan leaving the only options an RRSP or non-tax-sheltered savings.

38. For federally appointed judges, the Judicial Annuity provides retirement income with the judges paying 7% of income each year until they are eligible for an unreduced annuity at which time, contributions decrease to 1% of income[8]. Canada is responsible for the balance of the total cost which is paid out of the Consolidated Revenue Fund.

39. To properly reflect retirement savings costs for self-employed lawyers and for federally appointed judges, we need to consider their differing opportunities and differing costs for retirement saving.

Health and Welfare Benefits

40. Most employers provide a selection of health and welfare or group insurance benefits. Typically, these include life insurance, medical and drug benefits and dental benefits.

41. The value of these to an individual depends on how much the benefits are used, usually with respect to prescription drugs and dental.

42. Some employers provide these benefits at no cost to employees, while others may require part of the cost to be paid by employees. Canada pays all costs related to the

---

6 In 2019, 5.7 million Canadians were members of a pension plan requiring employee contributions. 0.7 million Canadians were members of a pension plan where they did not have to contribute. [Statistics Canada data table 11-10-0106-01]

7 Income Tax Regulations 8503(3)(a)

8 Judges Act R.S.C., 1985, c. J-1, section 50(2)

health and welfare benefits of judges. Self-employed lawyers will typically pay for these benefits out of their gross income.

Disability

43. Disability income protection is generally provided through a combination of short-term and long-term disability[9]. In my experience, short-term disability is usually entirely paid by the employer while long-term disability varies – due to income tax implications, usually paid entirely by the employer or entirely by the employee.

44. Self-employed lawyers will typically pay for long-term disability insurance out of their income and will typically self-fund for short-term disability.

45. Short-term disability protection is provided to judges by a continuation of salary. Long-term disability income protection is provided through the Judicial Annuity for a permanent disability and by a continuation of salary for a non-permanent disability.

46. Based on actuarial tables regarding disability claim rates, most people will never claim a disability benefit. In my experience, many people believe it is not an important benefit to have or the cost is too much to be worth having. For those that do have a disability, it is invaluable. As one ages, the chances of having a disability claim increases. At young ages, disability will normally arise from an accident, but as one ages, illnesses such as cancers, cardiovascular and mental health issues become increasingly prevalent in addition to accidents and lead to a greater likelihood of claims.

47. While the incidence rate is small in any single year, it becomes much larger over a number of years and especially as one ages. The actuarial assumptions I used show that 0.02% of judges at age 40 (that's two of every 10,000 judges) are expected to become permanently disabled. That rises to 0.1% by age 52 (10 of every 10,000), to 0.2% by age 60 (20 of every 10,000) and to 1.0% at age 74 (100 of every 10,000).

48. The average annual incidence over all ages is about 0.3% (30 of every 10,000 judges).

49. The Department of Justice provided me with historic data on judges who incurred a permanent disability. From 1985 to 2020, 94 federally appointed judges have become

[9] Short-term disability usually starts on the first day of absence due to illness or injury or shortly thereafter and continues for anywhere from about three-months to about a year. At the end of that time, long-term disability, if it exists, will commence and normally provide income protection up to recovery or age 65.

permanently disabled. I estimate that the actuarial assumption about disability would result in about the same number of expected permanent disabilities.

50. Both the average and median age of permanent disability was 63 following 11 years of service.

51. For a judge appointed at age 53, there is an 8.8% probability of becoming permanently disabled before age 75. But that 53-year-old would have achieved entitlement to a full retirement annuity at age 68, so there is no additional financial protection from the disability benefit after age 68.

52. For a judge appointed at age 53, there is a 4.3% probability of becoming permanently disabled before age 68.

53. While an annual probability of 0.3% may make the disability benefit sound like it is not worth very much, a probability of 4.3% (1 person out of every 23) becoming permanently disabled over a 15-year period between age 53 and 68 should cause most people to reconsider the value of permanent disability protection.

54. Since 1985, there have been 1,495 judges who have left the bench (retirement, disability or death). 94 of those were due to permanent disability – 6.3% of all judges leaving the bench. That includes judges who became permanently disabled after having qualified for a full retirement annuity and where the disability annuity did not provide any additional financial protection.

55. We can conclude that about 4.3% of judges will become permanently disabled prior to qualifying for a full annuity and 2.0% will become permanently disabled after qualifying for a full annuity.

Supernumerary Status

56. A valuable benefit available to judges is the ability to elect supernumerary status, where the judge is given a reduced workload and continues to receive full compensation. I was informed by the Department of Justice that there is no specific reference, but it is generally accepted that typically, the workload is about 50%.

57. To be eligible for supernumerary status, the judge must have served at least 15 years as a federally appointed judge and have a sum of age plus years of service totalling at least 80, or be at least 70 years old with at least ten years of service as a federally appointed judge. An exception is judges of the Supreme Court who are not eligible for

supernumerary status. Judges may sit as a supernumerary for a maximum of ten years or to age 75, whichever comes first.

58. Judges appointed prior to age 55 who meet the conditions to elect supernumerary status are also eligible to retire on a full unreduced retirement annuity. Judges appointed after age 55 become eligible for supernumerary status prior to their entitlement to a full retirement annuity, but they can grow into a full annuity by continuing in service in either a full-time or supernumerary status. At the time of first eligibility for supernumerary status, the amount of retirement annuity as a percent of Judicial Base Salary is:

Table 58 – Retirement Annuity at First Eligibility for Supernumerary Status

Age at Appointment	Retirement Annuity as % of Judicial Base Salary
55 or less	66.7%
56	62.2%
57	57.8%
58	53.3%
59	48.9%
60	44.4%
61	47.6%
62	51.3%
63	55.6%
64	60.6%
65 or more	66.7%
Weighted Average	62.4%

59. Basically, once having met the conditions required for electing supernumerary status, the decision for a judge is to:

a. Continue to work with a full caseload and receive full compensation;

b. Elect supernumerary status and continue to work approximately half-time and receive full compensation; or

c. Retire and receive a retirement annuity.

60. The financial benefits of this option for a judge are immediately obvious. But it is also a benefit for Canada. Rather than risk losing an experienced judge to retirement, there is a major incentive for the judge to continue in service, but at a reduced caseload. From the financial perspective, if the judge retired, the Judicial Annuity becomes payable at 2/3^{rds} of full compensation (subject to a reduction in some situations due to retiring

early). By continuing as a supernumerary, the judge receives full compensation – a difference of between 33.3% and 55.6% of the full compensation.

61. For Canada, the average cost of a supernumerary judge is about 38% of the full compensation[10] while the supernumerary judge carries about 50% of a full caseload.

62. As of 1 March 2021, there are 1,206 federally appointed judges in Canada of whom 292 are supernumeraries[11]. That is just under 25% of all judges.

63. I reviewed the statistics of 1,495 judges who left the bench between 1985 and 2020 (see table 267 for additional details). Of those judges,

    a. 1% of judges did not qualify for supernumerary status prior to age 75;

    b. 19% retired prior to qualifying for supernumerary status;

    c. 80% attained eligibility for electing supernumerary status, of whom:

        i. 8% chose to retire rather than elect supernumerary status; and

        ii. 72% elected supernumerary status and 90% of them (65% of all judges) so elected within one year of becoming eligible.

64. I estimated the average length of service as a supernumerary during the period 1985 to 2020 was 6.0 years. That lengthened slightly to 6.2 years for the supernumeraries serving between 2000 and 2020. The average age at which a judge elects supernumerary status is 68 with an average of about 18 to 19 years of service.

65. As of the end of 2020, there were 336 judges who had met the eligibility conditions for supernumerary status. 292 had previously elected to serve as supernumeraries (87% of all those eligible) and 44 remained serving full-time (13% of those eligible).

66. In my experience with organisations in the private sector, if an employee is permitted to elect a reduced workload, it is accompanied by an equivalent reduction in pay. But within the private sector, the payment of pensions is normally from a different source[12]

---

10 Or slightly less due to some judges delaying their election beyond their first eligibility or never electing supernumerary status. The 37.6% average cost to Canada is the difference between 100% of Base Judicial Salary and the 62.4% average retirement annuity percent from Table 58.

11 https://www.fja-cmf.gc.ca/appointments-nominations/judges-juges-eng.aspx

12 In the private sector, pensions are paid out of the pension plan, which is an entity separate and apart from the employer. Any benefit to an employer from an employee delaying retirement within the private sector is at best indirect. Private sector employers who do not sponsor a pension plan have no economic … incentive to pay full-time income for part-time work, since an employee's pension is from the employee's own savings and there is no direct or indirect offset to the compensation paid. For the federally appointed judges, both compensation and the Judicial Annuity are paid out of the Consolidated Revenue Fund.

than the employer's payroll, so the economic advantage of paying 100% of compensation for about 50% of work is very different.

67. It is clear that the availability of supernumerary status is valued by judges with the majority of them electing to spend their final years on the bench as a supernumerary.

68. I have looked at ways to calculate a value for this benefit and am not satisfied that any of my approaches is sufficiently robust and impartial between the parties. As a result, in my opinion, the availability of electing supernumerary status has a financial value that is intangible. I have not included any value for this as part of the Base Judicial Total Compensation (see paragraph 104).

Industrial Aggregate Increases ("IAI")

69. The *Judges Act* sets out how federally appointed judges' salaries are determined each year. Increases are effective as of 1 April in each calendar year. An adjustment factor is calculated based on the year over year change in the Industrial Aggregate, a data series maintained by Statistics Canada[13]. The factor is based on the most recently available data as of the first day of the period for which the salary amount is determined.

70. The Industrial Aggregate measures the number of working Canadians and their average weekly earnings. There are some types of jobs, like farming, fishing and military that are excluded. Earnings are tracked and the Industrial Aggregate is updated monthly. The Industrial Aggregate can be considered as similar to the Consumer Price Index except the Consumer Price Index tracks prices of items that are typically purchased by Canadian consumers whereas the Industrial Aggregate tracks the number of workers in Canada and their earnings[14].

71. In this report, when referring to the data series, I use the term Industrial Aggregate. Judges' salaries are adjusted annually by the percent change in the Industrial Aggregate value. I will refer to percent changes in the Industrial Aggregate as "**IAI**".

72. Based on Statistics Canada's publication schedule, there is usually a two-month lag between workers' pay dates and the publication of the Industrial Aggregate. For example, the Industrial Aggregate data that is published in February reports on workers and wages as of the previous December. Based on the data available as of

13 I have assumed that the data series referenced is the one identified by Statistics Canada as "Average weekly earnings by industry, monthly, unadjusted for seasonality", series 14-10-0203-01 and specifically, the sub-series "Industrial Aggregate excluding unclassified businesses".

14 Ibid.

early March 2021 (data for December 2020) and my assumption about how the calculation is to be done[15], I have determined the increase in judges' salaries will likely be 6.74% in 2021.

73. In the past fifteen years, the increase in Base Judicial Salary due to changes in the IAI has varied from 0.40% to 3.60% with an average of 2.42%. The average increase over the past five years (2015 to 2020) was 1.90%.

74. What has given rise to this large increase expected in 2021? Covid-19.

75. Business in Canada was largely shut down in March 2020 and many workers were laid off. The loss of jobs and of income was first reflected in the Industrial Aggregate reported for April 2020. The IAI increased by 5.7% from March to April.

76. The vast majority of workers who lost their jobs and income were from the lower paying jobs – work that could not be performed from home and work that is impacted by lockdowns, such as retail some of the service industry and manufacturing[16]. For those with higher paying jobs, their employment status was mainly unaffected by the closure of business as many of those jobs could be performed from home.

77. If a lower-paid worker suffers a large reduction in income but remains employed, the Industrial Aggregate will decrease. But if a lower-paid worker loses their job, they disappear from the calculation of the average and the Industrial Aggregate will increase[17]. With Covid-19, that increase in the Industrial Aggregate happened suddenly as about 2.9 million workers lost their jobs or were laid off in the second half of March and early April 2020[18].

78. In particular, the increase in IAI during 2020 was not because of workers receiving large wage increases, it was primarily because of workers losing their income.

---

15 The average of the Industrial Aggregate as reported by Statistics Canada in each of the 12-months immediately prior to the date of the increase, divided by the average in each of the 12-months immediately prior to the first averaging period above.

16 Statistics Canada, Infographic "COVID-19 and the Labour Market in May 2019. Publication 11-627-m/11-627-m2020038. [https://www150.statcan.gc.ca/n1/pub/11-627-m/11-627-m2020038-eng.htm]

17 Consider four numbers – 8, 10, 12 and 14. The average is 11. If the 8 is reduced to 4, the average reduces to 10. But if the 8 is simply removed (as would happen with a lay-off or job loss), the average increases to 12.

18 Change in total number of workers in Canada between February and May, Statistics Canada Table 14-10-0201-01, Employment by industry, monthly, unadjusted for seasonality.

How Does 2.9 Million Workers Getting Laid-off Cause Average Income to Increase?

Suppose that in February there are 2.9 million workers earning between $13 and $30 per hour with an average of $19.00 per hour. They work an average of 1,800 hours per year. That's an average annual income of $34,200 ($19.00 x 1,800). These 2.9 million workers do not know it, but they are about to lose their jobs.

In addition, there are 13.5 million workers that make between $13 per hour and several million dollars per year*. The average weekly income of those 13.5 million workers is $1,135, or just under $60,000 per annum.

Very roughly, that is the make-up of Canadian workers.

The average weekly income of all the 16.4 million workers is $1,051, or $54,700 per annum. That average income lies between the $34,200 annual amount for the 2.9 million workers and the $60,000 for the 13.5 million workers – as we would expect from averages.

Based on these assumptions, the Industrial Aggregate for February would be 1,051 – the average weekly income of the 16.4 million workers.

What happens when those 2.9 million workers get laid off in March and April? Their data simply disappears from the calculation. Instead of calculating the average income of 16.4 million workers, we calculate the average income of the remaining 13.5 million workers. Their incomes have not changed – there were no wage increases in March and April.

In May, the 13.5 million workers are still making an average weekly income of $1,135 – the same as in the second paragraph above. That is the total for all workers in May. So, the Industrial Aggregate for May is 1,135 - the average weekly income of the 13.5 million remaining workers.

Between February and May, the Industrial Aggregate has increased from 1,051 to 1,135. That's an increase of 8.0% - all because 2.9 million Canadians got laid-off from work.

_____

* This group includes some workers that make between $13 and $30 per hour, but they are not at risk for losing their job when Covid-19 hits.

Estimated increase without the Covid-19 Effect

79. If we had not experienced Covid-19 and assuming 2020 would have been similar to the average year with respect to wages of all Canadians, it is likely that the Industrial Aggregate would have increased but just not as much. In this section, I estimate what that increase would have been by looking at the budget plans for wage increases of employers across Canada.

80. A number of employee benefits and compensation consulting firms conduct compensation surveys to gather information on corporate budget plans for compensation increases in the following year.

81. Morneau Shepell[19] reported a budgeted average salary increase of 1.9% for 2021. If those expected to receive no increase are excluded, the average increase is budgeted as 2.5% for 2021. However, they report that 46% of survey respondents remained undecided at the time of responding to the survey. They also reported that in 2020, base salaries increased by 1.6% on average. If those whose salaries were frozen are excluded, the average increase in 2020 was 2.6%. Morneau Shepell's survey results showed that 36% of organisations froze salaries in 2020 compared with only 2% that had budgeted for a freeze. I assume that most, if not all of those changes were a response to Covid-19.

82. Normandin Beaudry[20] report an average budgeted salary increase for 2021 of 2.6%, excluding organisations that plan to freeze salaries. When those organisations that plan to freeze salaries are included, the average increase was lower by between 0.1% for organisations that have experienced little negative effect to a positive effect from Covi-19 to 0.5% lower for organisations with a negative effect from Covid-19.

83. Mercer[21] report that 2021 budgets average 2.3% for total salary increases. If the 13% of organisations that plan to have no salary increase are excluded, the average increase is budgeted to be 2.4% for 2021, compared with 2.6% for 2020.

84. Based on the various surveys of budgeted salary increases for 2021, it appears that the average will be between 2.0% and 2.5%. The survey results indicated a similar average was budgeted for 2020 increases prior to changes resulting from Covid-19.

85. In my opinion, based on the results of these three surveys of employer plans for salary adjustments, had there not been an employment disruption from Covid-19, the increase in the IAI for the 2021 judicial salary increase would likely have been between 2.0% and 2.5% with a similar increase in the IAI for 2022 increases.

Effect on IAI Increases in Future Years

86. In February 2020, there were 16.4 million workers included in the Industrial Aggregate earnings average. Three months later, there were 13.5 million workers, a decrease of

19 "News & Views", Volume 17, Issue 10, October 2020, page 6.

20 "Update of the 2021 Salary Forecasts", January 2021, [www.normandin-beaudry.ca/en/update-of-the-2021-salary-forecasts/]

21 "Moving Forward With Optimism", 24 November 2020, [www.imercer.com/ca/articledetail/moving-forward-with-optimism-1]

2.9 million. The loss of 2.9 million jobs resulted in an immediate 8.0% increase in the average industrial wage in Canada[22].

87. By December 2020, 2.3 million workers had returned to work. The Industrial Aggregate has decreased since May due to their return. The 8.0% increase between February and May had dropped to a 7.0% increase between February and December[23].

88. If the 550,000 workers who have still not returned to work are mostly at the bottom of the wage continuum, it is likely the Industrial Aggregate will decrease as and if they return to work. If all 550,000 were to return to work in 2021 and if their average earnings are less than $20 per hour, I estimate the IAI will further decrease by between 0.5% and 1.0%.

89. It is likely that decrease will be offset by wage increases granted to all workers in 2021. In paragraph 85, I estimated the increase to judicial salaries in the absence of Covid-19 would be between 2.0% and 2.5% for the April 2022 changes. Combining that with the effect of 550,000 more laid-off workers returning to work gives a net change in the IAI of between 1.0% and 2.0%. If less than 550,000 of those laid-off workers return to work, I estimate the change in the IAI for April 2022 will lie in the range of 1.0% to 2.5%.

90. In a letter from François Lemire, Director of the Office of the Chief Actuary for Canada to Anna Dekker dated 26 February 2021, Mr. Lemire sets out the Chief Actuary's current estimate for future changes in the IAI. He references the recent increase in Industrial Aggregate was caused by employment losses and that future decreases in the Industrial Aggregate are expected. His assumption for future changes in the IAI would result in increases to Judicial Base Salary of 6.7% in 2021 and 2.1% in 2022[24]. That 2.1% increase for 2022 lies within the range I have estimated, but it is at the upper end of the range. Based on my calculations, it likely assumes few of the remaining laid-off workers will return to work.

Weighted Averages

91. In the discussions in this report about income and benefits, many of the items vary by age. Sometimes the variance is by age of appointment and sometimes it is by current

22 Statistics Canada, Industrial Aggregate Index, Table: 14-10-0203-01.

23 Ibid.

24 He included assumptions for future years of 2.6% in 2023, 2.8% in 2024, 2.9% in 2025 and 3.0% in 2026 and beyond.

age. It can be helpful in those situations to also know the average amount. In addition, amounts may vary by province or by Census Metropolitan Areas.

92. Taking a straight average of the values shown in a table can, in some situations, be misleading. For example, in a high-school class, there were only three different grades on the last test – 50, 70 and 90. The average of those marks is 70. But if we are told that there were ten students with a grade of 50, ten with 70 and one with 90, the weighted average is 61[25].

93. When we look at incomes that vary by age, we could calculate an average of those amounts – if there are 30 ages involved, we average 30 income amounts. That would give a reasonable answer if the judges or lawyers were evenly distributed across all 30 ages.

94. If we are looking at incomes of 500 people who are distributed across those 30 ages, a more appropriate result is to take an average of the incomes for the 500 people rather than an average of the 30 age groups. We could create a table with the 500 amounts and calculate that average. Or we can achieve the same result by calculating a weighted average. A weighted average is simply a mathematical shortcut to calculating the average for all 500 people[26].

95. In this report, the weighted average is not an average of the values shown in a table. It is based on taking those values in the table, determining for each of the many individuals the value that applies, and taking an average over all the individuals.

96. Most of the time in this report where I calculate a weighted average, it is an age-based weighted average.

97. For example, in Table 133, the rightmost column (Total Value of Pension and Disability Net of Judges' Contributions) shows a weighted average of 34.9%. If we take an average of the values shown in the table for each age, we get 42.1% (not shown in Table 133).

    a. The 42.1% would be reasonable to use if there are an equal number of judges appointed at each age 40 to 69.

    b. The 34.9% is appropriate to use to reflect the actual historical distribution of judges by age at appointment.

---

25 That weighted average can be verified by writing down all 21 marks – 10 students got 50, ten got 70 and one got 90. The average of those 21 marks is 61. Weighted average is a quicker way to achieve the same result without actually listing all 21 (or in many situations, significantly more) values.

26 At least, in this example, it is 500 people.

c. A different result might be appropriate to use if the future age of judicial appointments is expected to change significantly from past ages at appointment.

98. In this report, I have looked at averages based on the age of the judges upon their appointment to the bench as well as the geographic location of the judges just prior to their appointment. To perform those calculations, I was provided with a summary of the age of all appointments as a federal judge from 1 April 2011 to 31 March 2015 and from 1 April 2015 to 23 October 2020[27].

99. In total, there were 598 appointments during that 9.5-year period – 226 from 2011 to 2015 and 372 from 2015 to 2020.

100. I examined the distribution by age during each of the two periods as well as the entire 9.5 years and found there was very little difference.

a. The average age at appointment was 52.4 between 2011 and 2015 and it was 52.7 between 2015 and 2020. Over the entire period, the average age at appointment was 52.6.

b. When I calculated the weighted average value for the Judicial Annuity as a percent of compensation (a discussion of the Judicial Annuity begins at paragraph 112), I obtained 37.6%, 38.0% and 37.8% respectively for appointments during 2011 to 2015, 2015 to 2020 and over the entire period 2011 to 2020.

101. In my opinion, those differences are not material for the purposes of this report, and I have therefore only calculated weighted averages based on the distribution of federal judicial appointments over the entire 9.5-year period from 2011 to 2020.

[27] The Department of Justice provided me with statistics on judicial appointments from April 2011 to October 2020, made available by the Office of the Commissioner for Federal Judicial Affairs.

E. Judicial Total Compensation

102. I understand that there are three main components to federal judicial total compensation[28] – salary, health and welfare benefits (often called group insurance benefits) and the Judicial Annuity, encompassing both permanent disability income protection and retirement income. There may be other items included and I have assumed that they are not material for the purposes of this report.

103. The nature of the judicial annuity is that the value varies significantly based on the age at appointment of a judge. Consequently, the total compensation for a federal judge will also differ among judges based on their age at appointment.

Salary

104. The salary for a federally appointed judge in 2020 was $338,800[29]. For ease of reference, I refer to the base salary ($338,800 for 2020 to 2021) as the **Base Judicial Salary**. I will refer to the total compensation for a judge who receives the Base Judicial Salary as the **Base Judicial Total Compensation**[30].

105. For this report, I will focus on the Base Judicial Salary and will ignore the effect of any supplemental amounts based on differing positions and geography.

106. Assuming that the increase in the IAI will be 6.74% in April 2021, the Base Judicial Salary will be increased to $361,600 as of 1 April 2021 – an increase of $22,800.

Retirement Savings

107. One component of compensation is retirement income accumulation. While many Canadians enjoy an employer-sponsored retirement plan, most Canadians are left to look after their personal retirement saving on their own, generally through contributing to a personal Registered Retirement Savings Plan ("**RRSP**").

---

28 "Guide for Candidates", Office of the Commissioner for Federal Judicial Affairs, [www.fja-cmf.gc.ca/appointments-nominations/guideCandidates-eng.html]

29 Ibid. In addition, there are supplemental amounts chief justices, associate chief justices, justices of certain courts and northern allowances.

30 As discussed later (Paragraphs 141 to 142), the total compensation for judges varies by their age at appointment. I determine an average amount that reflects the age profile of judges upon appointment and use that – so Base Judicial Total Compensation refers to the average total compensation of all judges based on their ages at appointment.

108. There are many different types of retirement plans in Canada. Most retirement plans provided by an employer require part of the annual contribution to be paid by the employees and the balance by the employer. A few plans are funded entirely by the employer with no contribution required from employees. Where there is no retirement plan offered by the employer, the entire cost of retirement savings is borne by the individual employee.

109. For the vast majority, if not all, self-employed lawyers, retirement savings are funded entirely out of the individual's net income.

110. For federally appointed judges, the Judicial Annuity provides retirement income with the judges paying 7% of income each year until they are eligible for an unreduced annuity at which time, contributions decrease to 1% of income. Canada is responsible for the balance of the total cost.

111. To properly reflect retirement savings costs for self-employed lawyers and for federally appointed judges, we need to consider their differing opportunities, differing costs and differing values for retirement saving.

The Judicial Annuity

112. The Judicial Annuity provides excellent retirement benefits to retired judges. It is one of the best retirement plans in Canada.

    a. A lifetime annuity equal to ⅔rds of the final year's earnings provided the judge has met one of three thresholds involving age and judicial service[31]. A reduced lifetime annuity is available upon retirement prior to those thresholds.

    b. A lifetime annuity equal to ⅔rds of the final year's earnings upon permanent disability while serving as a federal judge with no minimum service requirement.

    c. A surviving spouse income payable following the death of a judge (both before and after retirement) equal to half of the amount payable to the judge.

    d. Inflation protection based on changes in the Consumer Price Index in each year while the annuity is payable.

[31] Attained age 75 and served at least ten years; Served at least 15 years and has a total of age plus service of at least 80; Served on the Supreme Court of Canada for a total of at least ten years.

113. In addition to retirement benefits, the Judicial Annuity provides permanent disability income should a judge become permanently disabled[32]. Within the private sector, if disability income protection is provided, it is usually done through long-term disability insurance which covers both temporary and permanent disabilities.

114. So, the Judicial Annuity is a combination of retirement savings and permanent disability income protection.

115. Judges must contribute part of the cost of the Judicial Annuity through payroll deductions equal to 7% of salary in each year until they are eligible to retire without a reduction to the amount of the annuity, following which the contribution is 1% of salary in each year. Canada is responsible for the balance of the total cost.

Retirement Income Requirements

116. The general rule used by financial planners for retirement income sufficiency has for many decades been 70% of pre-retirement income. For some people, 70% is not sufficient to maintain their lifestyle. For some people, 70% is more than sufficient.[33]

117. If we look at averages, the replacement percent decreases as pre-retirement income increases[34]. For example, a family earning $30,000 per annum prior to retirement is unlikely to be able to maintain their lifestyle on a 70% ($21,000) pension. A family earning $1 million annually is likely to have more than enough to maintain a lifestyle on a 70% ($700,000) pension. For most families, this is because of savings. The larger the income, generally the larger the amount saved each year. And in most situations, savings are no longer required following retirement.

118. Two other factors that affect retirement income needs are:

    a. whether one owns a home that has become mortgage-free in the last few years;

    b. the number of children and whether they have become financially independent[35].

119. Based on my experiences working with people planning for retirement, it is my opinion that a 70% pension is usually appropriate for families with a total income of $60,000 to

---

32 *Judges Act* (s. 42(1.1)(b))

33 "Is a 70% retirement replacement income target too high?" by Fred Vettese, Globe & Mail, 14 Feb 2018, [www.theglobeandmail.com/globe-investor/retirement/retire-planning/book-excerpt-retirement-income-for-life-getting-more-without-savingmore/article37971172/]

34 Based on my working with people preparing for retirement as well as on unpublished research I have done over the past 30 years.

35 "Retirement Income for Life: Getting More Without Saving More" by Fred Vettese, Milner & Associates Inc., 2 March 2018.

$75,000. A higher percent is needed for lower income amounts and less for those with higher incomes.

120. Consequently, in my opinion, the vast majority of judges will have more income from the Judicial Annuity than is required to maintain their pre-retirement lifestyle.

121. While a judge may not require all of the income payable from the Judicial Annuity to maintain a lifestyle, the Judicial Annuity still delivers a full value to the judges. It provides them with an ability to support an increase in lifestyle if they should so wish, greater confidence in their financial future, as well as possibilities to provide larger inheritances and greater philanthropic activities.

Value of the Judicial Annuity

122. Within the pension industry, one generally expresses the value of retirement savings as a percent of salary (rather than as total dollars), thereby removing salary level as a factor for cost difference. In paragraph 128 below, I present the total dollar value of the Judicial Annuity for all years of service. For the rest of the report, I express the value of the Judicial Annuity as a percent of Base Judicial Salary.

123. Further, there are a number of ways to look at the value of a retirement pension. The two most common ways are:

a. **Annual Value**: the amount of funds required as a contribution in each year of service up to retirement, which can be expressed as either a dollar amount or a percent of earnings; and

b. **Total Value**: the total amount of funds required to pay for the total amount of retirement income earned as of the date of retirement.

124. There is no method that results in the same value for each person. At the time of retirement, the total value will vary by age of the judge, spousal status and gender. The annual value will vary by age of the judge, expected retirement age, expected spousal status at retirement, years of service as a judge and gender.

a. The younger a judge is when appointed to the bench, the more years there will be for the time value of money to discount the value from the future retirement age to the present, so the lower the annual value of the pension.

b. The younger a judge is at retirement, the greater will be the value of their pension since they will be retired for a longer time and receive greater total payments than if they retired at an older age.

c. If the judge has a spouse[36], the Judicial Annuity will be worth more than if there is no spouse because the annuity continues following the death of the judge as long as the spouse remains alive.

d. The value of a pension for a female is greater than for a male since females' life expectancy is greater than for males.

125. The value of a pension is based upon expectations at retirement as well as expectations prior to retirement (age at retirement, future compensation increases, etc.). While future events both before and after retirement will affect the final cost of a pension, the value is always based on expectations about what will happen in the future. While a 60-year-old retiree is expected to live more years than a 75-year-old retiree, that does not always happen.

126. Unless one is willing to wait for the cost of a Judicial Annuity to reveal itself once all retired judges have died, we must determine the value based on actuarial assumptions – expectations for the future.

What is Value?

I buy a 50/50 ticket for $10.00. With 1,000 tickets sold, the payout will be $5,000. My chance of winning the $5,000 is 1 in 1,000. My expected winnings are $5.00 – the $5,000 payout multiplied by my chance of winning it.

So, the value of that ticket to me is $5.00. After the draw is made, that ticket's value changes to either zero or $5,000. But prior to the draw, it always had a value of $5.00.

It is the same with pensions. The value is based on our expectations for the future, and that requires actuarial calculations and actuarial assumptions about future events.

The value may change over time as our expectations for the future change. But those changes do not change the past values since the past values were based on expectations at each past period of time.

127. I have focussed on the value for each year of service as a judge and have calculated the expected or average value each year from appointment to expected retirement based on a set of actuarial assumptions. Those assumptions are summarised in Appendix 4.

a. The assumptions recognise that judges retire at different ages and following different number of years of service. The probability of retirement for each age and service combination was taken from the Actuarial Report on the Pension Plan for Federally Appointed Judges as of 31 March 2019 (the most recent as of the date I made the calculations). Those assumptions were developed by the Chief Actuary based on past experience of when judges have retired.

[36] And/or children. There is a provision for continuation of the Judicial Annuity to any surviving dependent children. From my calculations, that provision has an immaterial effect on costs.

b. The retirement assumptions vary from age 55 (where ½ of 1% of judges are assumed to retire) to age 75 (where all judges who are still serving are assumed to retire).

c. Based on those assumptions, the average age of retirement varies from age 68 for a judge appointed at 40; to age 72 for a judge appointed at 50; and age 75 for a judge appointed at 60 and above.

d. Assumptions are also made for future interest (to recognise the time value of money), future salary increases, gender split of the judges, mortality rates, disability rates and probability of there being a survivor entitled to survivor benefits following the judge's death.

128. The dollar value of the Judicial Annuity is roughly similar regardless of the age at appointment. In the following, I calculated the weighted averages based on the number of judges appointed at each age from 40 to 69 over the past 9.5 years (April 2011 to October 2020)[37].

a. The total value for pension and disability benefits ranges from $1,775,000 to $2,172,000 for appointment at ages 40 to 65. The differences are mainly due to the time value of money. The weighted average over all ages is $1,885,000.

b. The total amount of contributions by a judge over their entire period of service varies from $187,000 to $356,000 for appointment at ages 40 to 65. The differences are mainly due of the length of time in service – the younger one is appointed, the more the total contributions will total. The weighted average over all ages is $280,000.

c. The total value of the pension and disability benefits, net of judges' contributions ranges from $1,447,000 to $1,984,000 for appointment at ages 40 to 65. Those differences are mainly due to the time value of money. The weighted average over all ages is $1,605,000.

129. The average age of retirement, based on the actuarial assumptions, is about 72. All judges are assumed to retire upon turning 75 or prior to that.

130. These total value amounts are not useful for determining total compensation nor are they useful for a comparison with retirement savings of self-employed lawyers and other professionals. For that, I have expressed the value of the Judicial Annuity as a percent of annual Base Judicial Salary – a percent that remains the same for each year of service as a judge.

[37] This averaging method is discussed further at paragraphs 91 to 101.

131. The value of the retirement income portion of the Judicial Annuity varies from 26.3% of Base Judicial Salary for a judge appointed at age 40 to 78.6% of Base Judicial Salary for a judge appointed at age 70. Assuming the judges' contributions are all utilised to fund the retirement income benefit, the value of the pension net of contributions ranges from 20.6% for a judge appointed at age 40 to 71.6% for a judge appointed at age 70.

132. The value of the disability income portion of the Judicial Annuity varies from 2.3% of earnings for a judge appointed at age 40 to 9.4% of earnings for a judge appointed at age 70. That assumes that no portion of the judge's contribution is used for disability income protection.

133. Table 133 sets out the annual value for the retirement income and permanent disability income based on each age at appointment from 40 to 70. Note that these percentages are an average over an entire career. As an example, for a judge appointed at age 50, the value net of judges' contributions for the pension and disability benefits would be 30.3% of Base Judicial Salary each year from appointment to retirement. The average cost to the judge would be 5.41% of Base Judicial Salary each year, which represents an average of the years with a 7% and a 1% contribution rate.

Table 133 – Value of Judicial Annuity by Age at Appointment – percent of Base Judicial Salary

Age at Appointment	Pension Value	Judges' Contributions	Pension Value Net of Judges' Contributions	Disability Value	Total Value of Pension and Disability Net of Judges' Contributions
40	30.63%	5.48%	25.15%	2.75%	27.90%
41	31.31%	5.37%	25.94%	2.86%	28.80%
42	30.80%	5.41%	25.39%	3.03%	28.42%
43	30.55%	5.26%	25.29%	3.20%	28.48%
44	30.36%	5.32%	25.04%	3.37%	28.41%
45	30.40%	5.18%	25.22%	3.55%	28.77%
46	30.97%	5.27%	25.70%	3.71%	29.40%
47	32.06%	5.17%	26.89%	3.85%	30.74%
48	32.94%	5.28%	27.66%	4.01%	31.67%
49	33.98%	5.16%	28.82%	4.18%	33.00%
50	34.73%	5.27%	29.46%	4.37%	33.83%
51	35.45%	5.39%	30.07%	4.58%	34.64%
52	36.12%	5.50%	30.62%	4.79%	35.42%
53	36.78%	5.63%	31.15%	5.02%	36.17%
54	37.43%	5.75%	31.68%	5.26%	36.94%
55	38.23%	5.90%	32.34%	5.51%	37.85%
56	39.10%	6.05%	33.05%	5.77%	38.82%
57	40.29%	6.23%	34.06%	6.04%	40.11%
58	41.96%	6.44%	35.52%	6.33%	41.84%

Age at Appointment	Pension Value	Judges' Contributions	Pension Value Net of Judges' Contributions	Disability Value	Total Value of Pension and Disability Net of Judges' Contributions
59	44.01%	6.69%	37.32%	6.61%	43.93%
60	46.87%	7.00%	39.87%	6.93%	46.80%
61	50.58%	7.00%	43.58%	7.22%	50.80%
62	54.89%	7.00%	47.89%	7.50%	55.39%
63	59.95%	7.00%	52.95%	7.76%	60.70%
64	65.95%	7.00%	58.95%	8.01%	66.96%
65	73.20%	7.00%	66.20%	8.26%	74.45%
66	73.87%	7.00%	66.87%	8.49%	75.37%
67	74.57%	7.00%	67.57%	8.73%	76.30%
68	75.28%	7.00%	68.28%	8.97%	77.25%
69	76.02%	7.00%	69.02%	9.23%	78.25%
Weighted Average	**38.52%**	**5.78%**	**32.74%**	**5.10%**	**37.84%**

134. By looking at the ages of judicial appointments, we can calculate an age-weighted average overall value of the Judicial Annuity for all federally appointed judges. Net of judges' contributions, that is 37.8% of Base Judicial Salary.

Cost to a Lawyer to Replicate the Judicial Annuity

135. The value of the Judicial Annuity shown above is prior to considering the effects of income taxes. While the judge must contribute towards the cost of the Judicial Annuity, that contribution is tax deductible and the actual value is somewhat less than the actual contribution.

136. After retirement, the entire benefit paid by the Judicial Annuity is taxable in each year as it is paid.

137. For a self-employed lawyer to replicate the benefit of the Judicial Annuity (i.e., 66.7% of the lawyer's income) takes a combination of RRSP contributions and contributions to an investment plan. The tax impact on an RRSP is similar to the tax impact on the Judicial Annuity. But the effect of taxes on an investment plan are very different. Contributions are made with after-tax dollars; any investment income is immediately taxable and withdrawals from the plan are tax-free.

138. I have performed calculations of the total amount of income prior to taxes that a self-employed lawyer would need to use in order to replicate the pension benefits from the Judicial Annuity using a combination of RRSP and investment plan. In doing so, I recognised the differing income tax treatment for the different types of saving, the age

at appointment to the judiciary and the average age of retirement of federal judges of age 72.

Total Value of the Judicial Annuity to a Self-Employed Lawyer

139. The value of the Judicial Annuity shown in Table 133 is prior to recognising that the income tax treatment afforded the Judicial Annuity is not available to individual Canadians, including the self-employed lawyers. Therefore, the value of the Judicial Annuity shown in Table 133 underestimates the actual value to the lawyer.

140. The cost to replicate the pension from the Judicial Annuity ranges from about 8% more for appointment at age 40 compared with the value of the Judicial Annuity to 18% more for appointment at age 65 compared with the value of the Judicial Annuity[38].

141. Table 141 shows the value of the Judicial Annuity based on age at appointment including the additional costs required to replicate the Judicial pension by a self-employed lawyer. This table builds on the results presented in Table 133 above.

Table 141 – Total Value of the Judicial Annuity to a Self-Employed Lawyer

Age at Appointment	Total Value of Pension and Disability Net of Judges' Contributions	Additional Cost to Replicate Judicial Annuity	Total Value of Judicial Annuity
40	27.90%	11.80%	39.70%
41	28.80%	12.60%	41.40%
42	28.42%	11.40%	39.82%
43	28.48%	11.30%	39.78%
44	28.41%	10.50%	38.91%
45	28.77%	10.70%	39.47%
46	29.40%	10.50%	39.90%
47	30.74%	10.80%	41.54%
48	31.67%	10.80%	42.47%
49	33.00%	11.70%	44.70%
50	33.83%	11.50%	45.33%
51	34.64%	11.20%	45.84%
52	35.42%	11.60%	47.02%
53	36.17%	11.20%	47.37%
54	36.94%	10.90%	47.84%
55	37.85%	11.30%	49.15%
56	38.82%	11.00%	49.82%
57	40.11%	10.90%	51.01%
58	41.84%	11.70%	53.54%

[38] The extra value varies up and down with age, but generally shows a gradually increasing pattern. The up and down fluctuations are mainly caused by changes in the assumed retirement age that starts at age 72 for appointments at age 40 and increases to retirement at age 75 for appointments at age 60 and above.

Age at Appointment	Total Value of Pension and Disability Net of Judges' Contributions	Additional Cost to Replicate Judicial Annuity	Total Value of Judicial Annuity
59	43.93%	11.90%	55.83%
60	46.80%	12.40%	59.20%
61	50.80%	13.40%	64.20%
62	55.39%	14.50%	69.89%
63	60.70%	15.80%	76.50%
64	66.96%	17.40%	84.36%
65	74.45%	19.20%	93.65%
66	75.37%	18.70%	94.07%
67	76.30%	18.30%	94.60%
68	77.25%	17.90%	95.15%
69	78.25%	17.50%	95.75%
Weighted Average	**37.84%**	**11.67%**	**49.51%**

142. By looking at the ages of judicial appointments, we can calculate an age-weighted average value of the Judicial Annuity for all federally appointed judges including the effects of income tax. Net of judges' contributions, that is 49.51% of salary[39]. A self-employed lawyer would, on average, need to save 49.51% more of their net income than a judge in order to provide savings sufficient to provide the 2/3rds of earnings payable under the Judicial Annuity.

Health & Welfare Benefits

143. Judges receive health and welfare benefits similar to those provided to federal government employees[40]. The cost to the government for that is the total of the claims actually submitted and approved by the individual and their family members plus a small amount to cover claims adjudication and administrative expenses of the insurance company.

144. Self-employed lawyers may also have health and welfare benefits which may be more or less generous than those provided for the judges. The cost of these benefits can be deducted as a business expense in many situations and would therefore normally be paid prior to the determination of net income.

---

39 That 49.51% applies to all salary amounts. The dollar value is different between people with different salaries, but the percent is the same. That is similar to the benefit payable from the Judicial Annuity. The full amount is 66.7% of a judge's salary – which produces a different dollar amount between judges with different salaries, but the percent is the same.

40 "Guide for Candidates", Office of the Commissioner for Federal Judicial Affairs, [www.fja-cmf.gc.ca/appointments-nominations/guideCandidates-eng.html]

145. While there may be some, or even many, self-employed lawyers who do not buy health and welfare benefits for themselves, I assume that those with net incomes above the median do have these benefits and that the cost is roughly similar as for a judge.

146. The cost of benefits typically forms part of total compensation. Since the costs are likely a wash in most situations, I have chosen to ignore it for purposes of this report.

Canada Pension Plan Contributions

147. There are at least two benefits with a different cost impact between self-employed lawyers and federally appointed judges: part of the Canada Pension Plan (**CPP**) contributions and retirement savings. Retirement savings are addressed above in paragraphs 135 to 142.

148. CPP contributions in 2021 total 10.9% of earnings between $3,500 and $61,600. Half is paid by the employee and half by the employer. For self-employed Canadians, the entire amount is paid by the self-employed person. For a person earning over $61,600 in 2021, the employee portion is $3,166 and the self-employed total contribution is $6,333. Those contributions are made out of net income. A judge therefore has $3,166 less in CPP contributions than the self-employed lawyer.

149. To properly reflect this difference in the CPP contributions, we could either reduce each of the net income amounts of self-employed lawyers shown in the tables in this report by the $3,166 difference or we could include the $3,166 as a benefit available to the judges as part of total compensation. In my opinion, it is easier to include this benefit as a part of the judges' total compensation since that involves adjusting only one amount.

Base Judicial Total Compensation

150. The Base Judicial Total Compensation is equal to the Base Judicial Salary plus an amount for Canada Pension Plan contributions plus the value for the Judicial Annuity plus the value of any other items or perquisites. I have assumed that the value of any other items or perquisites is not material and I have assigned a zero value to them for purposes of this report.

151. For a judge appointed at age 40, the Base Judicial Total Compensation in 2020 is $338,800 plus 39.7% (from table 141) for the Judicial Annuity plus $3,166 for CPP

contributions giving a total of $476,500[41]. For a judge appointed at age 69, the Base Judicial Total Compensation is $666,400. Table 151 shows the Base Judicial Total Compensation by age for each year 2019 to 2021. Note that the 2021 amounts are based on my estimate assuming an increase to Base Judicial Salary for 2021 of 6.74% (paragraph 106). The age-weighted average is based on the actual ages of the judges appointed during the period 1 April 2011 to 23 October 2020.

Table 151 – Base Judicial Total Compensation by Age at Appointment – 2019, 2020 and 2021

Age at Appointment	April 2019 to March 2020	April 2020 to March 2021	Estimated Effective April 2021
40	464,000	476,500	508,300
41	469,600	482,200	514,500
42	464,400	476,900	508,700
43	464,300	476,800	508,600
44	461,400	473,800	505,500
45	463,300	475,700	507,500
46	464,700	477,200	509,100
47	470,100	482,700	515,000
48	473,200	485,900	518,300
49	480,500	493,400	526,400
50	482,600	495,600	528,700
51	484,300	497,300	530,500
52	488,200	501,300	534,800
53	489,300	502,500	536,100
54	490,900	504,000	537,800
55	495,200	508,500	542,500
56	497,400	510,800	544,900
57	501,300	514,800	549,200
58	509,700	523,400	558,400
59	517,200	531,100	566,600
60	528,400	542,500	578,800
61	544,900	559,500	596,900
62	563,600	578,700	617,500
63	585,500	601,200	641,400
64	611,400	627,800	669,800
65	642,000	659,300	703,400
66	643,400	660,700	704,900
67	645,100	662,500	706,800
68	647,000	664,300	708,800
69	648,900	666,400	711,000
Weighted Average	**$496,000**	**$509,400**	**$543,800**

[41] In this report, I round compensation amounts to the nearest $100.

Effect on Base Judicial Total Compensation

152. The Base Judicial Total Compensation shown in Table 151 is comprised of three items – Base Judicial Salary which is the same at each age, the value of the Judicial Annuity which varies by age at appointment and the portion of the judge's Canada Pension Plan contributions paid by Canada which is the same at each age. To determine a single value representative of all judges, I have calculated the "weighted average for age at appointment" of Base Judicial Total Compensation effective April 2019 to be $496,000.

153. The similar age-weighted average Base Judicial Total Compensation effective April 2020 is $509,400.

154. If the 2021 Base Judicial Salary increases as I estimated (paragraph 106) to 361,600, the age-weighted average Base Judicial Total Compensation effective April 2021 will be $543,800.

155. I have estimated at which percentile of net income for self-employed lawyers in all regions of Canada these judicial compensation amounts fall[42]. I took the 2019 net-income amounts for all self-employed lawyers in all regions of Canada and adjusted them to 2020 and to 2021 using an increase based on the average annual increases between 2015 to 2019. Those average increase percentages were determined separately for each of the percentile ranges[43].

156. I estimate that the average Base Judicial Total Compensation in 2019 of $496,000 is approximately at the 88th percentile of the self-employed lawyers in 2019[44].

157. I estimate that the average Base Judicial Total Compensation in 2020 of $509,400 is approximately at the 88th percentile of the self-employed lawyers in 2020[45].

---

42 The net incomes for self-employed lawyers in Canada are discussed in Section F and detailed tables of net-income are found in Section H.

43 That produced an annual increase in the self-employed lawyers' net income for 2020 and again for 2021 by percentile of:

65-70th percentile:	1.39%
70-75th percentile:	1.21%
75-80th percentile:	1.09%
80-85th percentile:	0.80%
85-90th percentile:	1.07%
90-95th percentile:	1.21%
95-100th percentile:	1.72%

44 If the self-employed lawyer's with net income below $60,000 are excluded, this is the 84th percentile of the approximately 70% of all self-employed lawyers who have net incomes greater than $60,000.

45 If the self-employed lawyer's with net income below $60,000 are excluded, this is the 84th percentile of the approximately 70% of all self-employed lawyers who have net incomes greater than $60,000.

158. I estimate that the average Base Judicial Total Compensation in 2021 of $543,800 will be approximately at the 89th percentile of the self-employed lawyers in 2021[46].

Effect on Total Compensation of Prothonotaries

159. For April 2019 to March 2020, the base salary of a prothonotary was $263,900, from April 2020 to March 2021 it is $271,000 and I estimate beginning April 2021 it will be $289,200 (80% of the Base Judicial Salary).

160. Using the same adjustments to obtain total compensation as used for puisne judges[47], I determined the total compensation of a prothonotary.

161. The 2019 average total compensation of a prothonotary is $397,300. That is about the 84th percentile for all self-employed lawyers in Canada.

162. The 2020 average total compensation of a prothonotary is $408,100. That is about the 84th percentile for all self-employed lawyers in Canada.

163. The 2021 average total compensation of a prothonotary is estimated to be $435,500. That is about the 86th percentile for all self-employed lawyers in Canada.

46 If the self-employed lawyer's with net income below $60,000 are excluded, this is the 85th percentile of the approximately 70% of all self-employed lawyers who have net incomes greater than $60,000.

47 Take the base salary, add the value of the Judicial Annuity (based on the average value of 49.51%) and add the value of the government paying half of the Canada Pension plan contribution. This implicitly assumes that prothonotaries have a similar age profile at appointment as do the federally appointed judges.

F. Self-Employed Lawyers

164. About 2/3rds of the federal judicial appointees (2011 to 2020) are lawyers from private practice. That includes the self-employed lawyers as well as lawyers practicing in a corporation including professional corporations. Judges are also appointed from lawyers who are employed by organisations within the broader public sector. Canada Revenue Agency provided anonymous net income data for self-employed lawyers but was not able to provide sufficiently reliable employment information for lawyers working for a corporation or within the broader public sector. Consequently, I have utilised only self-employed lawyers as an income comparator.

165. A self-employed lawyer must cover all business expenses out of the gross income. The amount left over, or net income, is available to provide a personal income, retirement savings, and health and welfare benefits.

Percentiles

Percentiles help us easily rank a range of numbers, like compensation. When dealing with compensation, the 40th percentile refers to the compensation amount where 40% of all lawyers earn less and the rest (60%) earn more. The 75th percentile is the amount where 75% of lawyers earn less and the balance (25%) earn more.

The 50th percentile is also referred to as the median. Note that the median and the average are not the same. They are sometimes close in value, but they can also be very different – indicating the underlying data is skewed.

Consider the numbers 2, 3, 8, 15, 27. The average is 11. The median is 8 – the value that is in the middle – in this case where there are 2 values below it and two values above it.

Self-Employed Lawyers' Income

166. Canada Revenue Agency provided a data file of the net earnings of self-employed lawyers in Canada. I have analysed those and set out various analyses in section A.

167. Similar data has been provided and included in reports prepared for prior Quadrennial Commissions. I have provided results using similar analyses as was done in prior years. There is an issue with those analyses that I discuss later (see the call-out box on page 46). However, data that would have permitted me to address the issue was not available.

168. Compensation comparisons are a normal part of compensation reviews and are used mainly to determine how an organisation's total compensation amounts compare with similar organisations. It is normal to select other organisations that are in the same industry and similar sized organisations that compete for people with the same skills.

169. Once the data has been collected, one must determine what points in the range of salaries you want to utilise. If the evaluation is for employees with average skills and

average performance, the focus would be on the average or the median compensation from the study. To pay an average performing employee compensation measured at the 75th percentile would be overpaying and could lead to wage inflation within that job sector. If the evaluation is for high performing employees, the focus would likely be on compensation at the 70th to 80th percentile – or even higher if the individual is a star performer. To pay average compensation to a high performing employee could lead to them quitting or a cessation of performing well.

170. In this section, I will focus on the compensation of self-employed lawyers[48]. Specifically, I use the net income of self-employed lawyers. Net income is equal to the total income from all services provided less business expenses, such as compensation for employees, office expenses, etc. Net income is basically the total compensation available to the self-employed lawyer.

171. There is a wide range of net income among lawyers and an individual lawyer's net income could fluctuate greatly from year to year. For example, in 2019 the average income reported by Canada Revenue Agency in metropolitan areas ranged from $7,530 to $1,037,000 ($8,800 to $1,223,000 in Toronto)[49]. What the data does not show is whether and by how much an individual lawyer's income fluctuates.

Salary Exclusion

172. Within the compensation industry, median is frequently used – but that depends on the type of candidate one wants to attract. This process may not completely translate to the relationship of lawyers and judges' compensation because income is not a perfect indicator of suitability for a judicial position.

173. Some of the data provided to prior Quadrennial Commissions has been based on income amounts that excluded net incomes below a threshold of $60,000 or $80,000. Excluding lower salaries is a very unusual method that results in distorted results. I am unable to determine a valid and appropriate reason for such an exclusion.

---

48 It would be better to also include compensation of lawyers who are employed by an organisation, but Canada Revenue Agency advised there are practical issues with being able to extract that data and ensure the accuracy of it.

49 Canada Revenue Agency use a modified percentile method of reporting net earnings. The lowest earnings reported (referred to as the "1st decile mean") is described as the average of the net income for lawyers who fall between the 5th percentile and 10th percentile. For clarity, there is no information provided on the bottom 5 percent of incomes, although those incomes are utilised in calculating some of the numbers.

The highest earnings reported (referred to as the "10th decile mean") is the average of the net income for the top 5% of lawyers – that is the average of incomes from the 95th percentile to the 100th percentile.

174. For example, by excluding those with a net income less than $60,000 for the 2019 data, one excludes about 34% of the self-employed lawyers in British Columbia, 30% in Alberta, 29.5% in Ontario, 39% in Quebec, and 29% in Atlantic Canada. There were not enough lawyers in Saskatchewan, Manitoba, and the three Territories to preserve confidentiality, and Canada Revenue Agency therefore suppressed almost all data. As a result, the effect of an income exclusion could not be determined for those five jurisdictions.

175. If we assume that income is one indicator of suitability for a federal judicial appointment, those percentages suggest that only 30% of the self-employed lawyers in Alberta, Ontario and Atlantic Canada are unsuitable while almost 40% of those in Quebec are unsuitable.

176. Based on my past experience of working with large amounts of data, it is my opinion that there are likely no or very few regional differences in the percentage of lawyers that possess specific qualities. That implies there are no or few regional differences in the percentage of lawyers that possess the specific qualities desired for a federal judicial appointment.

177. Normally, when looking at compensation data, we look at data in the range of where one wants to attract employees. In most industries, one looks for candidates from a similar position in other organisations. If you want to have a staff of average performers, you would tend to look to the median income. If you want above average performers, you will tend to look to the 60th to 70th percentiles. If you want outstanding performers, you will tend to look to the 70th and higher percentiles.

178. By excluding incomes below a threshold, the income amounts at each of the percentiles is simply increased while the number of people (or data points) is decreased. The median income becomes the income for above-average performers. The 75th percentile becomes the income for very outstanding performers.

179. Even if there is a valid reason to exclude low earnings, doing so leaves a perception that the exclusion is artificial and was done in order to obtain a pre-conceived result. If we know that we need to focus primarily on incomes of the top 25% of all lawyers in order to attract quality candidates, we look to the income statistics of those at the 75th and higher percentiles.

180. To exclude those with net incomes below $60,000 and then determine the percentiles results in inflating the incomes at each percentile. The top 25% of those earning more than $60,000 may be the top 20% of all lawyers (an even smaller percent in Quebec). To actually include the top 25% of all lawyers, we would need to adjust our sights to looks

at roughly the top 30% (lower percent in Quebec) of all lawyers earning more than $60,000. That becomes a communication challenge when trying to explain to others why the top 25% of all lawyers includes those in the top 30%.

181. Since we can obtain the same end result without excluding any income, one needs to ask why an income exclusion was used. Say we end up selecting the income amount at the 80th percentile of the lawyers earning more than $60,000. That same result could be obtained by selecting the income amount at (approximately) the 85th percentile of all lawyers (no income exclusion).

182. If we exclude any data due to the amount of income, the results become inconsistent between geographic areas. If we make no exclusions, the data is consistent.

183. The report of the fifth Judicial Compensation and Benefits Commission (the "**2015 Quadrennial Commission**") submitted 30 June 2016 addressed the issue of excluding salaries. They summarised the position of the Canadian Superior Courts Judges Association (the "**Association**") and the Canadian Judicial Council (the "**Council**") by stating "*their rationale was that those who earn below a certain threshold are not suitable candidates for the judiciary: low income reflects a lack of success or time commitment incommensurate with the demands of a judicial appointment.*"

184. There are many reasons why an individual lawyer may have a low income, including issues around competence and commitment as suggested by the Association and Council. But there are also reasons, such as personal passions, practice areas and location, that could result in low income without implying unsuitability for a judicial appointment[50].

185. I also note that due to the variabilities of net income, it is likely that many lawyers will fluctuate between net incomes that are above and below a low-income threshold.

186. If we accept the position of the Association and Council that it is reasonable to exclude low net incomes from the compensation comparators, we should also consider an exclusion of high net incomes. In many situations, high income more likely implies business success (as opposed to legal acumen), a willingness to hustle to obtain clients and a focus on financial rewards rather than implying qualities commensurate with a judicial appointment. Excluding low net-income as well as high net-income does not

50 "Guide for Candidates", Office of the Commissioner for Federal Judicial Affairs. In describing the assessment process and considerations, there is no mention made of the salary of an applicant. Reference is made to "professional competence and experience, personal characteristics, and potential impediments to appointment."

mean that those lawyers are necessarily unsuitable for appointment, but rather that the likelihood of their having suitable characteristics is less than for the non-excluded lawyers.

187. If it is appropriate to exclude those with lower compensation, it is my opinion that there should also be a high-compensation exclusion. I suggest that excluding lawyers with net compensation above about $650,000 would be appropriate[51] – but only if there is also a low-compensation exclusion. I suggest that excluding net compensation below $60,000 would be appropriate – but only if there is also a high-compensation exclusion. (In my opinion is there should be no income exclusion at either the top or bottom of the income range. But if there is to be an income exclusion, it should be at both the top and bottom.)

188. Unfortunately, the format of the data from the Canada Revenue Agency does not permit an *accurate* calculation of the effect of including a high-income exclusion but it does permit an *estimated* calculation. I have estimated the effect of using both a low and high-income exclusion in Table 188.

Table 188 - Percentile Levels for Compensation with Various Exclusions

Age Range	Compensation Excluded	65-70th percentile	75-80th percentile	85-90th percentile	95-100th percentile
35 - 69	None	203,280	274,950	413,900	937,480
	Below $60,000	277,970	363,080	525,260	1,085,320
	Below $80,000	302,780	394,430	560,130	1,132,330
	Below $60,000 & Above $650,000	241,000	297,000	384,000	559,000
35 - 46	None	217,340	273,400	376,690	741,350
	Below $60,000	266,490	326,230	448,060	824,300
	Below $80,000	282,960	346,420	472,330	851,820
	Below $60,000 & Above $650,000	247,000	295,000	378,000	570,000

51 I selected $650,000 after examining the percentiles for net income. For the Other Regions (all of Canada except the 10 largest census metropolitan areas or CMAs), all the percentile points are less than $650,000. That does not mean there is no one earning over $650,000 outside the 10 CMAs, but that if there are such people, they are most likely less than 2.5% of all lawyers outside those 10 CMAs.

For the largest CMAs other than Calgary and Toronto, the income situation is similar to Other Regions except that there could be between 2.5% and 7.5% of all lawyers who earn more than $650,000. For Calgary and Toronto, this would result in excluding about 10% to 15% of all lawyers in those cities.

Other thresholds could be equally valid. At income levels over $650,000, the amount of income between percentiles gets wider and wider. There is less and less congestion around a specific income amount as the amount of net income increases. For example, if the exclusion was set at $750,000, it would have a small impact on the number of lawyers excluded compared with the $650,000 I have used.

Age Range	Compensation Excluded	65-70th percentile	75-80th percentile	85-90th percentile	95-100th percentile
47 - 54	None	261,160	367,380	578,250	1,189,810
	Below $60,000	346,400	477,690	691,970	1,322,200
	Below $80,000	378,350	518,960	727,040	1,368,460
	Below $60,000 & Above $650,000	273,000	335,000	445,000	606,000
55 - 69	None	166,900	237,100	375,100	925,020
	Below $60,000	257,870	346,740	507,170	1,124,970
	Below $80,000	287,580	383,760	546,940	1,185,670
	Below $60,000 & Above $650,000	220,000	278,000	357,000	545,000

189. By excluding only compensation at the low end, all percentile amounts are increased significantly. By excluding compensation at both the upper and lower end, the income amounts are increased at percentiles up to 80th (with the exception of ages 47 to 54) and the income amounts decrease at percentiles above the 80th.

190. When looking for comparators (whether for compensation or for other items), excluding any data is only appropriate if there are some obvious outliers that will distort the results if they are included. Given the large amount of data provided by Canada Revenue Agency, the effect of including an outlier with extremely large or small income would be immaterial for the purposes of this report.

191. If there is one lawyer in the data with a net income of $25 million, I have estimated there would be no change to any of the percentile amounts (except the 100th) and the 2019 average net income of all lawyers would be increased by $1,600. Because the sample size is smaller, the effect on the average net income for lawyers aged 47 to 54 would be about $7,600 increase if the outlier lawyer was aged between 47 and 54 – an amount that is unlikely to affect the results of the income relationships in this report[52].

192. While the 2015 Quadrennial Commission neither endorsed nor rejected the method of salary exclusions, they did find that there was no basis to apply an $80,000 threshold for such an exclusion.

193. In my opinion, excluding any compensation amounts distorts the results and creates a perception of possible manipulation.

[52] For the other age groups, the dollar effect would be less.

194. In the submission of the Association and Council, to the 2015 Quadrennial Commission, they utilised the average earnings of self-employed lawyers based on the ages between 44 and 56. That is the age range at which the majority of judges are appointed. But there have been judges appointed at ages below 44 and above 56. To exclude them from the analysis amounts to age exclusion – similar to earnings exclusion.

195. If we look at the net earnings data for self-employed lawyers (Table 256a), we can see that the ages with the lowest earnings are 35 to 43 and 56 to 69[53].

196. Calculating an average income amount by looking only at ages 44 to 56 is the same as excluding lawyers with low earnings – it is similar to a belief that younger and older lawyers are irrelevant for the purposes of reviewing judicial compensation.

197. It is true that relatively fewer lawyers (30% of appointments between 2011 and 2020) are appointed at ages outside the range 44 to 56 compared to those who are within that range (70% of appointments between 2011 and 2020). One way to reflect the smaller number of judges appointed at younger and older ages is to calculate a weighted average that is based on the relative number of judges appointed at each age. Because the younger and older appointees are relatively fewer, including them in the weighted average has a smaller effect on the average than those aged 44 to 56. But including them recognises that they exist and do get appointed.

198. Unless it can be shown that the data includes only a few outliers that will distort the results, there is no valid reason to exclude any data when calculating an average for a group.

199. For example, we can compare the net incomes of all self-employed lawyers as provided by the Canada Revenue Agency (ages 35 to 69) with the net incomes of self-employed lawyers aged 44 to 56 and with the average net incomes of all lawyers weighted to reflect the distribution of ages at appointment. For this I use the 2019 net income amounts for all lawyers in all regions of Canada.

Table 209 – Effect of Age Exclusion – 2019 Net Earnings

Ages	65-70th percentile	75-80th percentile	85-90th percentile	95-100th percentile	Average
35 - 69	203,280	274,950	413,900	937,480	224,140
Age weighted	230,840	321,080	499,160	1,065,810	259,270
44 - 56	251,630	349,530	539,060	1,124,160	277,930

53 However, for regions other than the top ten CMAs, income remains high through to age 59 and then drops off at ages 60 to 69.

200. Table 209 shows the effect of excluding the younger and older ages at appointment – at the 75th percentile, the net income of all lawyers in 2019 was $270,000, but by excluding the younger and older lawyers, it is boosted to $340,000 – an increase of 26%.

201. Instead of using the average net income of all self-employed lawyers, we could calculate a weighted average that reflects the age distribution of judges at their appointment. This method gives greater weight to the incomes at ages where more judges are appointed and less weight to the ages where fewer judges get appointed. The net income in 2019 weighted by age at appointment was $320,000 (79th percentile), but by excluding the younger and older lawyers, it is boosted to $350,000 (81st percentile) – an increase of 9%.

202. For the balance of the body of this report, I will look at net income amounts with no exclusions – either for age or income. For the sake of completeness, the data included in Section H does include compensation exclusions of incomes below both $60,000 and $80,000. Because of the significant amount of work required to add an exclusion at the high end of incomes, I have not made any calculations with a high-income exclusion other than those shown in Table 188.

Self-Employed Lawyers' Income Comparators

203. Table 205 shows the percentile net income amounts by age groupings and by calendar year 2015 to 2019. Ages 35 to 69 covers all of the lawyers within the data from Canada Revenue Agency. The next three age groups (35–46, 47–54, 55–69) follow the lawyers as they move through their careers. The last grouping (44 to 56) was used by the Association and Council in past years to be representative of the ages at which most new judicial appointments are made.

204. Net income fluctuates up and down from year to year, but generally with an upward trend.

205. In general, compensation increases with age and peaks somewhere between ages 47 and 54. Compensation then declines as lawyers approach retirement.

Table 205 - Changes in Net Income 2015 to 2019 by Ages - no income exclusion

Age Range	Year	65-70th percentile	75th percentile	75-80th percentile	85-90th percentile	95-100th percentile	Average
35 - 69	2015	188,590	260,000	259,720	394,710	868,420	210,390
	2016	188,790	250,000	252,540	370,480	806,250	201,940
	2017	192,820	260,000	259,620	385,070	825,440	206,950
	2018	197,340	270,000	273,550	416,440	929,160	221,020
	2019	203,280	270,000	274,950	413,900	937,480	224,140
35 - 46	2015	199,590	260,000	260,040	372,080	753,810	200,820
	2016	199,540	250,000	250,610	346,710	699,260	194,010
	2017	202,370	250,000	256,040	354,510	668,130	193,600
	2018	208,230	270,000	270,960	380,770	752,980	205,720
	2019	217,340	270,000	273,400	376,690	741,350	209,220
47 - 54	2015	224,110	320,000	319,240	481,370	1,000,220	247,980
	2016	221,050	300,000	306,640	444,560	941,220	236,950
	2017	232,330	320,000	325,200	482,460	998,450	251,610
	2018	249,040	350,000	353,020	562,010	1,152,910	279,780
	2019	261,160	360,000	367,380	578,250	1,189,810	292,580
55 - 69	2015	165,860	230,000	232,730	363,930	861,390	197,360
	2016	166,300	230,000	228,990	346,100	796,820	189,210
	2017	167,590	230,000	233,430	356,020	828,010	193,390
	2018	167,290	240,000	239,340	377,660	909,990	202,520
	2019	166,900	240,000	237,100	375,100	925,020	203,360
44 - 56	2015	227,440	320,000	320,770	477,460	997,070	249,820
	2016	223,540	300,000	306,030	443,370	941,030	238,960
	2017	232,750	320,000	319,270	471,910	955,380	246,560
	2018	244,640	340,000	343,940	537,310	1,094,120	269,580
	2019	251,630	340,000	349,530	394,710	868,420	210,390

How can percentiles mislead us?

1. It is important to note that these percentile numbers do not necessarily reflect the income levels of individual lawyers over a period of years. As a simplified example of this, consider a group of 100 lawyers. Each lawyer in the group normally has net income of $200,000 give or take $20,000 each year. Some lawyers are down, and some are up each year. The median net income is $200,000, the 90th percentile is $216,000 and the 100th percentile is $220,000.
2. However, in each year, five of those lawyers have a windfall year with a net income of $400,000. No lawyer has more than one windfall year in each decade. The statistics will still show a median income of about $200,000 and a 90th percentile of about $216,000, but the 100th percentile is $400,000.
3. Each year, the statistics will show the same result. The statistics will, at first glance, suggest that there are a few lawyers who have a net income of $400,000 consistently in each year with the rest having income between $180,000 and $220,000. And yet based on the scenario I laid out, there is no one who regularly makes more than $220,000.
4. In this example, if we focus on the $400,000 data point for a decision about individual incomes of high achievers, we will be led astray. Even if we focus on the 90th percentile and use the $216,000 net income amount, we will miss the approximately one year in ten with a huge income increase. That one year in ten amount would raise the *average annual net income* for the 90th percentile group from $216,000 to $236,000.
5. What we do not know from the data provided by Canada Revenue Agency is how much variability there is in year-to-year incomes of individuals nor the frequency and effect of any windfall years. With the large sample size used by Canada Revenue Agency, it is unlikely that the data would be as misleading as the above example, but there could be issues hidden within the data that we are not able to identify. For example, if we rank lawyers based on average net income over five or ten years, are the decile breaks lower, higher or approximately the same? How many lawyers have windfall years; how often does that occur and what is the effect on the income statistics?
6. In my opinion, if this issue affects the self-employed lawyers' income amounts, it will primarily do so at the upper and lower percentiles. It is possible that the income amounts at the upper percentiles may be significantly overstated and the amounts at the lower percentiles understated.
7. For that reason, I requested data on a sample set of individuals showing their net income over a ten-year period on an individual basis – either as a dollar amount or as a percentage of their 2010 income. The goal was to understand how income fluctuates and how it can affect the percentile rankings of all self-employed lawyers. Canada Revenue Agency advised they are unable to ensure confidentiality of individuals if data was provided in that format and consequently, they are not permitted to release that information.

206. The net-income data was provided based on a number of age groupings. That allows us to look at how net income changes as one ages and presumably gains experience and reputation.

207. Overall, self-employed lawyers have seen their income increase roughly in line with the IAI over the four-year period 2015 to 2019 (the most recent data available from Canada Revenue Agency). This is based on data for lawyers aged 35 to 69 in all areas of Canada without any income exclusion.

Table 207 - Increase in Net Income of Self-Employed Lawyers - 2015 to 2019

Grouping	Total Increase over 4-Years	Average Annual Increase
45 to 50th percentile	6.6%	1.6%
55 to 60th percentile	8.2%	2.0%
65 to 70th percentile	7.8%	1.9%
75 to 80th percentile	5.9%	1.4%
85 to 90th percentile	4.9%	1.2%
95 to 100th percentile	8.0%	1.9%
Average net income	6.5%	1.6%
Average of 65 to 100th percentile	6.9%	1.7%
IAI Change	7.0%	1.7%

208. While some of the net income brackets experienced increases in the 2015 to 2019 period greater than the IAI and other brackets less than the IAI, the average over all net income levels (6.5%) as well as the average over the 65th to 100th percentiles (6.9%)[54] were similar to the four-year total IAI increase (7.0%).

209. In my opinion, over the most recent four-year period for which we have data (2015 to 2019), the increase in the IAI has been approximately the same as the increase in net income of self-employed lawyers.

210. Based on that, we can state that the relationship between self-employed lawyers' net income and Base Judicial Total Compensation of judges has remained unchanged.

211. While we do not know how much self-employed lawyers net incomes changed in 2020, in my opinion, it is highly unlikely that they increased as much as the IAI. Therefore, I

54 The average increase for the 75th to 100th percentile was slightly lower at 6.8% over the four-year period 2015 to 2019, giving an average of 1.66% per year.

conclude that the Base Judicial Salary will likely increase more in April 2021 than will self-employed lawyers' net income.

Self-Employed Lawyers and Retirement Savings

212. For self-employed Canadians, saving for retirement involves making contributions to an RRSP and once the maximum contribution is reached, contributing to a non-registered investment account. RRSPs have income tax advantages that make them more efficient for retirement savings than other options.

213. It is important to recognise that the Judicial Annuity provides a retirement income that exceeds the maximum tax-assisted pension permitted under the *Income Tax Act* for the private sector. The same retirement income savings are available within the private sector, but the majority of that amount must be funded without the tax-sheltering of registered pension plans and RRSPs. Consequently, the cost of having equivalent savings is higher than the value of the Judicial Annuity.

214. If a Canadian wants to enjoy a retirement lifestyle more expensive than can be provided out of government benefits (CPP and Old Age Security), they will need to save. I have assumed that all judges and all self-employed lawyers with incomes above the median want more income than provided by government benefits. The Judicial Annuity serves that purpose for judges and so they most likely do not need to save any additional monies for retirement beyond their contributions towards the Judicial Annuity. Any savings for retirement by a self-employed lawyer will come out of net income because the *Income Tax Act* does not permit the self-employed to have a retirement savings plan where contributions are permitted as a business expense.

215. Table 141 shows the value of replicating the Judicial Annuity for a self-employed lawyer. To maintain consistency in any review of income relationships[55], we can either reduce the self-employed lawyers' net income by the required amount for retirement saving and compare that to the Base Judicial Salary, or we can use the total amount of the self-employed net income and compare that with the Base Judicial Total Compensation which includes the value of the Judicial Annuity is fully reflected. Either basis is comparing like with like. I have chosen the latter as it involves fewer calculations.

[55] That is, to ensure we are looking at "apples and apples" and have not included any oranges in the review.

G. Deputy Ministers Within the Federal Government

216. Past Quadrennial Commissions have reviewed the compensation of deputy ministers in relation to the compensation of federally appointed judges.

217. Like judges, deputy ministers receive both health and welfare benefits and pension benefits in addition to their salary. They both are required to make contributions towards the pension. CPP contributions are the same – the government pays half and the employee pays the other half. There are two significant differences – performance pay and the value of the pension[56].

218. Deputy ministers are eligible for performance pay in addition to their base salary. That has been reflected in the tables in this section.

219. The pension arrangements for deputy ministers differs from that for federally appointed judges. To obtain a similar pension income, a deputy minister needs to work within the public service for about 35 years and to contribute to the Public Service Superannuation Plan for those years. That likely includes many years of service prior to being appointed as a deputy minister.

220. The contribution rates are slightly greater than the 7% of base compensation for the judges – 9.83% on the first $61,600 of income and 12.26% on the balance[57]. For a deputy minister earning $300,000 per annum, that is a contribution of about 11.75% of base compensation, or about 4.75% more than a judge is required to contribute.

221. I estimate that the annual value of the pension for a deputy minister, net of contributions, is roughly 17.0% of a deputy minister's base compensation[58].

---

56 There is also a difference in contributions to the pension plan, but that will be included as part of the pension plan difference.

57 Lower contribution rates apply to those hired after 2012, but the provisions of the pension are less generous for retirement prior to age 65.

58 A Deputy Minister requires about 35 years of federal government service to earn a pension equivalent to a judicial pension. The average tenure of a judge, based on the assumptions used in the valuation of the judicial annuity, is 20.7 years. The average value of the judicial annuity for appointments between ages 40 and 65 is 36.7% of base compensation. Adjusting that 36.7% for the differences in tenure and then subtracting 4.75% to reflect the higher contributions required of a deputy minister results in an estimated value for a deputy minister's pension of 17.0% of compensation. A small additional adjustment should be made to reflect the differences in income tax treatment between the pension plan and retirement savings available to self-employed lawyers. I have ignored that adjustment.

222. To be able to make a valid and fair comparison of earnings, we need to use the total compensation of a deputy minister. In particular, there is a large difference between the value of a judge's pension and the value of a deputy minister's pension. To calculate the total compensation of a deputy minister so that the relationship with Base Judicial Total Compensation is a fair and proper one, we should gross-up the deputy ministerial compensation by 17.0%.

Deputy Minister Compensation

223. I was provided with a history of compensation for deputy ministers. There are four levels of deputy minister – DM-1, DM-2, DM-3, and DM-4.

224. The compensation information set out the salary range for each year (April to March), the average base compensation and average amount of at-risk pay. I was also provided with the maximum amount that could be payable as at-risk pay, expressed as a percentage of base compensation. The amount of at-risk pay varies by individual and is awarded at year-end based on the individual's performance.

Block Comparator

225. The 2015 Quadrennial Commission discussed[59] using compensation of deputy ministers at the DM-3 level, and their year-over-year increases as a reference for judicial compensation (the "**Block Comparator**"). The Block Comparator in each year is the mid-point of the DM-3 base salary range plus half of the total at-risk pay[60].

226. The 2015 Quadrennial Commission commented on a proposal from the Association and Council that the Block Comparator be changed to equal the total average compensation of DM-3s[61]. The number of DM-3s is small and average compensation can vary considerably based on the composition of the deputy ministers. They concluded that using average pay of DM-3s would not "provide a consistent reflection of year over year changes in compensation." I agree.

---

59 "Report and Recommendations Submitted to the Minister of Justice of Canada" by the Judicial Compensation and Benefits Commission, 30 June 2016, paragraphs 45-56.

60 Total at-risk pay is the maximum amount that a deputy minister can earn based upon performance. The amount of at -risk pay actually paid will vary from year to year and from person to person.

61 "Report and Recommendations Submitted to the Minister of Justice of Canada" by the Judicial Compensation and Benefits Commission, 30 June 2016, paragraph 49 - 51.

227. The Block Comparator is based on only two of the components of total compensation – salary and at-risk pay (see paragraphs 31 to 34). It ignores the pension plan and other forms of compensation available to deputy ministers. In essence, it assumes the value of a deputy minister's pension plan is equivalent to the value of the Judicial Annuity. Consequently, in my opinion, the Block Comparator should be used with care and recognition should be made either directly or indirectly to the large difference in value of the two pension plans.

228. In this section, I first review the total compensation of deputy ministers and of senior government agency appointments over the past five years and then I calculate the Block Comparator.

Total Compensation for Deputy Ministers.

229. The amount of at-risk pay shown in the tables below is the average amount paid to all deputy ministers at each level and is likely different by individual. The at-risk pay for the year beginning 2020 was not available as of the date of this report and so I have estimated it to be the same percentage of mid-point salary as in 2019 (shown in red). The total compensation includes the value of the pension net of contributions (paragraph 221).

230. I note the salary ranges have not changed in the last four years, but the deputy ministers' base compensation has increased, likely as a result of their progressing through the salary grids. With the possible exception of DM-4[62], base compensation is nearing the top-end of the salary range and it is likely that at least some of the deputy ministers have not received an increase in compensation in the past few years.

[62] The possible exception of DM-4 is because there is not enough data disclosed to be able to make a finding on this issue.

Table 230a – Compensation for Deputy Ministers at level DM-1

Year Beginning 1 April	Salary Range	Mid-Point Salary	Average Basic Compensation	At-Risk Pay	Cash Compensation	Total Compensation
2015	195,500 - 229,900	212,700	225,288	38,323	263,611	308,306
2016	200,000 - 235,200	217,600	227,721	39,412	267,133	312,425
2017	202,500 - 238,200	220,350	230,810	38,876	269,686	315,411
2018	202,500 - 238,200	220,350	233,556	37,404	270,960	316,901
2019	202,500 - 238,200	220,350	234,956	39,187	274,143	320,624
2020	202,500 - 238,200	220,350	236,754	39,487	276,241	323,078

Table 230b – Compensation for Deputy Ministers at level DM-2

Year Beginning 1 April	Salary Range	Mid-Point Salary	Average Basic Compensation	At-Risk Pay	Cash Compensation	Total Compensation
2015	224,700 - 264,300	244,500	259,432	52,945	312,377	365,341
2016	229,800 - 270,300	250,050	261,816	46,723	308,539	360,852
2017	232,700 - 273,700	253,200	265,894	53,937	319,831	374,058
2018	232,700 - 273,700	253,200	265,791	55,318	321,109	375,553
2019	232,700 - 273,700	253,200	266,944	63,881	330,825	386,916
2020	232,700 - 273,700	253,200	270,682	64,776	335,458	392,334

Table 230c – Compensation for Deputy Ministers at level DM-3

Year Beginning 1 April	Salary Range	Mid-Point Salary	Average Basic Compensation	At-Risk Pay	Cash Compensation	Total Compensation
2015	251,600 - 296,000	273,800	291,950	65,875	357,825	418,494
2016	257,300 - 302,700	280,000	298,200	62,578	360,778	421,948
2017	260,600 - 306,500	283,550	298,900	64,110	363,010	424,558
2018	260,600 - 306,500	283,550	298,143	67,371	365,514	427,487
2019	260,600 - 306,500	283,550	303,545	79,909	383,454	448,469
2020	260,600 - 306,500	283,550	304,450	80,147	384,597	449,806

Table 230d – Compensation for Deputy Ministers at level DM-4

Year Beginning 1 April	Salary Range	Mid-Point Salary	Average Basic Compensation	At-Risk Pay*	Cash Compensation	Total Compensation
2015	281,700 - 331,300	306,500	323,849	106,870	430,719	503,748
2016	288,000 - 338,800	313,400	331,140	109,276	440,416	515,088
2017	291,700 - 343,100	317,400	335,366	110,671	446,037	521,662
2018	291,700 - 343,100	317,400	335,366	110,671	446,037	521,662
2019	291,700 - 343,100	317,400	335,366	110,671	446,037	521,662
2020	291,700 - 343,100	317,400	335,366	110,671	446,037	521,662

* The average basic compensation and the at-risk pay was not provided for DM-4 due to the small number of incumbents and confidentiality issues. The amounts shown in Table 230d are estimated by me. I calculated the average ratio of the average basic compensation to the mid-point salary for DM-1, DM-2 and DM-3 over the period 2015 to 2019. I assumed that average would apply at DM-4 (shown in red). I examined the at-risk pay as a percent of average basic compensation for DM-1, DM-2 and DM-3 and assumed the actual amount paid at DM-4 would have been 33% (shown in red). Consequently, the total compensation for DM-4 is based on assumptions that I made and does not necessarily reflect the actual amounts.

Government Agency Appointments Compensation

231. I was provided with compensation information for positions within government agencies and similar organisations with a job classification of GC-09, GC-10, GCQ-09 and GCQ- 10. In each of these classifications, there are between 1 and 5 individuals and for confidentiality purposes, average salary was not provided. I note that as with the DM compensation grids, these grids have been frozen since 2017. It is therefore likely that the incumbents are close to if not at the upper end of their grid as with the deputy ministers. I have therefore assumed that the average basic compensation in each year 2015 to 2020 for GC and GCQ positions is the same as I assumed for DM-4 positions -- 105.5% of the mid-point salary in each year (shown in red).

232. The specifics of the pension plan available to each of these positions may vary from the Public Sector Pension Plan. I have assumed that any variance is not material and have applied the same value for the pension as I used for deputy ministers – 17.0%

233. I was informed by the Department of Justice that these two GC positions are eligible for at-risk pay, but the GCQ positions are not eligible.

Table 233a – Compensation for Government Appointments at GC-09

Year Beginning 1 April	Salary Range	Mid-Point Salary	Average Basic Compensation	At-Risk Pay*	Cash Compensation	Total Compensation
2015	229,500 – 269,900	249,700	263,834	61,737	325,571	380,772
2016	234,700 – 276,100	255,400	269,857	63,146	333,003	389,464
2017	237,700 – 279,600	258,650	273,291	63,950	337,241	394,420
2018	237,700 – 279,600	258,650	273,291	63,950	337,241	394,420
2019	237,700 – 279,600	258,650	273,291	63,950	337,241	394,420
2020	237,700 – 279,600	258,650	273,291	63,950	337,241	394,420

* Average at-risk pay was assumed to be a consistent 23.4% of average basic compensation each year.

Table 233b – Compensation for Government Appointments at GC-10

Year Beginning 1 April	Salary Range	Mid-Point Salary	Average Basic Compensation	At-Risk Pay*	Cash Compensation	Total Compensation
2015	263,700 - 310,200	286,950	303,192	86,107	389,299	455,305
2016	269,800 - 317,300	293,550	310,166	88,087	398,253	465,777
2017	273,200 - 321,300	297,250	314,075	89,197	403,273	471,648
2018	273,200 - 321,300	297,250	314,075	89,197	403,273	471,648
2019	273,200 - 321,300	297,250	314,075	89,197	403,273	471,648
2020	273,200 - 321,300	297,250	314,075	89,197	403,273	471,648

* Average at-risk pay was assumed to be a consistent 28.4% of average basic compensation each year.

Table 233c – Compensation for Government Appointments at GCQ-09

Year Beginning 1 April	Salary Range	Mid-Point Salary	Average Basic Compensation	At-Risk Pay	Cash Compensation	Total Compensation
2015	269,300 - 316,800	293,050	309,638	-	309,638	362,137
2016	275,400 - 324,000	299,700	316,664	-	316,664	370,355
2017	278,900 - 328,100	303,500	320,679	-	320,679	375,050
2018	278,900 - 328,100	303,500	320,679	-	320,679	375,050
2019	278,900 - 328,100	303,500	320,679	-	320,679	375,050
2020	278,900 - 328,100	303,500	320,679	-	320,679	375,050

Table 233d – Compensation for Government Appointments at GCQ-10

Year Beginning 1 April	Salary Range	Mid-Point Salary	Average Basic Compensation	At-Risk Pay	Cash Compensation	Total Compensation
2015	317,600 - 373,600	345,600	365,162	-	365,162	427,076
2016	324,800 - 382,100	353,450	373,457	-	373,457	436,776
2017	328,900 - 386,900	357,900	378,158	-	378,158	442,275
2018	328,900 - 386,900	357,900	378,158	-	378,158	442,275
2019	328,900 - 386,900	357,900	378,158	-	378,158	442,275
2020	328,900 - 386,900	357,900	378,158	-	378,158	442,275

234. I determined that the Base Judicial Total Compensation beginning April 2020 is $509,400 (paragraph 153). That is 113% of the Total Compensation of a DM-3 and 98% of the estimated Total Compensation of a DM-4.

235. I determined that the Base Judicial Total Compensation beginning April 2021 will be approximately $543,800 (paragraph 154). Assuming there are no increases effective April 2021 for deputy ministers, that is 121% of the Total Compensation of a DM-3 and 104% of the estimated Total Compensation of a DM-4.

The Block Comparator

236. In this section, I determine the amount of the Block Comparator (see paragraphs 225 to 228) for 2015 to 2020 in relation to the Base Judicial Salary.

Table 236 – Block Comparator and Base Judicial Salary

Year Beginning 1 April	Mid-point of Salary range for DM-3	50% of At-Risk Pay	Block Comparator	Base Judicial Salary	Percent of Block Comparator
2015	273,800	45,180	318,980	308,600	96.7%
2016	280,000	46,200	326,200	314,100	96.3%
2017	283,550	46,790	330,340	315,300	95.4%
2018	283,550	46,790	330,340	321,600	97.4%
2019	283,550	46,790	330,340	329,900	99.9%
2020	283,550	46,790	330,340	338,800	102.6%

237. In 2016 and 2017, the Block Comparator increased more than did Base Judicial Salary – 3.6% over the two years compared with IAI increases of 2.2% over the same two years. That is the smallest increase in the IAI over any two-year period since the IAI was introduced in 2005 as the automatic driver of judicial salary increases.

238. DM-3 salary ranges were frozen for 2018, and no increases have been given to DM-3s since April 2017 other than for progression through the salary range. Since 2017, the Base Judicial Salary has increased a total of 7.5% with no increase to the Block Comparator.

239. As discussed in paragraph 227, the Block Comparator ignores the unequal value of the pension arrangements for judges and deputy ministers. The value of the Judicial Annuity is about 32.5% more as a percent of salary than the value of the deputy minister's pension. One way to address that is to adjust the Block Comparator to reflect the value of a deputy minister's pension and the portion of the CPP contributions paid by the government[63] – which gives a comparator equivalent to the expected total compensation of a DM-3. That gives a like-for-like relationship between the Block Comparator and Base Judicial Total Compensation.

Table 239 – Adjusted Block Comparator and Base Judicial Total Compensation

Year Beginning 1 April	Block Comparator	Adjusted Block Comparator*	Base Judicial Total Compensation	Percent of Adjusted Block Comparator
2015	318,980	375,543	463,867	123.5%
2016	326,200	384,052	472,154	122.9%
2017	330,340	388,913	473,968	121.9%
2018	330,340	388,943	483,417	124.3%
2019	330,340	389,098	495,981	127.5%
2020	330,340	389,247	509,437	130.9%

* Block Comparator plus value of DM Pension and CPP Value

63 The amount of the CPP contributions paid by the government varies from year to year as the total CPP contribution amount changes. The Adjusted Block Comparator shown here reflects that changing value - $2,480 in 2015 increasing annually to $2,898 in 2020. (The 2021 amount, which is used elsewhere in this report for the 2021 Base Judicial Total Compensation is $3,166).

Deputy Minister Tenure

240. I was provided with details of past deputy ministers setting out their positions, initial appointment as a deputy minister and the date they left the ranks of deputy minister. From that, I calculated the time served as a deputy minister and the average tenure of deputy ministers. The data included 107 people whose term ended at either a DM-3 or DM-4 level. Two of those were acting deputy minister and had a term of less than one month, and I have excluded them. That leaves 105 with terms of more than one month.

241. The tenures for deputy ministers who were DM-3 or DM-4 at the end of their service ranged from five months to 20.7 years. The average tenure of those 105 deputy ministers was 8.75 years.

242. The average tenure of these deputy ministers is significantly shorter than the average expected tenure of a judge. Based on the assumptions used in valuing the Judicial Annuity, the average tenure of a federally appointed judge is 20.3 years – over twice the length of a deputy minister who reached a DM-3 or DM-4 level.

243. In my opinion, there are three possible reasons for this differential in tenure.

a. Deputy ministers retire much earlier than judges. Under the Public Service Superannuation Act, most government employees retire at or prior to age 65. For long-term employees, there is little or no incentive to remain working beyond age 65. Based on the assumptions used in valuing the Judicial Annuity, the average expected retirement age for judges is about age 72. Retirement could account for between 7 and 12-years differential in tenure.

b. Deputy ministers serve at the pleasure of the government and could be terminated at any time. The job security of a deputy minister may not be as high as it is with judges.

c. Deputy ministers may be subject to more stress and/or different stressors and may be unable to function at the high level demanded of their position for as long as a judge.

244. I am not able to offer an opinion as to whether and to what extent this differential in tenure should or could be reflected in any relationship between total compensation of deputy ministers and Judicial Total Compensation.

H. Data Tables Utilised in the Report

245. As was done for prior Quadrennial Commissions, Canada Revenue Agency provided a number of files with data on the past net income of self-employed lawyers in Canada. The data provided was already grouped by age brackets, census metropolitan areas ("**CMAs**") and provinces. If there are not enough lawyers within a grouping to preserve confidentiality, then no income amount was provided.

Number of Self-Employed Lawyers

246. The total number of self-employed lawyers for whom net income data was provided decreased from 2015 to 2020. This continued the trend seen in prior years. I obtained the number of self-employed lawyers for the 2010 to 2014 period from the Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in Preparation for the 2015 Judicial Compensation and Benefits Commission by Mr. Haripaul Pannu, dated 25 February 2016.

Table 246 – Total Number of Self-Employed Lawyers – 2010 to 2019[64]

Year	Number of Self-Employed Lawyers
2010	22,110
2011	19,310
2012	19,190
2013	19,360
2014	18,550
2015	18,740
2016	18,330
2017	17,270
2018	17,640
2019	15,510
Average	18,600

247. The most likely reason for this decrease in numbers is a gradual process of self-employed lawyers converting their practice to a professional corporation. The number

64 These are the total number of self-employed lawyers in Canada for whom Canada Revenue Agency provided data in each year. Only lawyers between ages 35 and 69 were included. There were some within that age range that were excluded for data reasons.

of self-employed lawyers could also be affected by a shift in the age of such lawyers – reducing the numbers between 35 and 69. In my opinion, that is likely to have a much smaller effect than the conversion of practices.

248. Canada Revenue Agency advise that they are not able to provide accurate income amounts from a professional corporation. The reporting of income from the provision of legal services is not separated from other types of income provided on income tax returns and so any information could be misleading. That is much less likely to happen with net income from the self-employed.

Data Presentation

249. There are many ways the data can be presented and reviewed. In the tables that follow in this section, I have presented the data in several ways that in my opinion provide differing ways to consider the relationships. With the exception of the first three groups of tables (Tables 253a to 255c), I have only shown the 65-70th and higher percentile ranges along with the median income and 75th percentile.

250. Definitions:

a. **Median**: the net income amount where half of all lawyers make less and half make more.

b. **Average or Mean**: the income amount that is the average of all the net incomes for all lawyers in the group. If the average is greater than the median, it indicates that the net incomes are skewed towards the high end – that is, there are some lawyers with very high net incomes relative to the entire group.

c. **Percentile**: A system of ranking data from the smallest to the largest. For income ranking, the 65th percentile is the amount where 65% of all self-employed lawyers make less and 35% make more. Refer also to the call-out box on page 37.

d. **Percentile range**: In the data from Canada Revenue Agency, the actual percentiles were not provided, but instead the average income amount for the five percentiles below the indicated percentile was given. For example, the 75th percentile is the average of the net incomes for all lawyers with incomes between the 70th and 75th percentiles. The 100th percentile is the average of the net incomes of the top five percent of self-employed lawyers. Where I refer to the percentile data provided by Canada Revenue Agency, I show the range, such as 70-75th percentile. We can estimate with sufficiently high accuracy the actual single-point percentile

represented by a range of percentiles is the mid-point. For example, the range 70-75th percentile is the 72.5th percentile[65].

e. **All Ages**: The data provided includes self-employed lawyers aged 35 to 69. So a reference to "All Ages" should be considered as ages 35 to 69.

f. **CMAs**: The lawyers were grouped within the ten largest Census Metropolitan Areas (**CMAs)** – in order of decreasing size, Toronto, Montréal, Vancouver, Calgary, Edmonton, Ottawa, Winnipeg, Québec City and combined into one group for confidentiality purposes, Hamilton and the Kitchener, Cambridge, Waterloo areas). All other regions of Canada were combined and are referenced as "**Other Regions**").

251. Canada Revenue Agency rounded all income amounts to the nearest $10 with the exception of the median and the 75th percentiles which were rounded to the nearest $10,000. The data contains a couple of apparent anomalies that are the result of the different rounding[66]. In my opinion, those anomalies are not material for the purposes of this report, and I have not drawn attention to them elsewhere.

252. While it is my opinion that income exclusions should have no place in a compensation comparison, I have included tables based on an income exclusion since that data was provided by Canada Revenue Agency and may have been utilised by prior Quadrennial Commissions in their deliberations.

65 This works well up to the 75th percentile. From the 75th to 90th percentile, it gives a result that is approximately equal to the correct value and above the 90th percentile, it will give a result that is low.

66 For example, the 70-75th percentile is slightly greater than the 75th percentile. If rounding were done consistently, the 70-75th percentile should never be larger than the 75th percentile.

Net Incomes for All Regions and All Ages 2015 to 2019

253. The following three tables present information for all of the self-employed lawyers in Canada over the period 2015 to 2019 based on (a) no income exclusion and (b) excluding those with net incomes less than $60,000 and (c) excluding those with net incomes less than $80,000.

Table 253a - Comparison of Net Incomes by Year - No Income Exclusion
All Regions, All Ages

Percentiles	2015	2016	2017	2018	2019	5-Year Average
0 to 5	3,840	4,030	3,930	3,180	3,430	3,682
5 to 10	12,220	12,740	13,060	11,190	11,310	12,104
10 to 15	21,430	22,040	22,360	19,620	20,240	21,138
15 to 20	30,910	31,810	32,210	28,840	29,890	30,732
20 to 25	41,420	42,950	43,240	39,380	41,320	41,662
25 to 30	52,970	54,990	54,600	51,540	53,610	53,542
30 to 35	65,450	67,250	67,480	64,500	67,470	66,430
35 to 40	78,470	80,390	81,660	77,910	81,930	80,072
40 to 45	92,540	95,160	96,230	93,270	98,200	95,080
45 to 50	109,020	111,770	112,800	111,320	116,600	112,302
50 to 55	127,490	129,900	131,920	131,780	138,140	131,846
55 to 60	149,680	150,040	154,280	155,250	161,680	154,186
60 to 65	173,830	174,810	178,680	182,280	188,710	179,662
65 to 70	203,340	202,790	207,020	212,410	217,890	208,690
70 to 75	237,500	232,500	239,140	250,210	252,250	242,320
75 to 80	281,940	272,580	280,070	296,910	297,680	285,836
80 to 85	347,750	329,830	339,630	363,280	361,970	348,492
85 to 90	441,670	411,080	430,450	469,590	465,890	443,736
90 to 95	601,490	552,270	573,980	646,740	638,900	602,676
95 to 100	1,135,630	1,060,510	1,076,910	1,211,900	1,236,440	1,144,278
Average	210,390	201,940	206,950	221,020	224,140	212,888
Median	118,000	121,000	122,000	121,000	127,000	121,800
Number of lawyers	18,740	18,330	17,270	17,640	15,510	17,498

Table 253b - Comparison of Net Incomes by Year - $60,000 Income Exclusion
All Regions, All Ages

Percentiles	2015	2016	2017	2018	2019	5-Year Average
0 to 5	64,490	64,210	64,840	64,460	64,810	64,562
5 to 10	73,340	73,250	74,690	73,500	74,750	73,906
10 to 15	82,840	82,820	84,660	83,410	85,220	83,790
15 to 20	92,650	93,190	94,950	94,480	96,700	94,394
20 to 25	103,930	104,480	106,040	106,680	109,290	106,084
25 to 30	116,150	116,860	118,570	120,430	123,020	119,006
30 to 35	129,500	129,650	132,200	135,030	138,700	133,016
35 to 40	145,150	143,640	148,110	151,350	154,880	148,626
40 to 45	160,860	158,940	164,040	169,150	172,870	165,172
45 to 50	179,030	177,630	182,010	188,860	192,250	183,956
50 to 55	199,640	197,340	201,770	209,770	212,830	204,270
55 to 60	222,330	217,470	223,650	233,970	234,560	226,396
60 to 65	248,150	239,630	247,170	263,610	261,840	252,080
65 to 70	280,110	268,590	276,450	296,290	294,120	283,112
70 to 75	322,690	305,530	315,480	338,910	334,190	323,360
75 to 80	377,950	352,680	364,990	397,160	391,910	376,938
80 to 85	447,570	413,650	434,570	478,490	469,850	448,826
85 to 90	549,570	501,250	525,930	595,310	580,560	550,524
90 to 95	720,860	661,050	678,440	769,300	761,630	718,256
95 to 100	1,287,530	1,200,970	1,219,710	1,379,180	1,409,020	1,299,282
Average	290,180	275,090	282,880	307,400	308,090	292,728
Median	190,000	187,000	191,000	199,000	202,000	193,800
Number of lawyers	13,050	12,920	12,120	12,210	10,890	12,238

Table 253c - Comparison of Net Incomes by Year - $80,000 Income Exclusion
All Regions, All Ages

Percentiles	2015	2016	2017	2018	2019	5-Year Average
0 to 5	84,150	84,550	84,410	84,400	85,080	84,518
5 to 10	92,940	93,770	93,610	94,370	95,340	94,006
10 to 15	103,000	103,830	103,340	105,070	106,450	104,338
15 to 20	113,800	114,750	114,380	117,380	118,470	115,756
20 to 25	125,170	125,980	126,020	129,860	131,870	127,780
25 to 30	138,600	138,110	139,590	144,030	146,410	141,348
30 to 35	152,690	150,850	153,840	159,080	161,220	155,536
35 to 40	167,100	165,830	168,570	175,740	178,230	171,094
40 to 45	184,400	183,100	185,100	193,860	195,530	188,398
45 to 50	202,800	200,630	203,130	212,490	214,330	206,676
50 to 55	223,320	218,590	222,800	234,540	233,770	226,604
55 to 60	246,240	238,130	243,620	260,900	257,710	249,320
60 to 65	273,660	263,290	268,370	289,490	286,160	276,194
65 to 70	309,150	293,940	301,360	324,730	319,400	309,716
70 to 75	354,260	333,090	340,370	370,630	362,950	352,260
75 to 80	409,500	380,500	394,460	433,320	425,920	408,740
80 to 85	481,180	442,890	463,140	517,080	503,700	481,598
85 to 90	586,710	534,810	555,870	632,940	616,560	585,378
90 to 95	759,660	698,490	711,950	808,830	799,860	755,758
95 to 100	1,339,640	1,250,110	1,265,050	1,434,530	1,465,470	1,350,960
Average	317,340	300,760	306,880	336,060	335,100	319,228
Median	213,000	210,000	213,000	222,000	223,000	216,200
Number of lawyers	11,610	11,480	10,900	10,900	9,780	10,934

Net Incomes for 10 Largest CMAs and All Ages 2015 to 2019

254. The following three tables present information for all of the self-employed lawyers in the ten largest CMAs over the period 2015 to 2019 based on (a) no income exclusion and (b) excluding those with net incomes less than $60,000 and (c) excluding those with net incomes less than $80,000.

Table 254a - Comparison of Net Incomes by Year - No Income Exclusion
10 CMAs, All Ages

Percentiles	2015	2016	2017	2018	2019	5-Year Average
0 to 5	3,980	4,360	4,150	3,460	3,600	3,910
5 to 10	12,590	13,130	13,290	11,500	11,470	12,396
10 to 15	21,840	22,380	22,510	20,120	20,610	21,492
15 to 20	31,970	32,450	32,630	29,750	30,810	31,522
20 to 25	43,680	44,670	44,650	41,090	42,950	43,408
25 to 30	56,280	57,600	57,400	54,620	56,570	56,494
30 to 35	70,640	71,430	72,410	68,870	71,930	71,056
35 to 40	86,360	87,230	88,490	84,570	88,420	87,014
40 to 45	103,510	104,440	105,300	102,620	107,120	104,598
45 to 50	123,190	124,340	124,640	124,670	129,350	125,238
50 to 55	147,060	146,190	148,650	149,890	154,510	149,260
55 to 60	173,140	171,800	175,040	178,640	182,800	176,284
60 to 65	203,280	200,700	203,460	208,390	213,070	205,780
65 to 70	235,530	229,130	235,280	244,040	245,780	237,952
70 to 75	277,460	265,370	271,890	287,270	286,950	277,788
75 to 80	334,550	314,510	321,420	344,490	340,720	331,138
80 to 85	408,670	377,810	392,840	428,370	422,340	406,006
85 to 90	510,360	467,620	491,440	547,900	536,150	510,694
90 to 95	683,910	624,550	643,270	726,560	719,340	679,526
95 to 100	1,227,470	1,162,550	1,176,690	1,324,130	1,355,050	1,249,178
Average	237,740	226,080	231,240	248,990	250,930	238,996
Median	134,000	135,000	136,000	137,000	142,000	136,800
Number of lawyers	13,990	13,670	12,920	13,070	11,590	13,048

Table 254b - Comparison of Net Incomes by Year - $60,000 Income Exclusion
10 CMAs, All Ages

Percentiles	2015	2016	2017	2018	2019	5-Year Average
0 to 5	65,140	64,890	65,420	65,120	65,420	65,198
5 to 10	76,160	75,200	76,850	75,620	76,630	76,092
10 to 15	87,290	86,810	88,300	87,140	88,620	87,632
15 to 20	99,290	98,680	99,960	99,690	101,640	99,852
20 to 25	112,590	112,130	113,130	114,480	116,150	113,696
25 to 30	127,220	126,810	127,390	131,290	133,180	129,178
30 to 35	144,610	142,460	144,760	149,230	150,960	146,404
35 to 40	162,450	159,380	163,340	169,080	170,560	164,962
40 to 45	182,940	179,340	182,550	190,170	191,390	185,278
45 to 50	204,060	200,310	203,230	211,130	213,420	206,430
50 to 55	226,700	220,350	225,710	235,820	235,740	228,864
55 to 60	252,760	242,240	249,560	265,030	262,620	254,442
60 to 65	285,670	270,780	277,630	297,010	293,400	284,898
65 to 70	326,590	305,900	313,160	338,150	331,830	323,126
70 to 75	376,010	347,980	357,740	392,110	382,610	371,290
75 to 80	434,150	398,070	417,640	462,080	450,660	432,520
80 to 85	510,040	465,900	489,900	551,050	535,310	510,440
85 to 90	622,110	563,990	587,570	666,400	653,460	618,706
90 to 95	798,420	733,520	749,260	848,150	840,370	793,944
95 to 100	1,374,410	1,305,520	1,319,900	1,493,240	1,531,710	1,404,956
Average	323,390	304,970	312,560	342,050	341,210	324,836
Median	215,000	210,000	214,000	222,000	224,000	217,000
Number of lawyers	9,940	9,780	9,240	9,220	8,270	9,290

Table 254c - Comparison of Net Incomes by Year - $80,000 Income Exclusion
10 CMAs, All Ages

Percentiles	2015	2016	2017	2018	2019	5-Year Average
0 to 5	84,950	85,450	85,210	85,130	85,750	85,298
5 to 10	95,410	96,010	95,580	96,290	97,210	96,100
10 to 15	107,210	107,690	106,960	108,990	110,150	108,200
15 to 20	119,780	120,680	119,350	123,480	124,280	121,514
20 to 25	134,290	134,530	133,410	139,240	140,400	136,374
25 to 30	150,610	148,770	149,990	156,160	156,840	152,474
30 to 35	166,840	165,160	167,040	174,790	175,340	169,834
35 to 40	186,250	183,660	184,580	193,820	194,160	188,494
40 to 45	205,170	202,530	203,580	212,870	214,440	207,718
45 to 50	225,800	220,620	224,120	235,450	234,640	228,126
50 to 55	248,940	240,040	245,490	261,760	258,580	250,962
55 to 60	277,520	265,310	269,810	290,050	285,970	277,732
60 to 65	313,080	295,090	300,450	324,810	318,590	310,404
65 to 70	354,660	331,360	336,350	369,190	359,090	350,130
70 to 75	403,940	372,990	385,200	426,360	415,340	400,766
75 to 80	462,740	425,170	445,030	495,970	481,910	462,164
80 to 85	540,900	493,470	516,000	586,270	568,320	540,992
85 to 90	654,040	595,850	614,140	699,480	687,600	650,222
90 to 95	832,140	767,580	779,960	884,220	874,980	827,776
95 to 100	1,417,040	1,350,040	1,360,020	1,543,880	1,585,160	1,451,228
Average	349,010	330,100	336,110	370,310	368,300	350,766
Median	237,000	229,000	234,000	248,000	245,000	238,600
Number of lawyers	9,030	8,840	8,420	8,360	7,520	8,434

Net Incomes for Other Regions and All Ages 2015 to 2019

255. The following three tables present information for all of the self-employed lawyers in the Other Regions over the period 2015 to 2019 based on (a) no income exclusion and (b) excluding those with net incomes less than $60,000 and (c) excluding those with net incomes less than $80,000.

Table 255a - Comparison of Net Incomes by Year - No Income Exclusion Other Regions, All Ages

Percentiles	2015	2016	2017	2018	2019	5-Year Average
0 to 5	3,430	3,220	3,420	2,520	2,960	3,110
5 to 10	11,260	11,590	12,310	10,210	10,890	11,252
10 to 15	20,300	21,040	21,990	18,490	19,300	20,224
15 to 20	28,610	30,310	31,240	26,610	27,560	28,866
20 to 25	36,750	39,300	40,280	35,710	37,630	37,934
25 to 30	45,760	49,190	49,200	45,190	47,280	47,324
30 to 35	55,510	58,860	58,020	55,590	58,150	57,226
35 to 40	65,460	68,690	68,350	65,880	69,260	67,528
40 to 45	73,900	78,200	79,000	76,250	80,490	77,568
45 to 50	83,750	88,610	89,550	87,660	93,480	88,610
50 to 55	94,580	101,280	101,970	101,330	107,300	101,292
55 to 60	107,830	114,460	116,410	116,740	122,610	115,610
60 to 65	122,090	127,610	131,980	130,980	139,980	130,528
65 to 70	138,630	142,770	148,980	149,460	158,370	147,642
70 to 75	156,030	160,510	165,840	169,730	180,100	166,442
75 to 80	176,810	184,270	189,370	196,430	204,730	190,322
80 to 85	205,820	211,320	218,370	230,770	233,760	220,008
85 to 90	247,030	249,630	255,290	279,580	281,290	262,564
90 to 95	307,710	315,350	330,230	351,270	356,890	332,290
95 to 100	618,060	570,470	584,420	666,910	669,730	621,918
Average	129,890	131,280	134,750	140,830	145,030	136,356
Median	89,000	95,000	96,000	95,000	100,000	95,000
Number of lawyers	4,750	4,670	4,350	4,560	3,920	4,450

Table 255b - Comparison of Net Incomes by Year - $60,000 Income Exclusion
Other Regions, All Ages

Percentiles	2015	2016	2017	2018	2019	5-Year Average
0 to 5	63,200	62,850	63,620	63,300	63,440	63,282
5 to 10	69,340	69,630	70,520	69,340	70,920	69,950
10 to 15	74,400	76,010	77,720	76,570	78,360	76,612
15 to 20	81,030	82,390	84,510	83,570	86,330	83,566
20 to 25	87,690	89,750	91,980	92,250	95,610	91,456
25 to 30	94,870	98,400	100,370	101,200	104,810	99,930
30 to 35	103,390	107,020	109,220	111,250	114,690	109,114
35 to 40	112,680	115,990	119,460	121,170	124,660	118,792
40 to 45	121,930	124,530	129,340	129,860	136,500	128,432
45 to 50	132,100	134,150	141,270	142,360	149,100	139,796
50 to 55	144,110	144,910	152,140	154,670	161,200	151,406
55 to 60	154,860	156,360	162,940	168,080	175,830	163,614
60 to 65	167,770	171,250	177,310	183,620	191,920	178,374
65 to 70	182,870	187,620	193,830	204,010	208,840	195,434
70 to 75	202,260	205,550	213,780	226,190	227,110	214,978
75 to 80	227,960	227,410	234,540	255,660	253,810	239,876
80 to 85	256,690	256,390	263,480	290,830	290,650	271,608
85 to 90	293,730	297,840	315,000	337,100	336,320	315,998
90 to 95	370,110	374,940	389,120	415,460	425,040	394,934
95 to 100	736,060	653,170	670,050	786,080	777,010	724,474
Average	183,790	181,720	187,920	200,540	203,600	191,514
Median	138,000	140,000	147,000	148,000	155,000	145,600
Number of lawyers	3,100	3,130	2,890	2,990	2,620	2,946

Table 255c - Comparison of Net Incomes by Year - $80,000 Income Exclusion
Other Regions, All Ages

Percentiles	2015	2016	2017	2018	2019	5-Year Average
0 to 5	82,740	82,770	83,070	82,880	83,530	82,998
5 to 10	88,370	88,870	88,790	90,160	91,330	89,504
10 to 15	94,310	96,210	96,330	97,790	99,060	96,740
15 to 20	101,120	103,380	103,140	105,490	107,220	104,070
20 to 25	108,810	110,920	111,220	114,820	116,060	112,366
25 to 30	116,690	118,330	120,180	122,570	124,500	120,454
30 to 35	124,310	125,500	128,440	129,990	134,540	128,556
35 to 40	133,130	133,720	138,720	140,850	145,530	138,390
40 to 45	143,220	142,670	148,360	151,100	155,850	148,240
45 to 50	152,140	152,130	157,220	162,190	166,970	158,130
50 to 55	162,190	162,820	167,270	174,130	180,960	169,474
55 to 60	173,780	176,920	180,780	188,740	194,480	182,940
60 to 65	187,060	190,330	194,990	206,430	209,450	197,652
65 to 70	204,260	205,820	212,240	225,440	224,750	214,502
70 to 75	225,520	223,820	229,610	249,880	246,550	235,076
75 to 80	249,350	246,910	251,090	279,840	275,810	260,600
80 to 85	276,070	276,820	286,090	311,940	309,740	292,132
85 to 90	318,180	320,560	336,150	359,630	359,540	338,812
90 to 95	398,830	400,830	411,790	443,450	450,250	421,030
95 to 100	794,510	690,940	707,280	835,310	820,840	769,776
Average	206,650	202,510	207,490	223,540	224,770	212,992
Median	157,000	157,000	162,000	168,000	173,000	163,400
Number of lawyers	2,580	2,640	2,480	2,540	2,260	2,500

Comparison of Net Incomes by Age

256. The Canada Revenue Agency provided net income amounts by age groupings for each year 2015 to 2019. To reduce the amount of data included herein, I show only the data for 2019. I have examined the other years and while the income progressions differ somewhat, they do follow the same pattern of increasing as one ages from 35 to about 50 and then gradually falling off by age 69.

Table 256a – Comparison of Net incomes by Age groups – No Income Exclusion
All Regions, Calendar Year 2019, 65-70th Percentile and Above

Region	Age Group	65-70th Percentile	75-80th Percentile	85-90th Percentile	95-100th Percentile	Average	Median - 50th Percentile	75th Percentile
All Regions	35-43	208,380	256,860	339,970	640,680	190,900	141,000	250,000
	44-47	264,630	359,800	535,130	1,002,360	272,460	170,000	350,000
	48-51	258,170	363,270	559,510	1,168,540	286,850	160,000	360,000
	52-55	239,300	339,380	559,350	1,189,660	281,210	150,000	330,000
	56-59	210,780	289,900	445,210	1,038,000	242,700	130,000	290,000
	60-63	171,990	247,220	398,210	1,009,360	218,020	110,000	240,000
	64-69	131,560	188,760	295,930	755,020	161,790	78,000	190,000
10 CMAs	35-43	221,580	275,000	369,650	678,010	202,720	150,000	270,000
	44-47	293,770	407,660	590,050	1,062,810	296,460	190,000	410,000
	48-51	289,090	412,470	634,840	1,264,470	314,340	180,000	410,000
	52-55	283,310	418,740	662,890	1,320,390	321,410	160,000	410,000
	56-59	235,050	327,230	507,670	1,157,850	268,900	150,000	330,000
	60-63	203,440	299,360	482,540	1,153,310	252,110	120,000	300,000
	64-69	154,880	227,660	360,390	875,660	189,320	90,000	230,000
Other Regions	35-43	167,680	203,670	250,430	430,100	146,700	120,000	200,000
	44-47	187,270	232,980	298,420	595,000	175,360	100,000	200,000
	48-51	196,350	241,780	339,220	609,780	183,420	100,000	200,000
	52-55	166,440	211,730	276,850	484,150	153,790	120,000	210,000
	56-59	166,270	214,640	295,530	609,150	168,840	110,000	210,000
	60-63	134,540	169,130	239,590	546,550	140,110	90,000	170,000
	64-69	97,950	135,850	191,870	434,180	106,420	60,000	140,000

Table 256b – Comparison of Net incomes by Age groups – $60,000 Income Exclusion
All Regions, Calendar Year 2019, 65-70th Percentile and Above

Region	Age Group	65-70th Percentile	75-80th Percentile	85-90th Percentile	95-100th Percentile	Average	Median - 50th Percentile	75th Percentile
All Regions	35-43	251,840	303,480	398,130	712,020	250,070	200,000	300,000
	44-47	333,330	448,700	624,040	1,090,460	345,110	240,000	440,000
	48-51	348,520	469,330	678,260	1,302,950	376,150	240,000	460,000
	52-55	323,740	458,250	684,310	1,333,400	368,940	220,000	460,000
	56-59	284,780	380,520	551,690	1,193,460	324,070	200,000	370,000
	60-63	261,200	357,710	532,770	1,206,150	311,090	180,000	350,000
	64-69	227,870	301,440	438,220	971,590	263,480	160,000	300,000
10 CMAs	35-43	269,770	325,590	434,510	747,220	265,390	214,000	330,000
	44-47	377,040	494,340	676,540	1,148,990	373,390	260,000	490,000
	48-51	394,140	544,000	754,190	1,402,120	413,780	270,000	550,000
	52-55	395,950	557,970	779,770	1,478,550	422,380	270,000	560,000
	56-59	318,310	435,400	617,870	1,325,870	358,450	220,000	440,000
	60-63	312,940	430,330	629,800	1,360,090	357,060	210,000	430,000
	64-69	264,190	354,620	503,740	1,102,720	299,350	180,000	350,000
Other Regions	35-43	202,450	231,440	280,210	481,050	191,640	160,000	230,000
	44-47	227,320	271,850	345,640	669,730	225,830	200,000	300,000
	48-51	232,110	298,840	377,920	670,640	235,890	200,000	300,000
	52-55	208,220	250,730	310,800	538,780	198,440	200,000	300,000
	56-59	214,020	266,620	354,460	696,870	224,310	200,000	300,000
	60-63	179,640	221,870	316,790	663,270	200,610	100,000	200,000
	64-69	168,060	205,360	275,050	576,320	180,710	130,000	210,000

Table 256c – Comparison of Net incomes by Age groups – $80,000 Income Exclusion
All Regions, Calendar Year 2019, 65-70th Percentile and Above

Region	Age Group	65-70th Percentile	75-80th Percentile	85-90th Percentile	95-100th Percentile	Average	Median - 50th Percentile	75th Percentile
All Regions	35-43	267,010	318,240	417,890	734,260	268,450	216,000	320,000
	44-47	365,390	480,720	656,920	1,123,710	374,050	260,000	480,000
	48-51	374,990	505,600	710,310	1,342,990	403,670	260,000	500,000
	52-55	356,590	502,780	722,850	1,385,150	400,090	250,000	500,000
	56-59	308,330	411,540	581,910	1,241,820	349,240	220,000	410,000
	60-63	294,500	395,270	580,200	1,270,650	341,900	200,000	390,000
	64-69	257,690	340,710	477,980	1,041,950	295,810	190,000	340,000
10 CMAs	35-43	284,520	342,810	455,510	769,020	284,410	230,000	340,000
	44-47	412,200	530,050	710,020	1,183,550	405,190	290,000	520,000
	48-51	425,880	575,130	787,780	1,437,210	441,610	290,000	580,000
	52-55	432,470	596,110	809,230	1,527,530	450,240	290,000	590,000
	56-59	345,930	466,670	649,600	1,373,770	385,420	240,000	470,000
	60-63	346,730	468,660	672,530	1,419,940	388,180	240,000	470,000
	64-69	296,060	392,330	539,430	1,166,350	330,180	220,000	390,000
Other Regions	35-43	212,960	242,300	290,820	499,630	206,320	180,000	240,000
	44-47	239,980	283,320	364,250	687,700	242,570	200,000	300,000
	48-51	252,790	322,160	395,260	700,190	256,520	200,000	300,000
	52-55	227,430	274,360	330,940	571,060	223,280	200,000	300,000
	56-59	232,700	282,060	374,380	721,050	242,070	200,000	300,000
	60-63	198,730	250,010	341,820	705,500	223,780	200,000	200,000
	64-69	191,870	229,560	317,510	628,050	208,430	160,000	230,000

Comparison of Net Incomes by Census Metropolitan Area

257. The Canada Revenue Agency provided net income amounts by CMA for each year 2015 to 2019. To reduce the amount of data included herein, I show only the data for 2019. I have examined the other years and while the income relationships differ somewhat, they do follow roughly the same pattern of increasing and decreasing from year to year.

Table 257a – Comparison of Net incomes by CMAs – No Income Exclusion
All Ages, Calendar Year 2019, 65-70th Percentile and Above

Region	65-70th Percentile	75-80th Percentile	85-90th Percentile	95-100th Percentile	Average	Median - 50th Percentile	75th Percentile
Toronto	287,980	414,060	642,550	1,598,410	295,880	161,000	370,000
Montréal	212,690	296,760	495,970	1,151,030	215,740	105,000	270,000
Vancouver	241,780	330,440	499,540	1,187,490	235,040	150,000	300,000
Calgary	247,240	322,370	461,610	1,082,320	222,990	140,000	300,000
Edmonton	234,560	283,000	409,920	673,030	199,600	200,000	300,000
Ottawa	253,360	341,760	497,080	1,470,080	256,370	160,000	310,000
Winnipeg	169,980	223,110	312,870	682,620	157,220	100,000	200,000
Québec City	210,180	256,410	345,490	895,680	190,350	140,000	240,000
Hamilton & KCW	203,850	260,460	370,970	831,940	184,350	120,000	240,000
10 CMAs	245,780	340,720	536,150	1,355,050	250,930	142,000	310,000
Other Regions	158,370	204,730	281,290	669,730	145,030	100,000	190,000
All Regions	**217,890**	**297,680**	**465,890**	**1,236,440**	**224,140**	**127,000**	**270,000**

Table 257b – Comparison of Net incomes by CMAs – $60,000 Income Exclusion
All Ages, Calendar Year 2019, 65-70th Percentile and Above

Region	65-70th Percentile	75-80th Percentile	85-90th Percentile	95-100th Percentile	Average	Median - 50th Percentile	75th Percentile
Toronto	386,860	526,360	762,040	1,777,320	390,700	246,000	490,000
Montréal	314,520	440,800	663,490	1,292,520	321,860	220,000	400,000
Vancouver	325,230	417,240	602,820	1,331,230	319,690	220,000	390,000
Calgary	321,580	416,350	559,950	1,286,800	310,460	200,000	400,000
Edmonton	268,790	325,520	452,410	701,910	246,030	200,000	300,000
Ottawa	324,220	427,610	583,020	1,729,730	339,030	220,000	400,000
Winnipeg	210,280	266,790	366,640	744,360	201,870	100,000	200,000
Québec City	247,490	289,760	410,680	1,023,980	245,650	200,000	300,000
Hamilton & KCW	257,470	333,130	475,860	895,040	253,470	200,000	300,000
10 CMAs	331,830	450,660	653,460	1,531,710	341,210	224,000	410,000
Other Regions	208,840	253,810	336,320	777,010	203,600	155,000	240,000
All Regions	**294,120**	**391,910**	**580,560**	**1,409,020**	**308,090**	**202,000**	**360,000**

Table 257c – Comparison of Net incomes by CMAs – $80,000 Income Exclusion
All Ages, Calendar Year 2019, 65-70th Percentile and Above

Region	65-70th Percentile	75-80th Percentile	85-90th Percentile	95-100th Percentile	Average	Median - 50th Percentile	75th Percentile
Toronto	420,170	558,050	792,620	1,827,930	418,200	274,000	520,000
Montréal	352,150	482,860	705,010	1,333,450	354,040	240,000	450,000
Vancouver	343,970	446,740	635,080	1,386,440	344,130	240,000	410,000
Calgary	344,710	435,140	575,370	1,327,500	334,600	300,000	400,000
Edmonton	274,430	339,880	461,480	710,200	257,380	200,000	300,000
Ottawa	349,150	450,810	607,830	1,802,000	363,550	240,000	420,000
Winnipeg	241,010	289,840	389,130	780,880	230,520	200,000	300,000
Québec City	258,600	303,880	431,600	1,053,030	262,940	200,000	300,000
Hamilton & KCW	277,120	345,740	506,570	922,020	271,200	200,000	300,000
10 CMAs	359,090	481,910	687,600	1,585,160	368,300	245,000	450,000
Other Regions	224,750	275,810	359,540	820,840	224,770	173,000	260,000
All Regions	**319,400**	**425,920**	**616,560**	**1,465,470**	**335,100**	**223,000**	**390,000**

Comparison of Net Incomes by Province

258. Canada Revenue Agency provided net income amounts by provinces and territories for each year 2015 to 2019. However, for Saskatchewan, Manitoba and the three territories, almost all of the data was suppressed due to confidentiality issues. To reduce the amount of data included herein, I show only the data for 2019. I have examined the other years and while the income relationships differ somewhat, they do follow roughly the same pattern of increasing and decreasing from year to year with the exception of Alberta. I have included a table that shows the data for all years for Alberta.

Table 258a – Comparison of Net incomes by Province – No Income Exclusion
All Ages, Calendar Year 2019, 65-70th Percentile and Above

Province	65-70th Percentile	75-80th Percentile	85-90th Percentile	95-100th Percentile	Average	Median - 50th Percentile	75th Percentile
British Columbia	197,350	263,420	398,080	1,066,110	196,510	110,000	240,000
Alberta	228,580	294,690	423,230	881,860	203,780	140,000	270,000
Saskatchewan & Manitoba	-	-	-	-	153,400	100,000	200,000
Ontario	243,100	343,290	543,390	1,439,770	258,490	145,000	310,000
Quebec	183,720	261,800	408,050	1,063,760	191,520	98,000	240,000
Atlantic	200,840	250,910	318,690	576,320	165,560	130,000	230,000
Territories	-	-	-	-	158,470	-	-
Total	**217,890**	**297,680**	**465,890**	**1,236,440**	**224,140**	**127,000**	**270,000**

Table 258b – Comparison of Net incomes by Province – $60,000 Income Exclusion
All Ages, Calendar Year 2019, 65-70th Percentile and Above

Province	65-70th Percentile	75-80th Percentile	85-90th Percentile	95-100th Percentile	Average	Median - 50th Percentile	75th Percentile
British Columbia	264,740	344,170	512,710	1,212,740	275,030	190,000	320,000
Alberta	286,990	362,810	484,060	981,540	270,680	210,000	330,000
Saskatchewan & Manitoba	-	-	-	-	-	-	-
Ontario	327,970	448,440	657,420	1,624,030	343,920	216,000	410,000
Quebec	277,650	363,490	563,630	1,211,520	285,940	188,000	330,000
Atlantic	243,160	289,180	354,550	625,080	215,320	190,000	280,000
Territories	-	-	-	-	-	-	-
Total	**294,120**	**391,910**	**580,560**	**1,409,020**	**308,090**	**202,000**	**360,000**

Table 258c – Comparison of Net incomes by Province – $80,000 Income Exclusion
All Ages, Calendar Year 2019, 65-70th Percentile and Above

Province	65-70th Percentile	75-80th Percentile	85-90th Percentile	95-100th Percentile	Average	Median - 50th Percentile	75th Percentile
British Columbia	292,650	372,930	551,920	1,271,970	301,980	210,000	350,000
Alberta	300,620	384,150	500,940	1,001,810	287,690	220,000	350,000
Saskatchewan & Manitoba	-	-	-	-	-	-	-
Ontario	353,540	479,700	692,290	1,680,050	370,580	237,000	440,000
Quebec	301,650	405,790	610,040	1,255,650	316,350	218,000	370,000
Atlantic	258,160	300,930	372,380	639,230	233,210	200,000	290,000
Territories	-	-	-	-	-	-	-
Total	**319,400**	**425,920**	**616,560**	**1,465,470**	**335,100**	**223,000**	**390,000**

259. Since the year-to-year net income amounts for Alberta fluctuated significantly and differently from the other provinces, but only at the 60th percentile and above, I have included the data for Alberta and for all other provinces in the two tables below. In 2016, the net incomes for those at the 60th percentile and above in Alberta decreased by between 14% and 40% from the 2015 amounts. For all other provinces, there was a small increase except in Ontario where there was a small decrease.

Table 259a – Comparison of Net Incomes for Alberta – No Income Exclusion
All Ages, Calendar Years 2015 to 2019, 65-70th Percentile and Above

Alberta	65-70th Percentile	75-80th Percentile	85-90th Percentile	95-100th Percentile	Average	Median - 50th Percentile	75th Percentile
2015	238,730	305,980	461,760	1,102,930	225,070	150,000	290,000
2016	203,470	257,790	349,200	661,860	174,450	130,000	240,000
2017	212,380	280,590	392,680	806,000	190,350	130,000	260,000
2018	212,050	288,450	409,680	848,470	192,190	120,000	270,000
2019	228,580	294,690	423,230	881,860	203,780	140,000	270,000

Table 259b – Comparison of Net Incomes for All Provinces ex Alberta – No Income Exclusion
All Ages, Calendar Years 2015 to 2019, 65-70th Percentile and Above

All Provinces Other than Alberta	65-70th Percentile	75-80th Percentile	85-90th Percentile	95-100th Percentile	Average	Median - 50th Percentile	75th Percentile
2015	206,377	291,957	451,270	1,126,649	218,592	123,154	270,000
2016	205,616	281,502	426,991	1,071,436	212,661	126,289	270,000
2017	210,700	288,770	442,319	1,086,044	217,182	129,037	270,000
2018	216,479	308,198	487,353	1,228,391	232,464	127,494	285,000
2019	219,706	307,591	479,232	1,253,421	235,702	131,819	290,000

Recent Appointments to Federal Judiciary

260. The Department of Justice provided me with a summary of the number of appointments to the federal judiciary. The data covered the period 1 April 2011 to 31 March 2015 and from 1 April 2015 to 23 October 2020. In total, that data covers about 9.5 years of appointments.

261. The first such table is age at appointment. The average age of appointment was 52.4 from 2011 to 2015; 52.7 from 2015 to 2020 and 52.6 from 2011 to 2020. The median age at appointment was 52, 53 and 52 respectively.

262. There was a total of 598 appointments during the 9.5-year period.

Table 262 - Age at Appointment to Federal Judiciary 2011 to 2020

	Number Appointed			Percent Appointed		
Age	1 Apr 2011 to 30 Mar 2015	1 Apr 2015 to 23 Oct 2020	1 Apr 2011 to 23 Oct 2020	Percentage 2011-2015	Percentage 2015-2020	Percentage 2011-2020
35	-	-	-	-	-	-
36	-	-	-	-	-	-
37	1	-	1	0.4%	0.0%	0.2%
38	-	-	-	-	-	-
39	-	-	-	-	-	-
40	1	2	3	0.4%	0.5%	0.5%
41	1	4	5	0.4%	1.1%	0.8%
42	2	2	4	0.9%	0.5%	0.7%
43	5	8	13	2.2%	2.2%	2.2%
44	11	8	19	4.9%	2.2%	3.2%
45	10	16	26	4.4%	4.3%	4.3%
46	10	20	30	4.4%	5.4%	5.0%
47	15	17	32	6.6%	4.6%	5.4%
48	10	16	26	4.4%	4.3%	4.3%
49	15	21	36	6.6%	5.6%	6.0%
50	9	20	29	4.0%	5.4%	4.8%
51	12	30	42	5.3%	8.1%	7.0%
52	18	18	36	8.0%	4.8%	6.0%
53	12	27	39	5.3%	7.3%	6.5%
54	8	24	32	3.5%	6.5%	5.4%
55	13	24	37	5.8%	6.5%	6.2%
56	14	23	37	6.2%	6.2%	6.2%
57	9	15	24	4.0%	4.0%	4.0%
58	9	17	26	4.0%	4.6%	4.3%
59	11	9	20	4.9%	2.4%	3.3%
60	7	16	23	3.1%	4.3%	3.8%
61	7	9	16	3.1%	2.4%	2.7%
62	3	5	8	1.3%	1.3%	1.3%
63	3	7	10	1.3%	1.9%	1.7%
64	5	3	8	2.2%	0.8%	1.3%
65	3	5	8	1.3%	1.3%	1.3%
66	1	2	3	0.4%	0.5%	0.5%
67	1	3	4	0.4%	0.8%	0.7%
68	-	1	1	-	0.3%	0.2%
69	-	-	-	-	-	-
70	-	-	-	-	-	-
Total	**226**	**372**	**598**	**100.0%**	**100.0%**	**100.0%**

263. We can summarise the age at appointment data into the age categories that were used by Canada Revenue Agency in compiling the net-income data.

Table 263a - Age at Appointment to Federal Judiciary 2011 to 2020 – 4-Year Bands[67]

Age Bracket	1 Apr 2011 to 30 Mar 2015	1 Apr 2015 to 23 Oct 2020	1 Apr 2011 to 23 Oct 2020	Percentage 2011-2020
35-44	10	16	26	4.3%
44-47	46	61	107	17.9%
48-51	46	87	133	22.2%
52-55	51	93	144	24.1%
56-59	43	64	107	17.9%
60-63	20	37	57	9.5%
64+	10	14	24	4.0%
Totals	**226**	**372**	**598**	**100.0%**

Table 263b - Age at Appointment to Federal Judiciary 2011 to 2020 – Broad Bands

Age Bracket	1 Apr 2011 to 30 Mar 2015	1 Apr 2015 to 23 Oct 2020	1 Apr 2011 to 23 Oct 2020	Percentage 2011-2020
35-46	41	60	101	16.9%
47-54	99	173	272	45.5%
55-69	86	139	225	37.6%
44-56	157	264	421	70.4%
35-69	226	372	598	100.0%

264. I also received details on the number of appointments by CMA over the same 9.5 years. This data showed the total number of appointments in each CMA as well as the number of appointments from private practice in each CMA.

[67] Note that the first age band (35 to 44) is actually nine years. The balance are four years each.

Table 264a – Number of Appointments by CMA – 2011 to 2020

CMA	1 Apr 2011 to 30 Mar 2015	1 Apr 2015 to 23 Oct 2020	1 Apr 2011 to 23 Oct 2020	Percentage 2011-2020
Calgary	8	20	28	4.7%
Edmonton	9	26	35	5.9%
Hamilton	6	5	11	1.8%
Kitchener/Cambridge/ Waterloo	0	5	5	0.8%
Montréal	29	43	72	12.0%
Ottawa -Gatineau	13	27	40	6.7%
Québec	12	15	27	4.5%
Toronto	32	60	92	15.4%
Vancouver	20	40	60	10.0%
Winnipeg	8	11	19	3.2%
Other Regions	89	120	209	34.9%
Totals	**226**	**372**	**598**	**100.0%**

Table 264b – Number of Appointments from Private Practice by CMA – 2011 to 2020

CMA	1 Apr 2011 to 30 Mar 2015	1 Apr 2015 to 23 Oct 2020	1 Apr 2011 to 23 Oct 2020	Percentage 2011-2020
Calgary	5	13	18	4.7%
Edmonton	6	14	20	5.3%
Hamilton	5	2	7	1.8%
Kitchener/Cambridge/ Waterloo	0	4	4	1.1%
Montréal	22	29	51	13.5%
Ottawa -Gatineau	4	10	14	3.7%
Québec	10	11	21	5.5%
Toronto	17	39	56	14.8%
Vancouver	14	26	40	10.6%
Winnipeg	6	8	14	3.7%
Other Regions	56	78	134	35.3%
Totals	**145**	**234**	**379**	**100.0%**

265. I was provided with a distribution of the judicial appointments over the same 9.5 years by province and territory.

Table 265 – Number of Appointments by CMA – 2011 to 2020

Province	1 Apr 2011 to 30 Mar 2015	1 Apr 2015 to 23 Oct 2020	1 Apr 2011 to 23 Oct 2020	Percentage 2011-2020
Alberta	17	47	64	10.7%
British Columbia	24	47	71	11.9%
Manitoba	10	13	23	3.8%
New Brunswick	5	12	17	2.8%
Newfoundland & Labrador	7	10	17	2.8%
Northwest Territories	2	0	2	0.3%
Nova Scotia	11	17	28	4.7%
Nunavut	2	3	5	0.8%
Ontario	94	134	228	38.1%
Prince Edward Island	1	4	5	0.8%
Québec	41	68	109	18.2%
Saskatchewan	12	15	27	4.5%
Yukon	0	2	2	0.3%
Totals	**226**	**372**	**598**	**100.0%**

266. The number of appointments by gender was also provided.

Table 266 – Number of Appointments by Gender – 2011 to 2020

Gender	1 Apr 2011 to 30 Mar 2015	1 Apr 2015 to 23 Oct 2020	1 Apr 2011 to 23 Oct 2020	Percentage 2011-2015	Percentage 2015-2020	Percentage 2011-2020
Female	76	204	280	33.6%	54.8%	46.8%
Male	150	168	372	66.4%	45.2%	53.2%
Totals	**226**	**372**	**598**	**100%**	**100%**	**100%**

Election of Supernumerary Status

267. I was provided the following data for the number of judges electing supernumerary status between 1985 and 2020.

Table 267 – Election of Supernumerary Status – 1985 to 2020

Years from Eligibility to Supernumerary Election	Years of Supernumerary Service								Total Number	Percent of All Judges	Percent of All Elections
	Less than 1	1 to 1.9	2 to 2.9	3 to 3.9	4 to 4.9	5 to 6.9	7 to 10	Never Elected			
Never Qualified Prior to 75	-	-	-	-	-	-	-	17	17	1.1%	0.0%
Did Not Elect Supernumerary	-	-	-	-	-	-	-	121	121	8.1%	0.0%
Retired Before Qualifying	-	-	-	-	-	-	-	282	282	18.9%	0.0%
Within 1 Year of First Eligibility	33	63	74	81	183	177	353	-	964	64.5%	89.7%
1 to < 2 Years After First Eligible	2	3	3	7	3	4	18	-	40	2.7%	3.7%
2 to < 3 Years After First Eligible	1	-	6	2	1	7	10	-	27	1.8%	2.5%
3 to < 4 Years After First Eligible	-	3	1	2	1	6	1	-	14	0.9%	1.3%
4 to < 5 Years After First Eligible	2	1	1	2	-	2	-	-	8	0.5%	0.7%
5 to < 7 Years After First Eligible	-	3	2	1	8	1	1	-	16	1.1%	1.5%
7 to < 10 Years After First Eligible	2	1	1	-	1	-	-	-	5	0.3%	0.5%
10 or More Years After First Eligible	1	-	-	-	-	-	-	-	1	0.1%	0.1%
Totals	**41**	**74**	**88**	**95**	**197**	**197**	**383**	**420**	**1,495**	**100%**	**100%**

I. Summary of Compensation Amounts

268. In this section, I summarise the compensation amounts for federally appointed judges, self-employed lawyers and deputy ministers (including government appointments to GC and GCQ senior positions) for 2015 to the most recent year data is available.

269. The first set of tables shows the base salary[68] for these positions. Note that these numbers should not be compared between tables as that would be an "apples and Oranges" comparison. The second set of tables shows the total compensation[69] for these positions

Summary of Base Salaries

270. Table 270 shows the Base Judicial Salary for selected judicial offices. There are other offices not shown here that receive a supplement in addition to the amounts shown in this table. The amounts shown for the year beginning April 2021 are calculated by me based on my estimate of the increase in the Industrial Aggregate.

Table 270 - Base Judicial Salary – 2015 to 2021

Year beginning 1 April	Supreme Court of Canada		Other Chief Justices	Puisne Justices	Protho-notaries
	Chief Justice	Puisne Justices			
2015	$ 396,800	$ 367,300	$ 338,400	$ 308,600	$ 234,500
2016	403,900	373,900	344,400	314,100	251,200
2017	405,400	375,300	345,700	315,300	252,200
2018	413,500	382,800	352,600	321,600	257,200
2019	424,200	392,700	361,700	329,900	263,900
2020	435,600	403,300	371,400	338,800	271,000
2021	464,900	430,400	396,400	361,600	289,200

271. Table 271 shows the net incomes of self-employed lawyers at the 70th percentile and above based on all ages (34 to 69) and all regions of Canada.

68 Base Judicial Salary, net income and base salary respectively for judges, self-employed lawyers and deputy ministers and senior government appointees.

69 Base Judicial Total Compensation, net income and total compensation respectively for judges, self-employed lawyers and deputy ministers and senior government appointees.

Table 271 – Net Income of Self-Employed Lawyers – 2015 to 2019

Calendar Year	65-70th Percentile	75-80th Percentile	85-90th Percentile	95-100th Percentile	Average	Median - 50th percentile	75th percentile
2015	$ 188,590	$ 259,720	$ 394,710	$ 868,420	$ 210,390	$ 118,000	$ 260,000
2016	188,790	252,540	370,480	806,250	201,940	121,000	250,000
2017	192,820	259,620	385,070	825,440	206,950	122,000	260,000
2018	197,340	273,550	416,440	929,160	221,020	121,000	270,000
2019	203,280	274,950	413,900	937,480	224,140	127,000	270,000

272. Table 272 shows the average base salary plus average at-risk pay for deputy ministers and government appointees to senior positions at GC and GCQ classifications[70].

Table 272 – Base Salary and At-Risk Pay for DM, GC and GCQ positions: 2015 - 2020

Beginning 1 April	DM-1	DM-2	DM-3	DM-4	GC-09	GC-10	GCQ-09	GCQ-10
2015	$263,611	$312,377	$357,825	$430,719	$325,571	$389,299	$309,638	$365,162
2016	267,133	308,539	360,778	440,416	333,003	398,253	316,664	373,457
2017	269,686	319,831	363,010	446,037	337,241	403,273	320,679	378,158
2018	270,960	321,109	365,514	446,037	337,241	403,273	320,679	378,158
2019	274,143	330,825	383,454	446,037	337,241	403,273	320,679	378,158
2020	276,241	335,458	384,597	446,037	337,241	403,273	320,679	378,158

273. Past Quadrennial Commissions have been provided with the percentile comparisons of Base Judicial Salary with the net earnings of self-employed lawyers. As discussed above (paragraphs 31 to 34), in my opinion this is a misleading and inappropriate comparison.

Base Judicial Salary

274. The 2019 Base Judicial Salary of $329,900 is about the 80th percentile of self-employed lawyers.

275. The 2020 Base Judicial Salary of $338,800 is about the 80th percentile of self-employed lawyers.

70 For DM-4, GC-09 and GC-10 positions, the amounts were estimated by me as described in the footnotes to Tables 231 and 234a.

276. The 2021 Base Judicial Salary of $361,600 is about the 82nd percentile of self-employed lawyers.

Base Salary of Prothonotaries

277. The 2019 base salary of a prothonotary of $263,900 is about the 74th percentile of self-employed lawyers.

278. The 2020 base salary of a prothonotary of $271,000 is about the 74th percentile of self-employed lawyers.

279. The 2021 estimated base salary of a prothonotary of $289,200 is about the 76th percentile of self-employed lawyers.

Summary of Total Compensation

280. Table 280 shows the Base Judicial Total Compensation for selected judicial offices. There are other offices not shown here that receive a supplement in addition to the amounts shown in this table. The amounts shown for the year beginning April 2021 are calculated by me based on my estimate of the increase in the Industrial Aggregate.

Table 280 – Base Judicial Total Compensation – 2015 to 2021

Year Beginning 1 April	Supreme Court of Canada		Other Chief Justices	Puisne Justices	Protho-notaries
	Chief Justice	Puisne Justices			
2015	$ 595,700	$ 551,600	$ 508,400	$ 463,900	$ 353,100
2016	606,400	561,600	517,500	472,200	378,100
2017	608,700	563,700	519,400	474,000	379,600
2018	620,800	574,900	529,800	483,400	387,100
2019	637,000	589,900	543,500	496,000	397,300
2020	654,200	605,900	558,200	509,400	408,100
2021	698,200	646,700	595,800	543,800	435,500

281. Table 281 shows the net incomes of self-employed lawyers at the 70th percentile and above based on all ages (34 to 69) and all regions of Canada[71].

[71] This is the same as Table 271 since there is no difference between the concept of a base salary and total compensation for a self-employed lawyer.

Table 281 – Net Income of Self-Employed Lawyers – 2015 to 2019

Calendar Year	65-70th Percentile	75-80th Percentile	85-90th Percentile	95-100th Percentile	Average	Median - 50th percentile	75th percentile
2015	$ 188,590	$ 259,720	$ 394,710	$ 868,420	$ 210,390	$ 118,000	$ 260,000
2016	188,790	252,540	370,480	806,250	201,940	121,000	250,000
2017	192,820	259,620	385,070	825,440	206,950	122,000	260,000
2018	197,340	273,550	416,440	929,160	221,020	121,000	270,000
2019	203,280	274,950	413,900	937,480	224,140	127,000	270,000

282. Table 282 shows the total compensation including at-risk pay for deputy ministers and government appointees to senior positions at GC and GCQ classifications[72].

Table 282 – Total Compensation for DM, GC and GCQ positions: 2015 - 2020

Beginning 1 April	DM-1	DM-2	DM-3	DM-4	GC-09	GC-10	GCQ-09	GCQ-10
2015	$308,306	$365,341	$418,494	$503,748	$380,772	$455,305	$362,137	$427,076
2016	312,425	360,852	421,948	515,088	389,464	465,777	370,355	436,776
2017	315,411	374,058	424,558	521,662	394,420	471,648	375,050	442,275
2018	316,901	375,553	427,487	521,662	394,420	471,648	375,050	442,275
2019	320,624	386,916	448,469	521,662	394,420	471,648	375,050	442,275
2020	323,078	392,334	449,806	521,662	394,420	471,648	375,050	442,275

Base Judicial Total Compensation and Self-Employed Lawyers Net Income

283. The 2019 Base Judicial Total Compensation (the $496,000 shown in Table 280 for Puisne Judges) is at about the 88th percentile of self-employed lawyers.

284. The 2020 Base Judicial Total Compensation (the $509,400 shown in Table 280 for Puisne Judges) is at about the 88th percentile of self-employed lawyers based on my estimation of the increase in self-employed lawyers net income for 2020[73].

285. The 2021 Base Judicial Total Compensation (the $543,800 shown in Table 280 for Puisne Judges) is at about the 89th percentile of self-employed lawyers based on my estimation of the increase in self-employed lawyers net income for 2021[74].

---

72 For DM-4, GC-09 and GC-10 positions, the amounts were estimated by me as described in the footnotes to Tables 230d and 233a and b.

73 To estimate the net income of self-employed lawyers in 2020, I projected their 2019 net income together with an increase based on the average annual increases from 2015 to 2019.

74 To estimate the net income of self-employed lawyers in 2021, I projected their 2019 net income together with two years of increase based on the average annual increases from 2015 to 2019.

Total Compensation of Prothonotaries

286. The 2019 base salary of a prothonotary was $263,900, beginning April 2020 it is $271,000 and I estimate beginning April 2021 it will be $289,200 (80% of the Base Judicial Salary).

287. Using the same adjustments to obtain total compensation as used for puisne judges[75], I determined the total compensation of a prothonotary.

288. The 2019 average total compensation of a prothonotary is $397,300 (Table 280). That is about the 84th percentile for all self-employed lawyers in Canada.

289. The 2020 average total compensation of a prothonotary is $408,100 (Table 280). That is about the 84th percentile for all self-employed lawyers in Canada.

290. The 2021 average total compensation of a prothonotary is estimated to be $435,500. (Table 280). That is about the 86th percentile for all self-employed lawyers in Canada.

[75] Take the base salary, add the value of the Judicial Annuity (based on the average value of 49.51%) and add the value of the government paying half of the Canada Pension plan contribution. This implicitly assumes that prothonotaries have a similar age profile at appointment as do the federally appointed judges.

J. Certification

291. I hereby certify that:

a. in my opinion, the data used is sufficient and reliable for the purposes of the report;

b. in my opinion, the actuarial methods employed are appropriate for the purposes of this report;

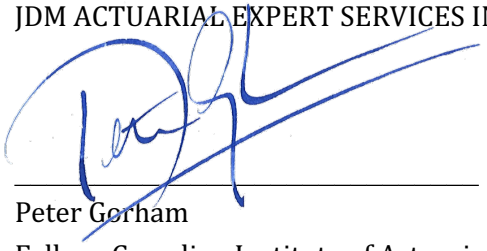
c. in my opinion, the assumptions used are, in aggregate, appropriate for the purposes of the work;

d. the calculations were prepared in accordance with the Canadian Institute of Actuaries Standards of Practice;

e. there are no subsequent events other than those discussed in this report that I am aware of that would have an impact on the results presented herein; and

f. this report has been prepared and my opinions given in accordance with accepted actuarial practice in Canada.

JDM ACTUARIAL EXPERT SERVICES INC.



Peter Gorham
Fellow, Canadian Institute of Actuaries
Fellow, Society of Actuaries

26 March 2021
Date

Appendix 1 Curriculum Vitae of Peter Gorham, F.S.A, F.C.I.A.

Position & Responsibilities	Peter is the President and Actuary of JDM Actuarial Expert Services Inc. (JDM Actuarial). He provides pension and actuarial consulting advice, expert testimony, retirement planning and governance services.
Areas of Specialization	Peter has provided expert advice and testimony to the legal profession since 1987. His experience includes determining: • certification of criminal rates of interest, • lost benefits for wrongful dismissal, • the present value of future income and future care costs, • valuation of life estates, • present value of future trust plan benefits and present value of past funds under various possible investment scenarios, • present value of future contingent events. In the past, Peter has also provided expert evidence for: • family law pension valuations. He has provided expert testimony to the Supreme Court of British Columbia, Court of Queen's Bench of Alberta, Court of Queen's Bench of Manitoba, the Ontario Superior Court of Justice, La Cour Supérieure du Québec, the Ontario Unified Family Court, the High Court of Justice of Trinidad and Tobago, the Supreme Court of Bermuda, Ontario Employment Standards Tribunal, Ontario Workplace Safety and Insurance Tribunal, Canada Human Rights Tribunal and the Canadian Institute of Actuaries Disciplinary Tribunal. Within the pension and actuarial consulting practice, Peter's main areas of expertise include the design, financing, administration and governance of pension and benefit plans. His strengths lie in providing innovative and workable solutions that address a client's needs. He is effective in communicating actuarial concepts in simple and understandable terms. Peter is an experienced public speaker and an author of numerous articles related to pensions and benefits.
Background	Peter is an actuary, receiving his fellowship in 1980. He attended the University of Toronto, graduating with a B.Sc. in Actuarial and Computer Sciences. Prior to founding JDM Actuarial in 2011, Peter spent 13 years as a partner at Morneau Shepell, and prior to that, 20 years with Aon Consulting, (formerly MLH + A inc), serving clients in the area of pension and employee benefits.
Professional & Other Affiliations	Fellow of the Canadian Institute of Actuaries Fellow of the Society of Actuaries Faculty, Humber College PPAC program Past-President, Rotary Club of Whitby Sunrise

Appendix 2 **Documents Utilised**

292. The following documents and data were provided to me for use in preparing this report:

a. "Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in Preparation for the 2015 Judicial Compensation and Benefits Commission", by Haripaul Pannu, 25 February 2016

b. "Report on the Value of the Judicial Annuity" prepare for Norton Rose Fulbright Canada LLP 29 March 2016 by Dean Newell;

c. Letter from Nick Leswick, Assistant Deputy Minister, Economic and Fiscal Policy Branch, Department of Finance to Christopher Rupar dated 9 December 2020 summarising the prevailing economic conditions in Canada;

d. Letter from Francois Lemire, Director, Office of the Chief Actuary, to Anna Dekker dated 2 November 2020 setting out estimates for future increases in federally appointed judges' salaries;

e. Letter from Francois Lemire, Director, Office of the Chief Actuary, to Anna Dekker date 26 February 2021 setting out updated estimates for future increases in federally appointed judges' salaries;

f. A series of 96 excel data files prepared by Canada Revenue Agency with data regarding net incomes of self-employed lawyers in Canada;

g. An excel file "2011-2020 Appointment Profile Extract for PG.xlsx" providing summary details (location, type of practice) of judicial appointments made from 1 April 2011 to 23 October 2020;

h. An excel file "Appointment Profiles For Peter Gorham Dec 7 2020.xlsx" providing a summary analysis (age, location, type of practice) of judicial appointments made from 1 April 2011 to 23 October 2020;

i. A document "27 - Quad Comm 2020 - DM Average Salary Mid-Point and Counts.doc" from the Department of Justice setting out current and historic salary levels of deputy ministers;

j. A document "22 - Quad Comm 2020 - DM Distribution of At-Risk Pay.doc" from the Department of Justice setting out current and historic at-risk pay of deputy ministers;

k. A document "28 - Quad Comm 2020 - GC and GCQ Income Information.doc" from the Department of Justice setting out current and historic salary information and at-risk pay for the most senior positions in government agencies;

l. A spreadsheet "26 - Quad Comm 2020 - DM Tenure.xlsx" setting out the positions held by individuals over their career at deputy minister level together with the dates served.

293. The following documents and data were obtained by me and were utilised in the preparation of this report:

a. "Judges Act", as amended to 12 April 2019;

b. "Guide for Candidates", Office of the Commissioner for Federal Judicial Affairs Canada, downloaded from the internet 2 February 2021 [www.fja-cmf.gc.ca/appointments-nominations/guideCandidates-eng.html]

c. Actuarial Report on the Pension Plan for the Federally Appointed Judges as at 31 March 2019;

d. Actuarial Report on the Pension Plan for the Federally Appointed Judges as at 31 March 2016;

e. Submission of the Government of Canada to the 2015 Judicial Compensation and Benefits Commission, 29 February 2016;

f. Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council to the 2015 Judicial Compensation and Benefits Commission, 29 February 2016;

g. Letter to Louise Meagher from Haripaul Pannu and Dean Newell dated 26 May 2016 identifying the differences in their respective reports regarding the value of the Judicial annuity;

h. Letter to Louise Meagher from Haripaul Pannu and Dean Newell dated 15 June 2016 providing a supplement to their 26 May 2016 letter;

i. "Report and Recommendations Submitted to the Minister of Justice of Canada" by the Judicial Compensation and Benefits Commission, 30 June 2016;

j. "Response of The Government of Canada to the Report of the 2015 Judicial Compensation and benefits Commission", 30 November 2016;

k. "Report and Recommendations Submitted to the Minister of Justice of Canada pursuant to section 26(4) of the Judges Act, R.S.C. 1985, c. J-1" by the Judicial Compensation and Benefits Commission, 28 October 2019;

l. Historic data for the Industrial Aggregate Index downloaded from Statistics Canada (Table 14-10-0222-01) showing for each month rom December 2001 to November 2020 the number of working Canadians included in the index along with their average weekly earnings.

Appendix 3 Summary of Judicial Annuity Benefits

Full Benefit	66.7% of final year salary
Eligibility for Full Benefit	1. Age 75 with at least 10 years of service. 2. At least 15 years of service with the sum of age plus service equalling 80 or more. 3. At least 10 years of service while a justice of the Supreme Court of Canada. 4. Permanent disability.
Eligibility for a reduced benefit	1. Age 75 2. Age 55 with at least 10 years of service
Reduced benefit amount	At age 75 with less than 10 years of service, the reduced benefit is pro rata to service. e.g. with 7 years of service, the reduced benefit is 70% of the Full Benefit. For ages 60 to 74, where age plus service is less than 80, the reduced benefit is pro rata to service. e.g. with 10 years of service at age 60, the sum of age and service is 70. It will take 5 more years of service to reach a total of 80 (at age 65 with 15 years of service). the reduced benefit is 10/15^{ths}, or 66.7% of the Full Benefit. For ages under 60 with age plus service less than 80, the reduced benefit is pro rata as in the previous paragraph plus an additional 5% reduction for each year prior to age 60.
Indexing	The benefit payable is adjusted each year based on the changes in the Consumer Price Index as of 30 September.
Survivor benefit	If the judge's spouse at the time of retirement is alive following the judge's death, a surviving spouse benefit equal to 50% of the amount payable to the judge will continue for the surviving spouse's lifetime.
Refund of contributions	If both ethe judge and spouse should die prior to receiving a total benefit at least equal to the judge's contributions plus interest, the difference is paid as a lump sum.
Death before retirement	A lump sum equal to 16.7% of earnings; plus A survivor annuity equal to 33.3% of final year salary is payable to a surviving spouse; plus A survivor annuity equal to 6.7% of final year salary is paid to each dependent child (maximum of 4) which amount is doubled if there is no surviving spouse.
Termination	A refund of contributions plus interest.
Contributions	The judge makes contributions each year prior to becoming eligible for a Full Benefit equal to 7% of salary and thereafter, 1% of salary.
Interest	Interest is credited on judges' contributions at the same rate that is paid on income tax refunds.

Appendix 4 **Actuarial Assumptions Utilised**

The actuarial assumptions I utilised for determining a value of the Judicial Annuity are the same as used in the Actuarial Report on the Pension Plan for the Federally Appointed Judges as at 31 March 2019 (the "**Actuarial Report**"), except where indicated otherwise.

Valuation Date	1 January 2021

Economic Assumptions (Expectations for the Future)

Interest Rate	4.50%
Inflation Rate	2.00%
Real Salary Increase	1.00%
Indexing of annuity after retirement	2.00%
Interest on Contributions	4.50%

Demographic Assumptions

Gender	41% of judges are assumed to be female and 59% male.
Appointment to Chief Justice or Associate Chief Justice	4 appointments annually
Appointment to Supreme Court	0.4 appointments annually
Retirement	Varies by age and service. The rates used in the Actuarial Report assume the probability of retirement increases after 14 complete years of service. At that point, many of the judges will be 12-months from earnings a full pension and I have assumed they will most likely work that additional year unless in poor health. I therefore utilised the same rates as set out in the Actuarial Report, but based on one additional year of service.

Sample Rates of Retirement

	Completed Years of Service						
Age Last Birthday	0 to 9	10 to 14	15	16	17	20	25+
Under 55	-	-	-	-	-	-	-
55	-	0.5%	0.5%	0.5%	0.5%	0.5%	15.0%
60	-	0.5%	0.5%	0.5%	0.5%	13.0%	2.0%
65	-	0.5%	6.0%	3.0%	3.0%	5.0%	6.0%
70	-	0.5%	12.0%	4.0%	8.0%	8.0%	8.0%
75	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Permanent Disability	Varies by age.

Sample Rates of Disability

Age Last Birthday	Male	Female
40	0.2	0.4
50	0.7	1.0
60	2.0	3.1
70	6.4	10.1

Termination	Judges are assumed to leave the bench without qualifying for an annuity with a probability of 3% in their first year of service, 2% in the second year and 1% per annum for years 3 to 9. After reaching 10 years of service, all departures from the bench are treated as a retirement, disability or death.
Death	Ignored prior to retirement. Based on the mortality assumptions after retirement
Mortality	Canadian Pensioner Mortality Table for public sector workers with allowance or future mortality improvements based on the CPM-B projection factors. An adjustment for the size of the retirement income was made -- for males, 74% of those rates were used and for females, 92%.
Surviving Spouse	The probability of having a surviving spouse at death as well as the number of surviving children and their assumed age was taken from the 2016 Actuarial Report (Table 23) as that report contained more detail about this assumption. The 2019 Actuarial report stated the assumptions were the same as in 2016. For males, the probability of having a surviving spouse is 98% at age 60 decreasing to 74% at 80 and to 17% at 100. For females, the probability of having a surviving spouse is 83% at age 60 decreasing to 35% at 80 and to 2% at 100. Spouses are assumed to be of the opposite gender from the judge with the male spouse being about 3 years older (spousal age differences vary by age of the judge)

QUAD COMMAPPOINTMENTS (without elevation) BETWEEN 2015/04/01 AND 2020/10/23

FIRST APPOINTED DATE	CITY APPOINTED TO	PROVINCE	CITYOF ORIGIN	GENDER	AGE	EMPLOYMENT	LCL Size of firm	NTLSize of firm	AREA OF PRACTICE/POSITION
2015/04/30	Saint John	New Brunswick	Moncton	F	46	Private Practice	30	200	Commercial Law
2015/04/30	Toronto	Ontario	Toronto	M	60	Priv. Pract.	7	N/A	Civil litigation
2015/04/30	Halifax	Nova Scotia	Halifax	M	44	Priv. Pract.	15	N/A	Civil litigation
2015/04/30	Ottawa	Ontario	Halifax	M	49	Priv. Sector	N/A	N/A	Litigation
2015/05/28	Montréal	Québec	Montréal	M	43	Prov. Gov.	N/A	N/A	Criminal law
2015/05/28	Vancouver	British Columbia	New Westminster	F	48	Priv. Pract.	19	N/A	Family law
2015/05/28	Ottawa	Ontario	Ottawa	F	56	Priv. Pract.	32	N/A	Personal Injury
2015/05/28	Montréal	Québec	Montréal	M	54	Priv. Pract.	100	200	Civil litigation
2015/05/28	Ottawa	Ontario	Ottawa	M	53	Retired Fed. Gov.	N/A	N/A	International Law
2015/05/28	Québec	Québec	Québec	M	51	Priv. Pract.	12	N/A	Civil litigation
2015/05/28	Regina	Saskatchewan	Regina	M	45	Provincial Judge	N/A	N/A	Crown Attorney's Office
2015/05/28	Ottawa	Ontario	Edmonton	M	66	Priv. Pract.	89	540	Tax Law
2015/06/02	Woodstock	New Brunswick	Fredericton	M	50	Priv. Pract.	15	200	Workers' Compensation
2015/06/19	Iqaluit	Nunavut	Iqaluit	M	60	Fed. Gov.	N/A	N/A	Criminal law
2015/06/19	Ottawa	Ontario	Calgary	M	63	Provincial Judge	N/A	N/A	Commercial Law
2015/06/19	Trois-Rivières	Québec	Victoriaville	F	47	Sole Pract.	N/A	N/A	Family law
2015/06/19	Winnipeg	Manitoba	Winnipeg	F	57	Sole Pract.	N/A	N/A	Advocacy
2015/06/19	Ottawa	Ontario	Kingston	F	62	Priv. Pract.	2	N/A	Real estate
2015/06/19	Québec	Québec	Québec	F	43	Priv. Pract.	5	N/A	Civil litigation
2015/06/19	Sydney	Nova Scotia	Sydney	M	51	Prov. Gov.	N/A	N/A	Criminal law
2015/06/19	Windsor	Ontario	Kitchener	F	54	Priv. Pract.	18	N/A	Matrimonial Law
2015/06/19	Montréal	Québec	Montreal	F	52	Priv. Pract.	145	586	Commercial Law
2015/06/19	Red Deer	Alberta	Rocky Mountain House	M	57	Sole Pract.	N/A	N/A	Matrimonial Law
2015/06/19	Saskatoon	Saskatchewan	Saskatoon	M	52	Provincial Judge	N/A	N/A	Criminal law
2015/06/19	Winnipeg	Manitoba	Winnipeg	F	48	Provincial Judge	N/A	N/A	Public Prosecution
2015/06/19	Montréal	Québec	Montréal	F	41	Priv. Pract.	86	740	Civil litigation
2015/06/19	Peterborough	Ontario	Lindsay	M	58	Sole Pract.	N/A	N/A	Family law
2015/06/19	Prince Albert	Saskatchewan	Saskatoon	M	56	Priv. Pract.	22	N/A	Corporate Law
2015/06/19	Calgary	Alberta	Calgary	M	59	Priv. Pract.	100	499	Environmental law
2015/06/19	Sherbrooke	Québec	Sherbrooke	M	48	Priv. Pract.	27	174	Civil litigation
2015/06/19	Ottawa	Ontario	Ottawa	M	52	Case Man. Master	N/A	N/A	Civil litigation
2015/06/19	Hamilton	Ontario	Hamilton	F	57	Priv. Pract.	15	N/A	Civil litigation
2015/06/19	Ottawa	Ontario	Ottawa	M	54	Sole Pract.	N/A	N/A	Administrative
2015/06/19	Winnipeg	Manitoba	Winnipeg	M	46	Sole Pract.	N/A	N/A	Family law
2015/06/19	Montréal	Québec	Sherbrooke	M	46	Priv. Pract.	27	174	Commercial Law
2015/06/19	Ottawa	Ontario	Halifax	M	49	Priv. Pract.	109	200	Tax Law
2015/06/19	Victoria	British Columbia	Kelowna	F	60	Fed. Gov.	N/A	N/A	Personal Injury
2015/06/20	Québec	Québec	Québec	M	55	Priv. Pract.	45	693	Health law
2015/06/20	Ottawa	Ontario	Ottawa	F	53	Fed. Gov.	N/A	N/A	Administrative
2015/06/20	Corner Brook	Newfoundland and Labrador	St.John's	M	45	Priv. Pract.	9	0	Corporate Law
2015/06/20	Montréal	Québec	Montréal	F	47	Priv. Pract.	145	586	Commercial Law
2015/06/30	Montréal	Québec	Montréal	F	46	Prinv. Pract.	100	200	Civil litigation
2015/06/30	Québec	Québec	Québec	M	54	Priv. Pract.	30	100	Construction Law/Disputes
2015/07/05	Montréal	Québec	Montréal	F	52	Priv. Pract.	58	418	Commercial Law
2015/07/06	London	Ontario	Kitchener	F	62	Provincial Judge	N/A	N/A	Law Society
2015/07/07	Sault Ste. Marie	Ontario	Sault Ste. Marie	F	46	Sole Pract.	N/A	N/A	Family law
2015/07/10	Montréal	Québec	Montréal	M	49	Prinv. Pract.	1	N/A	International Law
2015/07/20	Montréal	Québec	Saint-Lambert	F	50	Sole Pract.	1	N/A	Health law
2015/09/01	Ottawa	Ontario	Fredericton	F	49	Priv. Pract.	22	200	Corporate Law
	Sub-Total by FY: 49								

Please note that this tab has also been provided in its original Excel version

FIRST APPOINTED DATE	CITY APPOINTED TO	PROVINCE	CITYOF ORIGIN	GENDER	AGE	EMPLOYMENT	LCL Size of firm	NTLSize of firm	AREA OF PRACTICE/POSITION
2016/06/16	Prince George	British Columbia	Williams Lake	F	52	Provincial Judge	N/A	N/A	Corporate Law
2016/06/16	Montréal	Québec	Montreal	M	53	Provincial Judge	N/A	N/A	Citizenship & Immigration
2016/06/16	London	Ontario	London	M	41	Provincial Judge	N/A	N/A	Civil litigation
2016/06/16	Edmonton	Alberta	Edmonton	M	63	Provincial Judge	N/A	N/A	Commercial Law
2016/06/16	Edmonton	Alberta	Edmonton	F	44	Fed. Gov.	N/A	N/A	Criminal law
2016/06/16	Toronto	Ontario	Toronto	F	55	Priv. Pract.	10	N/A	Administrative
2016/06/16	Oshawa	Ontario	Toronto	F	50	Priv. Pract.	6	N/A	Civil litigation
2016/06/16	Ottawa	Ontario	Ottawa	M	60	Case Man. Master	N/A	N/A	Insolvency law
2016/06/16	Edmonton	Alberta	Edmonton	M	60	Fed. Gov.	N/A	N/A	Administrative
2016/06/16	Calgary	Alberta	Calgary	F	56	Priv. Pract.	11	N/A	Family law
2016/06/16	Brampton	Ontario	Toronto	F	50	Prov. Gov.	N/A	N/A	Constitutional Law
2016/06/16	Vancouver	British Columbia	Vancouver	F	60	Priv. Pract.	19	N/A	Civil litigation
2016/10/19	Toronto	Ontario	Toronto	F	46	Priv. Pract.	133	248	Constitutional Law
2016/10/19	Calgary	Alberta	Calgary	F	46	Fed. Gov.	N/A	N/A	Criminal law
2016/10/19	Edmonton	Alberta	Edmonton	F	45	Prinv. Sector	N/A	N/A	Administrative
2016/10/19	Toronto	Ontario	Toronto	M	60	Priv. Pract.	170	500	Commercial Law
2016/10/19	Vancouver	British Columbia	Victoria	F	53	Gov. Prov.	N/A	N/A	Criminal law
2016/10/19	Newmarket	Ontario	Toronto	M	45	Priv. Pract.	3	N/A	Criminal law
2016/10/19	Calgary	Alberta	Calgary	M	55	Priv. Pract.	111	740	Civil litigation
2016/10/19	Ottawa	Ontario	Ottawa	F	54	Children's Aid Society	N/A	N/A	Family law
2016/10/19	Edmonton	Alberta	Edmonton	M	61	Priv. Pract.	100	500	Health law
2016/10/19	Edmonton	Alberta	Edmonton	M	49	Fed. Gov.	N/A	N/A	Criminal law
2016/10/19	Halifax	Nova Scotia	Dartmouth	M	57	Provincial Judge	N/A	N/A	Family law
2016/10/19	Winnipeg	Manitoba	Winnipeg	F	40	Priv. Pract.	63	63	Employment Law
2016/10/19	Montréal	Québec	Montreal	M	61	Provincial Judge	N/A	N/A	Administrative
2016/10/19	Winnipeg	Manitoba	Winnipeg	M	51	Priv. Pract	67	N/A	Bankruptcy
2016/10/19	Halifax	Nova Scotia	Halifax	F	60	Fed. Gov.	N/A	N/A	Family law
2016/10/19	Vancouver	British Columbia	Vancouver	F	59	Case BC Master	N/A	N/A	Criminal law
2016/10/19	Kitchener	Ontario	London	F	48	Priv. Pract.	2	N/A	Family law
2016/10/19	Winnipeg	Manitoba	Winnipeg	F	56	Priv. Pract.	1	N/A	Family law
2016/10/19	Victoria	British Columbia	Vancouver	F	57	Crown Counsel	N/A	N/A	Criminal law
2016/10/19	Ottawa	Ontario	Halifax	M	62	Priv. Pract.	12	206	Tax Law
2016/10/19	Halifax	Nova Scotia	Halifax	F	60	Priv. Pract.	333	375	Employment Law
2017/03/08	Charlottetown	Prince Edward Island	Charlottetown	F	48	Priv. Pract.	22	200	Litigation
2017/03/21	Calgary	Alberta	Calgary	F	53	Priv. Pract.	27	N/A	Civil litigation
2017/03/21	Red Deer	Alberta	Calgary	F	53	Provincial Judge	N/A	N/A	Family law
2017/03/21	Edmonton	Alberta	Edmonton	F	53	Priv. Pract.	10	N/A	Litigation
2017/03/24	Montréal	Québec	Montreal	M	47	University Professor	N/A	N/A	Civil litigation
	Sub-Total by FY: 38								

FIRST APPOINTED DATE	CITY APPOINTED TO	PROVINCE	CITYOF ORIGIN	GENDER	AGE	EMPLOYMENT	LCL Size of firm	NTLSize of firm	AREA OF PRACTICE/POSITION
2017/06/08	Ottawa	Ontario		M	42	Fed. Gov.	N/A	N/A	Intellectual property
2017/04/07	Toronto	Ontario	Ottawa	M	62	Provincial Judge	N/A	N/A	Criminal law
2017/04/10	Kingston	Ontario	Kingston	F	50	Sole Pract.	N/A	N/A	Family law
2017/04/12	Vancouver	British Columbia	Vancouver	M	68	Priv. Pract.	23	N/A	Civil litigation
2017/04/12	Vancouver	British Columbia	Prince Rupert	M	50	Com. & Regulatory Affair:	N/A	N/A	Environmental law
2017/04/12	Toronto	Ontario	Toronto	M	57	Provincial Judge	N/A	N/A	Criminal law
2017/04/12	Ottawa	Ontario	Ottawa	F	55	Priv. Pract.	150	369	Administrative
2017/05/03	Montréal	Québec	Montreal	M	44	Professeur	N/A	N/A	International Law
2017/05/03	Montréal	Québec	Montreal	F	48	Priv. Pract.	8	N/A	Civil litigation
2017/05/03	Montréal	Québec	Montreal	F	52	Priv. Pract.	50	125	Civil litigation
2017/05/03	Montréal	Québec	Montreal	M	50	Poursuites crim. et pénal	N/A	N/A	Criminal law
2017/05/11	St. John's	Newfoundland and Labrador	St. John's	F	53	Priv. Pract.	38	155	Litigation
2017/05/11	Happy Valley-Goose Ba	Newfoundland and Labrador	St. John's	F	55	Fed. Gov.	N/A	N/A	Criminal law
2017/05/11	Lethbridge	Alberta	Lethbridge	F	47	Sole Pract.	N/A	N/A	Litigation
2017/05/11	New Westminster	British Columbia	Vancouver	M	47	Fed. Gov.	N/A	N/A	Criminal law
2017/05/18	Ottawa	Ontario	Embrun	F	47	Priv. Pract.	11	16	Family law
2017/05/18	Cornwall	Ontario	Cornwall	F	42	Priv. Pract.	2	N/A	Family law
2017/05/18	Toronto	Ontario	Toronto	F	53	Fed. Gov.	N/A	N/A	Administrative
2017/05/18	Toronto	Ontario	Toronto	M	63	Prov. Gov.	N/A	N/A	Constitutional Law
2017/05/18	Ottawa	Ontario	Ottawa	F	43	Royal Ottawa Health Gro	N/A	N/A	Health law
2017/05/18	Brampton	Ontario	Sudbury	F	54	Priv. Pract.	10	N/A	Insurance Claims
2017/05/18	Ottawa	Ontario	Ottawa	F	57	Priv. Pract.	7	N/A	Civil litigation
2017/06/08	Vancouver	British Columbia	Vancouver	M	49	Priv. Pract.	16	N/A	Insurance Claims
2017/06/08	Belleville	Ontario	Belleville	M	57	Priv. Pract.	2	N/A	Civil litigation
2017/06/08	St. John's	Newfoundland and Labrador	St. John's	M	52	Law Society NFLD	N/A	N/A	Administrative
2017/06/08	Montréal	Québec	Montreal	F	44	Aide Juridique Québec	N/A	N/A	Family law
2017/06/14	Vancouver	British Columbia	Vancouver	F	56	Priv. Pract.	33	N/A	Health law
2017/06/14	Vancouver	British Columbia	Vancouver	F	57	Priv. Pract.	1	3	Civil litigation
2017/06/14	Vancouver	British Columbia	Vancouver	M	54	Priv. Pract.	87	500	Bankruptcy
2017/06/14	Vancouver	British Columbia	Vancouver	M	53	Sole Pract.	N/A	N/A	Criminal law
2017/06/21	Calgary	Alberta	Calgary	F	52	Alberta Human Rights Cc	N/A	N/A	Administrative
2017/06/21	Vancouver	British Columbia	Vancouver	M	51	Crown Counsel	N/A	N/A	Criminal law
2017/06/21	Montréal	Québec	Montreal	M	54	Private Practice	20	NA	Civil litigation
2017/06/21	Toronto	Ontario	Toronto	M	58	Priv. Pract.	169	340	Contract law / Disputes
2017/06/21	Ottawa	Ontario	Toronto	M	66	Priv. Pract.	289	371	Litigation
2017/06/21	Kamloops	British Columbia	Kamloops	M	54	Provincial Judge	N/A	N/A	Aboriginal Law
2017/06/21	Ottawa	Ontario	Ottawa	M	60	Dep. Min. Just. & Dep. At	N/A	N/A	Human Rights
2017/06/21	Brampton	Ontario	Toronto	F	52	Priv. Pract.	43	48	Constitutional Law
2017/06/21	New Westminster	British Columbia	Surrey	F	51	Sole Pract.	N/A	N/A	Commercial Law
2017/06/21	Ottawa	Ontario	Ottawa	F	58	Sole Pract.	N/A	N/A	Family law
2017/06/22	Toronto	Ontario	Brampton	M	50	Provincial Judge	N/A	N/A	Administrative
2017/06/22	Québec	Québec	Québec	F	44	Sole Practice	10	NA	Criminal law
2017/07/01	Ottawa	Ontario	Ottawa	F	53	Priv. Pract.	44	2018	Civil litigation
2017/07/14	Halifax	Nova Scotia	Halifax	F	45	Private Pract.	107	231	Civil litigation
2017/07/14	Halifax	Nova Scotia	Halifax	F	61	Provincial Judge	N/A	N/A	Criminal law
2017/07/14	Québec	Québec	Québec	F	48	Priv. Pract.	59	59	Banking
2017/07/14	Montréal	Québec	Montréal	M	52	Off. Dir. of Crim. & Penal	N/A	N/A	Criminal law
2017/07/14	Toronto	Ontario	Toronto	F	51	Prov. Judge	N/A	N/A	Criminal law
2017/07/14	Halifax	Nova Scotia	Antigonish	F	51	Antigonish Legal Aid	N/A	N/A	Family law
2017/07/14	Toronto	Ontario	Toronto	M	60	Priv. Pract.	15	N/A	Insurance Claims
2017/07/14	Oshawa	Ontario	Toronto	F	59	Crown Law Office Ontaric	N/A	N/A	Criminal law
2017/08/15	Brampton	Ontario	Toronto	M	58	Sole Pract.	N/A	N/A	Criminal law
2017/08/15	Montréal	Québec	Montreal	M	49	Priv. Pract.	32	93	Administrative
2017/08/15	Vancouver	British Columbia	Vancouver	F	53	Priv. Pract.	4	N/A	Criminal law
2017/09/14	Ottawa	Ontario	Calgary	M	55	sole pract.	N/A	N/A	Citizenship & Immigration
2017/09/29	Vancouver	British Columbia	Vancouver	M	67	Priv. Pract.	11	N/A	Criminal law
2017/09/29	Toronto	Ontario	Toronto	F	56	Priv. Pract.	309	606	Tax Law

2017/09/29	Edmonton	Alberta	Edmonton	M	52	Finning Canada	N/A	N/A	Litigation
2017/10/20	Toronto	Ontario	Toronto	M	52	priv. pract.	2	N/A	Criminal law
2017/10/20	Montréal	Québec	Montréal	M	46	priv. pract.	5	N/A	Administrative
2017/10/20	Saint John	New Brunswick	Saint John	F	47	Fed. Govt.	N/A	N/A	Litigation
2017/10/20	St. John's	Newfoundland and Labrador	Clarenville	M	65	Fed. Govt.	N/A	N/A	Aboriginal Law
2017/10/20	Newmarket	Ontario	Ottawa	M	54	Fed. Govt.	N/A	N/A	Family law
2017/10/26	Charlottetown	Prince Edward Island	Charlottetown	M	54	Priv. Pract.	14	130	Criminal law
2017/10/26	Milton	Ontario	Milton	M	63	Prov. Judge	N/A	N/A	Mediation
2017/10/26	Montréal	Québec	Montréal	F	46	Prov. Judge	N/A	N/A	Criminal law
2017/10/26	Charlottetown	Prince Edward Island	Charlottetown	F	51	Proth. PEI Courts	N/A	N/A	Civil litigation
2017/11/09	Ottawa	Ontario	Ottawa	M	47	Professeur	N/A	N/A	Family law
2017/11/09	St. John's	Newfoundland and Labrador	St. John's	M	61	Priv. Pract.	34	95	Natural Resource Law
2017/11/29	Amos	Québec	Amos	F	46	Priv. Pract.	3	206	Municipal
2017/11/29	Regina	Saskatchewan	Regina	M	56	Priv. Pract.	60	314	Intellectual property
2017/11/29	Québec	Québec	Québec	M	49	Prov. Judge	N/A	N/A	Criminal law
2017/12/11	Ottawa	Ontario	Saskatoon	M	46	Priv. Pract.	54	78	Aboriginal Law
2017/12/19	Brandon	Manitoba	Brandon	M	45	Private Practice	10	N/A	Family law
2017/12/19	Granby	Québec	Longueuil	F	53	Affaires juridiques	N/A	N/A	Administrative
2017/12/19	Toronto	Ontario	Brampton	F	49	Prov. Judge	N/A	N/A	Appellate Advocacy
2017/12/19	Edmonton	Alberta	Edmonton	M	53	Private Practice	33	N/A	Commercial Law
2017/12/19	Edmonton	Alberta	Edmonton	M	56	Federal Gov.	N/A	N/A	Bankruptcy
2017/12/19	Vancouver	British Columbia	Vancouver	F	46	Private Practice	18	N/A	Administrative
2017/12/19	London	Ontario	Simcoe	M	58	Prov. Judge	N/A	N/A	Criminal law
2018/01/18	Vancouver	British Columbia	Vancouver	M	52	Federal Gov.	N/A	N/A	Aboriginal Law
2018/01/18	Toronto	Ontario	Toronto	F	48	Ont. Human Rights Com.	N/A	N/A	Administrative
2018/01/18	Montréal	Québec	Montréal	F	56	Private Practice	37	N/A	Family law
2018/02/06	Vancouver	British Columbia	Vancouver	F	55	Teachers' Federation	N/A	N/A	Human Rights
2018/02/21	Vancouver	British Columbia	Vancouver	F	54	Private Pract.	66	460	Civil litigation
2018/02/21	Edmonton	Alberta	Edmonton	F	56	Federal Government	N/A	N/A	Civil litigation
2018/02/21	Oshawa	Ontario	Ottawa	F	49	Private Pract.	10	N/A	Family law
2018/02/21	Saskatoon	Saskatchewan	Saskatoon	F	46	Private Pract.	10	460	Civil litigation
2018/02/21	Vancouver	British Columbia	Vancouver	F	51	Private Pract.	11	N/A	Aviation
2018/02/21	Regina	Saskatchewan	Regina	F	45	Private Pract.	46	240	Labour
2018/02/21	New Westminster	British Columbia	Vancouver	F	58	Private Prac.	62	N/A	Civil litigation
2018/02/26	Ottawa	Ontario	Toronto	M	58	Sole Practice	N/A	N/A	Immigration
2018/02/26	Ottawa	Ontario	Ottawa	F	55	Royal Can. Mount. Police	N/A	N/A	Administrative
2018/03/12	Whitehorse	Yukon	Whitehorse	F	45	Federal Gov.	N/A	N/A	Civil litigation
	Sub-Total by FY: 94								

FIRST APPOINTED DATE	CITY APPOINTED TO	PROVINCE	CITYOF ORIGIN	GENDER	AGE	EMPLOYMENT	LCL Size of firm	NTLSize of firm	AREA OF PRACTICE/POSITION
2018/04/03	Montréal	Québec	Sorel-Tracy	M	47	Private Pract.	3	N/A	Commercial Law
2018/04/03	Montréal	Québec	Montreal	M	54	Private Pract.	145	586	Intellectual property
2018/04/04	Calgary	Alberta	Calgary	F	48	Private Pract.	156	693	Employment Law
2018/05/01	Calgary	Alberta	Calgary	M	56	Federal Government	N/A	N/A	Criminal law
2018/05/03	Chilliwack	British Columbia	Vancouver	M	63	Prov. Judge	N/A	N/A	Criminal law
2018/05/03	Calgary	Alberta	Calgary	F	54	Vice President Ferus Inc.	1	N/A	Corporate Law
2018/05/03	Edmonton	Alberta	Edmonton	F	56	Fed. Gov.	N/A	N/A	Family law
2018/05/03	Calgary	Alberta	Calgary	F	46	Private Practice	173	369	Dispute Resolution
2018/05/03	Calgary	Alberta	Calgary	F	54	Private Practice	156	693	Civil litigation
2018/05/03	Edmonton	Alberta	Edmonton	M	65	Private Practice	102	N/A	Civil litigation
2018/05/11	Saskatoon	Saskatchewan	Saskatoon	F	50	Fed. Government	N/A	N/A	Criminal law
2018/05/23	Cornwall	Ontario	Ottawa	F	55	Federal Gov.	N/A	N/A	Civil litigation
2018/05/23	Thunder Bay	Ontario	Thunder Bay	F	50	Private Practice	18	N/A	Family law
2018/06/06	Ottawa	Ontario	Toronto	F	59	Private Pract.	19	N/A	Tax Law
2018/06/06	Ottawa	Ontario	Vancouver	F	53	Fed. Government	N/A	N/A	Administrative
2018/06/14	Vancouver	British Columbia	Vancouver	M	60	Private Practice	15	N/A	Commercial Law
2018/06/14	Bathurst	New Brunswick	Shippagan	M	56	Private Practice	4	N/A	Penal Law
2018/06/21	Iqaluit	Nunavut	Kingston	F	61	Queen's University	N/A	N/A	Criminal law
2018/06/21	Québec	Québec	Québec	F	50	Provincial Judge	N/A	N/A	Municipal
2018/06/21	Moncton	New Brunswick	Moncton	F	58	Provincial Judge	N/A	N/A	Criminal law
2018/06/21	Iqaluit	Nunavut	Iqualuit	M	44	Federal Gov.	N/A	N/A	Litigation
2018/06/21	Ottawa	Ontario	Ottawa	M	51	Federal Government	N/A	N/A	Tax Law
2018/06/21	Regina	Saskatchewan	Regina	M	59	Private Practice	114	240	Administrative
2018/08/29	Halifax	Nova Scotia	halifax	M	48	Gov. Federal	N/A	N/A	Tax Law
2018/08/29	Charlottetown	Prince Edward Island	Charlottetown	M	56	Priv. Practice	16	204	Litigation
2018/08/29	Toronto	Ontario	Toronto	F	45	Priv. Practice	2	N/A	Criminal law
2018/08/29	Brampton	Ontario	Toronto	F	48	Prov. Government	N/A	N/A	Constitutional Law
2018/08/29	Brampton	Ontario	Waterloo	F	53	Priv. Practice	18	460	Civil litigation
2018/08/29	Vancouver	British Columbia	Vancouver	M	60	Priv. Practice	3	N/A	Civil litigation
2018/08/29	Québec	Québec	Québec	M	54	Priv. Practice	182	693	Litigation
2018/08/29	Vancouver	British Columbia	Vancouver	F	53	Fed. Gouv.	N/A	N/A	Constitutional Law
2018/08/29	Edmonton	Alberta	Edmonton	M	55	Priv. Practice	35	N/A	General Civil Law
2018/08/29	Brampton	Ontario	Hamilton	F	49	Children, Aid Society	N/A	N/A	Family law
2018/08/29	Montréal	Québec	Montréal	M	63	Priv. Practice	58	442	Commercial Law
2018/08/29	Montréal	Québec	Amos	F	49	Priv. Practice	5	N/A	Civil litigation
2018/08/29	Toronto	Ontario	Toronto	F	51	Prov. Government	N/A	N/A	Administrative
2018/08/29	Montréal	Québec	Montréal	M	54	Priv. Practice	158	765	Litigation
2018/08/29	London	Ontario	Windsor	M	65	Prov. Judge	N/A	N/A	Family law
2018/09/20	Regina	Saskatchewan	Regina	M	65	Sask. Labour Relations B	N/A	N/A	Public Prosecution
2018/09/28	Barrie	Ontario	Huntsville	F	59	Private Pract.	18	N/A	Insurance Claims
2018/09/28	Barrie	Ontario	Barrie	F	45	Sole Pract.	N/A	N/A	Family law
2018/09/28	Toronto	Ontario	Toronto	F	53	Private Pract.	195	211	Commercial Law
2018/09/28	Toronto	Ontario	Toronto	F	46	Private Pract.	27	N/A	Family law
2018/10/04	Winnipeg	Manitoba	Winnipeg	M	65	Private Pract.	30	N/A	Aboriginal Law
2018/10/04	Winnipeg	Manitoba	Winnipeg	F	44	Legal Aid Manitoba	N/A	N/A	Family law
2018/10/04	Vancouver	British Columbia	Victoria	F	53	Federal Govern.	N/A	N/A	Constitutional Law
2018/10/04	Winnipeg	Manitoba	Winnipeg	F	54	Private Pract.	6	N/A	Wills and/or estates
2018/10/17	Kelowna	British Columbia	Kelowna	M	52	Govern. Federal	N/A	N/A	Real estate
2018/11/01	St. John's	Newfoundland and Labrador	St. John's	M	56	Private Pract.	5	N/A	Health law
2018/11/01	Toronto	Ontario	Yellowknife	F	45	Federal Gouv.	N/A	N/A	Criminal law
2018/11/01	Milton	Ontario	Toronto	F	49	Sole Practioner	N/A	N/A	Criminal law
2018/11/01	Brampton	Ontario	Toronto	M	52	Federal Gov.	N/A	N/A	Regulatory Law
2018/11/01	Battleford	Saskatchewan	Saskatoon	F	58	Sole Practitiooner	N/A	N/A	Employment Law
2018/11/01	Regina	Saskatchewan	Regina	F	55	Private Pract.	13	N/A	Family law
2018/11/01	Brampton	Ontario	Brampton	M	47	Provincial Judge	N/A	N/A	Criminal law
2018/11/07	Moncton	New Brunswick	Dieppe	F	56	Private Pract.	3	5	Family law
2018/11/07	Montréal	Québec	Longueuil	M	47	Provincial Judge	N/A	N/A	Matrimonial Law

2018/11/07	Toronto	Ontario	Toronto	M	67	Private Pract.	195	211	Civil litigation
2018/11/21	Edmonton	Alberta	Edmonton	F	59	Federal Gov.	N/A	N/A	Litigation
2018/11/21	Calgary	Alberta	Calgary	F	50	University	N/A	N/A	Administrative
2018/11/29	Whitehorse	Yukon	Whitehorse	F	57	Private Pract.	10	N/A	Aboriginal Law
2018/11/29	Halifax	Nova Scotia	Halifax	F	55	Private Pract.	6	N/A	Insurance Claims
2018/11/29	Halifax	Nova Scotia	Halifax	M	58	Private Prac.	104	211	Civil litigation
2018/12/06	Montréal	Québec	Montreal	F	54	Gouvernement Fédérale	N/A	N/A	Criminal law
2018/12/06	Montréal	Québec	Montréal	F	58	Private Pract.	6	N/A	Family law
2018/12/06	Ottawa	Ontario	Ottawa	F	59	University of Ottawa	N/A	N/A	Tax Law
2018/12/12	Newmarket	Ontario	Toronto	M	53	Private Pract.	2	N/A	Criminal law
2018/12/12	Toronto	Ontario	Toronto	F	58	Private Pract.	9		Family law
2018/12/12	Toronto	Ontario	Toronto	M	54	Law School	N/A	N/A	Administrative
2019/01/29	Toronto	Ontario	Toronto	M	59	Prinate Pract.	21	35	Insurance Claims
2019/01/29	Edmonton	Alberta	Edmonton	F	45	Private Pract.	4	N/A	Criminal law
2019/01/29	Toronto	Ontario	Toronto	F	47	Legal Education & Action	N/A	N/A	Health law
2019/02/05	Kelowna	British Columbia	Kamloops	M	61	Private Ptract.	10	20	Litigation
2019/03/07	Vancouver	British Columbia	Vancouver	F	56	Private Pract.	66	N/A	Administrative
2019/03/07	Vancouver	British Columbia	Vancouver	F	47	Private Pract.	22	N/A	Family law
2019/03/07	Lethbridge	Alberta	Lethbridge	M	51	Provincial Govern.	N/A	N/A	Criminal law
2019/03/07	Montréal	Québec	Westmount	M	51	Private Pract.	5	N/A	Employment Law
2019/03/07	Fredericton	New Brunswick	Moncton	M	62	Private Practice	157	225	Insurance Claims
2019/03/07	Toronto	Ontario	Toronto	F	58	Sole practitioner	N/A	N/A	Administrative
2019/03/07	Edmonton	Alberta	Edmonton	F	45	Private Pract.	100	270	Commercial Law
2019/03/07	Montréal	Québec	Outremont	F	55	Sole Pract.	N/A	N/A	Administrative
2019/03/07	Montréal	Québec	Montreal	F	54	Private Pract.	5	N/A	Insurance Claims
2019/03/07	Montréal	Québec	Montreal	M	51	Private Pract.	39	765	Commercial Law
2019/03/07	Québec	Québec	New Carlisle	M	61	Private Pract.	2	N/A	Civil litigation
2019/03/07	London	Ontario	London	F	51	Private Pract.	76	120	Health law
2019/03/25	St. John's	Newfoundland and Labrador	St. John's	F	48	Legal Aid Commission	N/A	N/A	Criminal law
2019/03/25	Kentville	Nova Scotia	Halifax	M	55	Private Prac.	63	203	Construction Law/Disputes
2019/03/25	Oshawa	Ontario	Toronto	M	51	Provincial Govern.	N/A	N/A	Criminal law
2019/03/25	Grand Bank	Newfoundland and Labrador	St. John's	F	47	Private Pract.	4	N/A	Civil litigation
2019/03/25	Lindsay	Ontario	Kingston	M	64	Private Pract.	3	N/A	Criminal law
	Sub-Total by FY: 90								

FIRST APPOINTED DATE	CITY APPOINTED TO	PROVINCE	CITYOF ORIGIN	GENDER	AGE	EMPLOYMENT	LCL Size of firm	NTLSize of firm	AREA OF PRACTICE/POSITION
2019/04/09	Hamilton	Ontario	Hamilton	F	43	Private Practice	6	N/A	Family law
2019/04/09	Pembroke	Ontario	Pembroke	F	55	Sole Practice	N/A	N/A	Family law
2019/04/09	Welland	Ontario	Welland	F	51	Provincial Judge	N/A	N/A	Family law
2019/04/09	St. Thomas	Ontario	London, ON	M	64	Private Practice	4	N/A	Family law
2019/04/09	Toronto	Ontario	Toronto	M	60	Private Pract.	278	575	Civil litigation
2019/04/09	Belleville	Ontario	Toronto	F	64	Sole Practice	N/A	N/A	Family law
2019/04/09	Kitchener	Ontario	Hamilton	F	50	Children's Aid Society	N/A	N/A	Human Rights
2019/04/15	Edmonton	Alberta	Edmonton	F	54	Provin. Judge	N/A	N/A	Criminal law
2019/04/15	Ottawa	Ontario	Toronto	M	57	Sole Practice	N/A	N/A	Tax Law
2019/05/02	Kitchener	Ontario	Kitchener	F	43	Sole practitioner	N/A	N/A	Matrimonial Law
2019/05/02	Welland	Ontario	Oakville	F	61	Sole practitioner	N/A	N/A	Commercial Law
2019/05/02	Ottawa	Ontario	Ottawa	M	51	Private Pract.	13	480	Litigation
2019/05/02	Ottawa	Ontario	Montreal	M	58	Private Pract.	125	753	Marine Law
2019/05/02	Kitchener	Ontario	Kitchener	F	51	Pricate Pract.	30	N/A	Family law
2019/05/17	Saskatoon	Saskatchewan	Saskatoon	F	43	Provincial Judge	N/A	N/A	Criminal law
2019/05/17	Calgary	Alberta	Toronto	M	48	Federal Govern.	N/A	N/A	Administrative
2019/05/17	Regina	Saskatchewan	Regina	F	58	Federal Government	N/A	N/A	Criminal law
2019/05/17	Regina	Saskatchewan	Regina	M	61	Sole Pract.	N/A	N/A	Administrative
2019/05/21	Edmonton	Alberta	Edmonton	M	60	Private Pract.	49	460	Labour
2019/05/21	Edmonton	Alberta	Edmonton	M	55	Private Pract.	6	120	Administrative
2019/05/21	Gander	Newfoundland and Labrador	St. John's	M	54	Private Pract.	154	203	Civil litigation
2019/05/21	Calgary	Alberta	Calgary	F	49	Private Pract.	18	N/A	Civil litigation
2019/06/02	Moncton	New Brunswick	Moncton, NB	F	51	Private Pract.	18	200	Criminal law
2019/06/02	Moncton	New Brunswick	Moncton, NB	M	49	Private Pract.	27	203	Corporate Law
2019/06/02	Moncton	New Brunswick	Moncton	M	50	Private Pract.	15	211	Civil litigation
2019/06/02	Montréal	Québec	Montreal	M	56	Provincial Judge	N/A	N/A	Construction Law/Disputes
2019/06/02	Gatineau	Québec	Gatineau	M	52	Provincial Judge	N/A	N/A	Civil litigation
2019/06/02	Montréal	Québec	Gatineau, Québec	F	51	Private Pract.	2	N/A	Family law
2019/06/02	Montréal	Québec	Montreal	F	46	Société Radio-Canada	N/A	N/A	Mediation
2019/06/02	Vancouver	British Columbia	Vancouver	F	51	Federal Govern.	N/A	N/A	Civil litigation
2019/06/22	Barrie	Ontario	Toronto	F	47	Provincial Judge	N/A	N/A	Criminal law
2019/06/22	Vancouver	British Columbia	Vancouver	M	50	Private Pract.	567	700	Mediation
2019/06/22	Toronto	Ontario	Toronto	M	52	Private Pract.	284	442	Constitutional Law
2019/06/22	Halifax	Nova Scotia	Amherst	M	52	Provincial Judge	N/A	N/A	Family law
2019/06/22	Vancouver	British Columbia	Vancouver	M	57	Private Pract.	84	N/A	Insurance Claims
2019/06/22	Vancouver	British Columbia	Vancouver	F	55	Private Pract.	5	N/A	Litigation
2019/06/27	Montréal	Québec	Montreal	M	54	Private Pract.	139	165	Litigation
2019/06/27	Ottawa	Ontario	Ottawa	F	58	Private Pract.	9	20	Intellectual property
2019/06/27	Montréal	Québec	Montreal	F	46	Private Pract.	182	693	Construction Law/Disputes
2019/06/27	Montréal	Québec	Laval	M	53	Teamsters Canada	N/A	N/A	Labour
2019/06/27	Winnipeg	Manitoba	Carman	F	53	Provincial Judge	N/A	N/A	Litigation
2019/06/27	Winnipeg	Manitoba	Winnipeg	F	41	Public Pros. of Canada	N/A	N/A	Criminal law
2019/12/18	Vancouver	British Columbia	Vancouver	M	47	Edelmann & Co. Law Cor	20	NA	Citizenship & Immigration
2020/01/30	Saskatoon	Saskatchewan	Saskatoon	M	46	Private Practice	50	250	Insolvency law
2020/01/30	Québec	Québec	Québec	F	50	Federal Government	N/A	N/A	Constitutional Law
2020/01/30	Moncton	New Brunswick	Fredericton	F	55	Provincial Government	N/A	N/A	Civil litigation
2020/01/30	Sudbury	Ontario	Timmins	F	51	Private Practice	10	50	Civil litigation
2020/01/30	Ottawa	Ontario	Toronto	F	51	Private Practice	300	750	Intellectual property
2020/01/30	Toronto	Ontario	Toronto	M	55	Sole Practice	4	N/A	Civil litigation
2020/02/05	Winnipeg	Manitoba	Winnipeg	M	55	Private Practice	100	325	Civil litigation
2020/02/05	Fredericton	New Brunswick	Saint John	F	51	Sole Practice	5	N/A	Workers' Compensation
2020/03/04	Québec	Québec	Québec	M	46	Private Practice	30	550	Civil litigation
2020/03/04	Yarmouth	Nova Scotia	Yarmouth	F	50	Provincial Judge	NA	Na	Family law
2020/03/04	Edmonton	Alberta	Edmonton	F	49	Provincial Judge	N/A	N/A	Criminal law
2020/03/04	Edmonton	Alberta	Edmonton	F	44	Federal Government	N/A	N/A	Litigation
2020/03/04	Halifax	Nova Scotia	Shubenacadie	M	48	Mi'kmaw Family & Childre	50	NA	Family law
2020/03/04	Truro	Nova Scotia	Truro	M	67	Provincial Judge	NA	NA	Insurance Claims

2020/03/04	Québec	Québec	Québec	F	53	Sole Practice	5	NA	Family law
2020/03/04	Ottawa	Ontario	Ottawa	M	51	Private Practice	10	15	Commercial Law
2020/03/04	Edmonton	Alberta	Edmonton	M	49	Private Practice	20	N/A	Criminal law
2020/03/12	Newmarket	Ontario	Toronto	F	49	Provincial Government	NA	NA	Criminal law
2020/03/12	Vancouver	British Columbia	Vancouver	M	45	Federal Government	NA	NA	Tax Law
2020/03/12	Vancouver	British Columbia	Vancouver	M	53	Provincial Government	NA	NA	Corporate Law
	Sub-Total by FY: 63								

FIRST APPOINTED DATE	CITY APPOINTED TO	PROVINCE	CITYOF ORIGIN	GENDER	AGE	EMPLOYMENT	LCL Size of firm	NTLSize of firm	AREA OF PRACTICE/POSITION
2020/04/03	Welland	Ontario	Hamilton	F	46	Federal Government	N/A	N/A	Criminal law
2020/04/03	Calgary	Alberta	Calgary	F	51	Private Practice	100	500	Labour
2020/04/03	Toronto	Ontario	Toronto	F	50	Private Practice	34	NA	Family law
2020/04/03	Montréal	Québec	Montréal	M	57	Private Practice	100	750	Constitutional Law
2020/04/03	Calgary	Alberta	Calgary	F	56	Private Practice	20	N/A	Construction Law/Disputes
2020/04/28	Ottawa	Ontario	Toronto	M	55	Private Practice	200	400	Arbitration
2020/04/28	Vancouver	British Columbia	Vancouver	F	53	Provincial Government	NA	NA	Finance
2020/05/13	Québec	Québec	Québec	F	45	Private Practice	75	NA	Civil litigation
2020/05/13	Chicoutimi	Québec	Alma	M	56	Sole Practice	7	NA	Real estate
2020/05/13	Bridgewater	Nova Scotia	Halifax	F	53	Provincial Government	NA	NA	Administrative
2020/05/20	Barrie	Ontario	Barrie	F	57	Sole Practice	1	NA	Family law
2020/05/20	Brampton	Ontario	Toronto	F	43	Provincial Government	NA	NA	Human Rights
2020/05/20	Toronto	Ontario	Toronto	F	55	Sole Practice	1	NA	Contract law / Disputes
2020/05/20	Toronto	Ontario	Toronto	F	55	Private Practice	20	NA	Insurance Claims
2020/05/20	Ottawa	Ontario	Ottawa	F	53	Federal Government	NA	NA	Criminal law
2020/05/20	Toronto	Ontario	Toronto	F	50	Private Practice	350	650	Pension & Benefits
2020/05/20	Toronto	Ontario	Toronto	F	60	Private Practice	25	NA	Civil litigation
2020/05/20	Oshawa	Ontario	Toronto	F	48	Private Practice	15	NA	Criminal law
2020/06/01	Windsor	Ontario	Windsor	F	58	Sole Practice	1	NA	Criminal law
2020/06/01	Calgary	Alberta	Calgary	F	56	Private Practice	15	50	Family law
2020/06/01	Edmonton	Alberta	Edmonton	F	55	Private Practice	15	NA	Family law
2020/06/01	Edmonton	Alberta	Edmonton	M	49	Provincial Government	NA	NA	Civil litigation
2020/06/22	Newmarket	Ontario	Toronto	F	49	Sole Practice	1	N/A	Family law
2020/06/22	Vancouver	British Columbia	Vancouver	M	56	Private Practice	25	N/A	Contract law / Disputes
2020/07/01	Vancouver	British Columbia	Vancouver	F	56	Sole Practice	10	N/A	Human Rights
2020/09/02	Vancouver	British Columbia	Vancouver	F	51	Private Practice	29	n/a	Contract law / Disputes
2020/09/02	New Westminster	British Columbia	New Westminster	M	63	Provincial Judge	n/a	n/a	Litigation
2020/09/02	Belleville	Ontario	Kingston	F	40	Private Practice	28	3	Civil litigation
2020/09/02	London	Ontario	London	M	48	Private Practice	5	0	Personal Injury
2020/09/02	London	Ontario	St. Catharines	F	43	Private Practice	8	0	Family law
2020/09/30	Montréal	Québec	Drummondville	F	41	Private Practice	16	200	Tax Law
2020/09/30	Montréal	Québec	Montréal	F	51	Private Practice	95	4	Banking
2020/09/30	Québec	Québec	Québec	F	47	University of Laval	N/A	N/A	Environmental law
2020/09/30	Québec	Québec	Québec	F	45	Private Practice	8	N/A	Personal Injury
2020/09/30	Montréal	Québec	Montréa;	M	50	Federal Government	N/A	N/A	Constitutional Law
2020/10/02	Newmarket	Ontario	Barrie	F	51	Sole Practice	N/A	N/A	Family law
2020/10/02	Owen Sound	Ontario	Barrie	M	57	Private Practice	14	N/A	Labour
2020/10/02	Calgary	Alberta	Calgary	M	49	Provincial Government	N/A	N/A	Criminal law
	Sub-Total by FY: 38								

SUBMISSIONS

of the

CANADIAN SUPERIOR COURT JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

to the

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

further to the

RULING RESPECTING RECOMMENDATION 8(5)(C) OF THE REPORT OF THE SIXTH QUADRENNIAL JUDICIAL COMPENSATION AND BENEFITS COMMISSION

April 6, 2023

Pierre Bienvenu, Ad. E.
Audrey Boctor
Étienne Morin-Levesque
IMK LLP / s.e.n.c.r.l.

imk
avocats • advocates

TABLE OF CONTENTS

A. BACKGROUND

1. The Judicial Compensation and Benefits Commission (the "**Commission**") delivered the Sixth Report and Recommendations of the Commission to the Minister of Justice of Canada on August 30, 2021 (the "**Report**").

2. The Report contains a detailed recommendation ("**Recommendation 8**") that the parties promptly begin preparatory work to collect various data points for use by the Seventh Quadrennial Commission. Recommendation 8 includes a recommendation that the Office of the Commissioner for Federal Judicial Affairs ("**FJA**") begin preparation now of statistical data for each province and territories as to compensation levels of appointees immediately prior to their appointment ("**Recommendation 8(5)(c)**").

3. The relevance and appropriateness of collecting of pre-appointment income data ("**PAI data**") is a highly contentious issue that has been debated extensively before two previous Commissions. Both the Block and Rémillard Commissions concluded that collecting PAI data was problematic, and that the data was not useful to determining the adequacy of judicial salaries. The issue was not raised or debated before this Commission.

4. Representatives of the Canadian Superior Court Judges Association (the "**Association**"), the Canadian Judicial Council (the "**Council**") (collectively, the "**Judiciary**"), the Associate Judges of the Federal Court, the Government of Canada, FJA, and the Canadian Revenue Agency ("**CRA**") met for the first time on November 23, 2022 to discuss Recommendation 8 and the way forward for the next Commission. The Judiciary conveyed that it had been surprised by the inclusion of Recommendation 8(5)(c) in the Report, given that the issue had not been raised by any party, and particularly in light of the long history surrounding this issue, the conclusions of the Block and Rémillard Commissions, and the established doctrine that valid reasons are required to depart from the conclusions of a previous Commission. The Judiciary understands that the Government of Canada was also surprised at the inclusion of Recommendation 8(5)(c). However, the Government indicated that it had committed, on December 29, 2021, to

implement the Commission's Report, and therefore took the position that the Judiciary should raise its objection with the Commission.

5. On February 13, 2023, the Association and Council wrote to the Commission to express its concerns and seek the Commission's guidance. On February 16, 2023, the Government of Canada wrote to the Commission indicating that it was prepared to act on the Commission's recommendations but would await the Commission's further direction regarding Recommendation 8(5)(c) before collecting any data.

6. On February 24, 2023, the Commission issued a Ruling Respecting Recommendation 8(5)(c) of the Report of the Sixth Quadrennial Judicial Compensation and Benefits Commission (the "**Ruling**"). The Commission directed that Counsel for the Judiciary file any written submissions in favour of the position that it wishes the Commission to take with respect to the implementation of Recommendation 8(5)(c) by April 10, 2023 and set a schedule for the submissions of the Government and any other hearing participant, and any responses or replies. The Commission directed that the submissions be delivered in a form that supports a determination in writing, and that if a party wishes an oral hearing, it should make that request, and the Commission will determine whether an oral hearing is necessary after receipt of all written submissions.

B. OVERVIEW OF THE JUDICIARY'S POSITION

7. The Judiciary thanks the Commission for the opportunity to make submissions on Recommendation 8(5)(c) and wishes to address at the outset the timing of this issue arising.

8. The Judiciary's surprise and concern with Recommendation 8(5)(c) were immediate upon the release of the Report. Careful consideration was given by the Association and Council at the time to immediately register the Judiciary's objection given that the collection of PAI Data had not been requested by any hearing participant nor had it been raised in any written or oral submissions made to the Commission. However, considering that the absence of any such request or debate was a matter of record and could not be disputed, the Judiciary deferred

raising this issue until its first post-Report meeting with the Government and the FJA, in the hope of coming to the Commission with a common position.

9. The Parties' first meeting to discuss the implementation of Recommendation 8 took place on November 23, 2022. The Judiciary raised its objection to the collection of PAI Data at that meeting. The Government took the matter under consideration and, in a subsequent communication, suggested that the Judiciary informally raise the question with the Commission. The Judiciary's letter followed shortly thereafter.

10. The Judiciary also wishes to address at the outset the statement in paragraph 64 of the Judiciary's March 29, 2021 Submission, referenced in the Ruling, that a major cause of the drop in interest from lawyers in private practice is the income gap between what outstanding candidates earn in private practice and the judicial salary. With respect, this submission does not express a position on the advisability of collecting PAI data – that is, data regarding the pre-appointment income of those who have accepted an appointment. Rather, it reflects the Judiciary's long-held view that it is imperative to collect accurate data regarding the income of top private practice lawyers more broadly, as reflected in Recommendation 8(1). In no way did this submission signal a change in the Judiciary's consistent position that collecting PAI data specifically is a breach of privacy, is self-serving, and is of little relevance to understanding the situation of those who are **not** applying.

11. The Judiciary's position with respect to Recommendation 8(5)(c) is that implementation of the recommendation should be deferred at this time for the following reasons:

    a. Recommendation 8(5)(c) was issued without giving the parties an opportunity to be heard;
    b. Recommendation 8(5)(c) departs from the findings of previous Commissions contrary to the Commissions' established principles and the expectations of the parties;
    c. In accordance with the approach of previous Commissions, the parties should be given an opportunity to first consult and attempt to agree on the

subject-matter of Recommendation 8(5)(c). Absent agreement, if the Government wishes to raise the issue of PAI data before this Commission or a future Commission, then the Government should make a full and transparent proposal setting forth:

1. the type of data that will be collected;
2. how the consent of appointees will be obtained prior to collecting their PAI data;
3. how the data will be collected so as to both protect appointees' privacy and ensure the data can be reliably tested;
4. the use the Government intends to make of the data; and
5. the reasons advanced for seeking to depart from the conclusions of previous Commissions as regards the relevance and usefulness of PAI data;

the whole so as to give the Judiciary – and the Commission – a proper opportunity to review the proposal, potentially with the assistance of experts, as has been done before previous Commissions.

C. DETAILED SUBMISSIONS

I. Procedural Fairness in the Context of Compensation Commissions Requires Notice and an Opportunity To Be Heard on Recommendations

a. General Principles Regarding Procedural Fairness

12. Although the Commission is not strictly adversarial, it is bound by the duty of procedural fairness. The duty of fairness "extends to all administrative bodies acting under statutory authority".[1] It is triggered by **"**[t]he fact that a decision is administrative and affects the rights, privileges or interests of an individual".[2]

13. Even where an administrative body only issues "recommendations", it may be bound by the duty of fairness "where the recommendation process is an integral

[1] *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 SCR 249, para. 75 [Book of Documents of the Association and Council ("**BDAC**") tab 1].
[2] *Baker v. Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 81, para. 20 [*Baker*] [BDAC tab 2].

part of the decision-making process […]."[3] The duty of fairness has been held to apply to bodies making recommendations under statutory authority, including a judicial council and its committee of inquiry[4] and commissions of inquiry, even if their findings "cannot result in either penal or civil consequences for a witness".[5]

14. Applying the above principles, there is no doubt the Commission is bound by the duty of procedural fairness. The Commission acts under the statutory authority of s. 26 of the *Judges Act* and its work has a significant impact on the rights of the parties. Although its recommendations are not binding, its work must be given "meaningful effect" in the process of determining judicial remuneration.[6] As the Supreme Court has stated, "[t]he commission's recommendations must be given weight. They have to be considered by the judiciary and the government."[7] Indeed, the government can only reject or vary the Commission's recommendations where legitimate reasons are given, and its response is subject to judicial review.[8]

b. The Content of Procedural Fairness

15. While the content of the duty of fairness varies according to the circumstances, at its core, it ensures that administrative bodies provide "an opportunity for those affected by [their] decision to put forward their views and evidence fully and have them considered by the decision-maker."[9] Accordingly, even when the content of the duty is minimal, a decision-maker must provide notice to the affected party regarding its decision and receive and consider the affected party's submissions.[10]

---

[3] Donald J.M. Brown and Hon. John M. Evans, *Judicial Review of Administrative Action in Canada* (2022, loose-leaf ed.) at § 7:55 [BDAC tab 8].
[4] *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, para. 81 [BDAC tab 3].
[5] *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, 1997 CanLII 323 (SCC), [1997] 3 SCR 440, para. 55 [BDAC tab 4].
[6] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, para. 175 [*PEI Reference*] [BDAC tab 5]
[7] *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, [2005] 2 S.C.R. 286, 2005 SCC 44, para. 23 [*Bodner*] [BDAC tab 6].
[8] *Bodner*, paras. 24, 28 [BDAC tab 6].
[9] *Baker*, para. 22 [BDAC tab 2].
[10] *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 SCR 504, para. 5 [BDAC tab 7].

16. The expectations of the parties also play a role in determining the content of the duty of fairness. Where a party "has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness".[11]

17. In *Bodner*, the Supreme Court emphasized that the commission's recommendations had to result from a fair hearing after considering the submissions of the parties:

> The commission must objectively consider the submissions of all parties and any relevant factors identified in the enabling statute and regulations. Its recommendations must result from a fair and objective hearing. Its report must explain and justify its position.[12]

18. In the context of compensation commissions, procedural fairness is not just a legal requirement; it goes to the legitimacy of the enterprise as "independent, objective and impartial."[13] As the Supreme Court stated in the *PEI Reference*, objectivity is best promoted by ensuring a commission is "fully informed before deliberating and making its recommendations."[14]

19. As noted in the Judiciary's letter dated February 13, 2023, from its inception more than 20 years ago, the Commission has always ensured the respect of the parties' right to be heard regarding issues that may form the subject of formal recommendations. Whenever this foundational principle has been perceived to be at risk, the parties have acted to safeguard it.

20. The baseline requirements of procedural fairness and the legitimate expectations of the parties thus required the Commission to provide the parties with notice and an opportunity to be heard *prior* to issuing Recommendation 8(5)(c).

21. The requirement to provide notice and an opportunity to be heard is all the more acute given that the subject-matter of Recommendation 8(5)(c) – the collection of PAI data – has already received extensive consideration by previous Commissions, as set out more fully below.

---

[11] *Baker*, para. 26 [BDAC tab 2].
[12] *Bodner*, para. 17 [BDAC tab 6].
[13] *Bodner*, para. 16 [BDAC tab 6]; *PEI Reference*, para. 169 (emphasis added) [BDAC tab 5].
[14] *PEI Reference*, para. 173 [BDAC tab 5].

II. The Conclusions of Previous Commissions Should Not Be Departed From Without Valid Reason

a. General Principles Regarding the Conclusions of Previous Commissions

22. Recommendation 8(5)(c) also engages procedural fairness because of the repeated principle that Commissions will give "careful consideration to the reasoning of previous Commissions" and that valid reasons – such as a change in circumstances or additional evidence – are required to depart from the conclusions of a previous commission.

23. In *Bodner*, the Supreme Court established that commissions should take note of the work and recommendations of their predecessors:

> Each commission must make its assessment in its own context. However, this rule does not mean that each new compensation commission operates in a void, disregarding the work and recommendations of its predecessors. The reports of previous commissions and their outcomes form part of the background and context that a new compensation committee should consider.[15]

24. Past Commissions have considered this issue. The Block Commission (2008) first suggested that "[w]here consensus has emerged around a particular issue during a previous Commission inquiry […] in the absence of demonstrated change, […] such a consensus [should] be recognized by subsequent Commissions and arguably reflected in the approach taken to the question in the submissions of the parties."[16]

25. The Levitt Commission (2012) issued a Notice prior to its inquiry that it had determined that in the absence of "a change in facts or circumstances", the Commission "intend[ed] to regard" recommendations from the previous commission "as a settled matter of principle."[17]

---

[15] *Bodner*, para. 15 [BDAC tab 6].
[16] Block report, para. 201, reflected in Recommendation 14, at page 71 [BDAC tab 9].
[17] Notice issued by the Judicial Compensation and Benefits Commission on December 8, 2011 [BDAC tab 10].

26. Of note, the Government submitted that this Notice was inconsistent with the Commission's mandate, the principles of natural justice and its right to be heard.[18] However, following submissions on the appropriateness of relying on recommendations of a prior commission, the Levitt Report decided that "in arriving at its recommendations, it is entitled to take into account recommendations made by a previous commission, in the absence of a demonstrated change, where consensus has emerged around a particular issue during a previous commission inquiry."[19] It issued a formal recommendation to the same effect.[20]

27. The Rémillard Commission adopted a similar approach:

> We approached matters decided by previous Commissions and Special Advisors in light of the evidence and arguments made before us. We adopted a common sense approach: careful consideration has been given to the reasoning of previous Commissions as well as to the evidence brought before us. **Valid reasons were required – such as a change in current circumstances or additional new evidence – to depart from the conclusions of a previous Commission.**[21]

28. In its more recent submissions to this latest Commission, the Government accepted that the Commission should follow this "common sense approach",[22] which the Judiciary supported.[23] This Commission itself also acceded to this approach:

> [W]e have tried to follow the common sense approach applied by the Rémillard Commission by giving careful consideration to the reasoning of previous Commissions as well as to the evidence before us. If valid reasons exist to change an approach, be it a change in circumstances, additional new evidence or developments to date, we took them into consideration in our deliberations before arriving at

[18] Response to Notice by the Government (December 12, 2011) [BDAC tab 11].
[19] Levitt Report, para. 111 [BDAC tab 12].
[20] Levitt Report, p. 40, Recommendation 10: "Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus should be taken into account by the Commission, and reflected in the submissions of the parties." [BDAC tab 12].
[21] Rémillard Report, para. 26 [BDAC tab 13].
[22] Submissions of the Government of Canada (March 29, 2021), para. 12 [BDAC tab 14]; Turcotte Report, para. 195 [BDAC tab 15].
[23] Turcotte Report, para. 194 [BDAC tab 15]; referring to Transcript of the May 10, 2021 Public Hearings of the Turcotte Commission at 13: 24-25, 14: 1-4.

> our recommendations. We believe that we have brought a fair and objective approach to any competing considerations.[24]

29. Thus, all participants in this process had a shared understanding that the Commission would only depart from the conclusions of a previous Commission for "valid reasons" such as a change in circumstances or new evidence. This shared understanding reflected the approach of the three previous Commissions, as well as the current Commission.

b. The Conclusions of Previous Commissions on PAI Data

30. The collection of PAI data is an issue on which the parties traditionally have had opposing views, and hence it has been the subject of extensive evidence and debate before two previous Commissions – Block and Rémillard – both of which concluded that this type of data was of minimal relevance.

i. The Block Commission (2008)

31. The Block Commission had the benefit of extensive evidence and submissions on the usefulness of PAI data before reaching its conclusion that the data was of little use in determining the adequacy of judicial salaries.[25]

32. Before the Block Commission, the Government actually submitted a PAI study, with data from the CRA about the pre-appointment income of judges between 1995 and 2007. The data collected by CRA, which, notably, could not be verified for privacy reasons, indicated that 62 % of appointees who had been self-employed lawyers received an increase in income upon their appointment.[26] The Judiciary had serious concerns about the reliability of this conclusion and the underlying data, but its expert was refused access to the raw data for privacy reasons.[27]

33. The Judiciary also objected to the PAI study on procedural bases, noting that "the Government ought to have disclosed to the judiciary that it would be seeking to

---

[24] Turcotte Report, para. 25 [BDAC tab 15].
[25] Block Report, paras. 81-91 [BDAC tab 9].
[26] Block Report, para. 85 [BDAC tab 9]; *Report on the Pre-Appointment Earnings of Judges for the Department of Justice Canada* (2008) [BDAC tab 16].
[27] Supplementary Reply Submission of the Association and Council (February 12, 2008), paras. 19-39 [BDAC tab 17].

collect this data for use before the Commission, *so as to give the judiciary an opportunity to comment on the proposed data collection and the methodology applied by the CRA."*[28]

34. In addition, the Judiciary provided the Commission with an expert report from Navigant (encompassing 67 pages including appendixes) analyzing the data provided by the CRA. The Navigant Report concluded that it was "impossible to conclude" that the data was "valid or reliable" – in fact, there were "enough methodological problems in the PAI data as to render it unreliable".[29] The Navigant Report also concluded that, assuming the data was valid, its relevance was "very low" to determine an adequate level of judicial compensation to attract outstanding candidates.[30]

35. Considering both the PAI study and the critiques set out in the responsive expert opinion, the Judiciary filed a full brief on the sole question of PAI data,[31] raising several concerns regarding the appropriateness of the data, and its lack of relevance and reliability.[32] Regarding the relevance of the data, the Judiciary noted that the PAI study was not prospective in nature: it revealed "what individuals earned before appointment, not the future earning prospects that they would take into account in deciding whether to accept a judicial appointment."[33] The issue was debated at length during the oral hearings in front of the Block Commission.[34]

---

[28] Block Report, para. 88 (emphasis added) [BDAC tab 9].
[29] Report on the Canada Revenue Agency's pre-appointment income data (February 12, 2008), paras. 28-29 [BDAC tab 18]. The Navigant report highlighted that the CRA had used an inappropriate time period to calculate the pre-appointment income**,** that the pre-appointment income of some judges was suspiciously low and that the variance of PAI was very large**.**
[30] *Id*., para. 24.
[31] Supplementary Reply Submission of the Association and Council [BDAC tab 17].
[32] See the February 13 2023, letter: "The Association and Council took great exception to the Government's PAI study. They explained that (i) they were not properly informed of the Government's intention to conduct this study, (ii) they were not consulted on the methodology to be used, (iii) the data collected by the Government, while aggregated, concerned sitting judges who had not provided their consent, and, (iv) in any event, the data was not relevant to the Commission's mandate."
[33] Block Report, para. 88 [BDAC tab 9].
[34] Transcript of the March 3, 2008 Public Hearings of the Block Commission, pages 62-74 (Submissions from the Judiciary), pages 118-126 (Submissions from the Government on the "due process" issue), pages 126-132 (submissions from the Government relying on the PAI study), pages 166-170 (Counsel for the Government addressing the methodological issues raised by the Judiciary's expert report), pages 181-187 (reply from the Judiciary on the PAI study) [BDAC tab 19].

36. With the benefit of actual data, expert reports, and full submissions on the PAI issue, the Block Commission concluded:

> We are […] not in a position to judge whether the information obtained is accurate. In any case, the information provided to us only served to confirm that some appointees earn less prior to appointment and some earn more.
>
> We do not believe that a snapshot of appointees' salaries prior to appointment is particularly useful in helping to determine the adequacy of judicial salaries. Such a study does not tell us whether judicial salaries deter outstanding candidates who are in the higher income brackets of private practice from applying for judicial appointment.[35]
>
> [Emphasis added.]

37. Moreover, the Block Report strongly urged that should the Government seek to adduce such information in the future, prior consultation occur so as to collect information that "both parties agree is reliable and useful".[36]

ii. The Rémillard Commission (2016)

38. None of the parties raised the issue of PAI data or sought recommendations on the subject in front of the Levitt Commission (2012). However, the relevance of PAI data to the Commission's mandate was raised again by the Government before the Rémillard Commission, which reached the same conclusion as the Block Commission.

39. This time, the Government brought a motion at a preliminary stage asking the Commission to undertake a study on the PAI of sitting judges, along with 14 pages of submissions and multiple appendixes setting out the purported relevance and probative value of the data, along with a proposed process to obtain such data.[37]

---

[35] Block Report, paras 89-90 [BDAC tab 9].
[36] Block Report, para. 91: "Should similar information be sought in the future, we urge the Government and the Association and Council to consult on the design and execution of such studies to ensure that future commissions are provided with information that both parties agree is reliable and useful." [BDAC tab 9].
[37] Submissions of the Government of Canada on the Proposal for a Pre-Appointment Income Study (January 19, 2016) [BDAC tab 20].

40. The Judiciary was given the opportunity to file a 13-page response on this sole question, and raised several concerns, including that (i) the information sought was not relevant, since it would not say anything about lawyers who have not applied, yet would be outstanding candidates, (ii) the proposed PAI study was self-serving, and (iii) the proposed study would generate incomplete data.[38] The Judiciary noted that should the Commission undertake a PAI study, the Judiciary would need to have an expert "review, analyze and possibly file an expert report on this subject" and be given the opportunity to make submissions to the Commission "on the data generated and the expert evidence filed".[39]

41. The Rémillard Commission dismissed the Government's motion on the grounds that the question was premature and that the benefits of the study had not been established considering the absence of "a fully developed set of submissions and a record".[40]

42. In its main submissions to the Rémillard Commission, the Government renewed its request for a PAI study. The Judiciary filed expert evidence concluding that the PAI study would not produce reliable or needed data to assist the Commission with its mandate.[41] The issue was again fully debated during the oral hearings. [42]

43. With the benefit of expert evidence and full submissions on the subject of PAI data, the Rémillard Commission reached conclusions on both the substantive and procedural issues raised by the parties. It concluded once again that (i) simply collecting information about compensation levels of appointees prior to their appointment was not useful; and (ii) prior to any formal recommendation being issued with respect to future studies, the parties should consult and agree on the approach:

---

[38] Response of the Association and the Council to the proposal by the Government for a Pre-Appointment Income Study (January 29, 2016) [BDAC tab 21].
[39] *Id*., para. 16.
[40] Ruling Respecting Preliminary Issues: Pre-Appointment Income Study and Representational Costs of Prothonotaries (18 February 2016) [BDAC tab 22].
[41] Association and Council's Reply Submission (March 29, 2016), Appendix B, at page 5 (page 40 of the complete submissions) [BDAC tab 23].
[42] Transcript from the public hearings of the Rémillard Commission, April 28, 2016, pp. 119-121; pp. 169-173 [BDAC tab 24].

> 229. The pre-appointment income of those accepting an appointment does not tell us much about why other attractive candidates do not put their names forward and whether this is connected to a significant compensation reduction were they to accept a judicial appointment.
>
> 230. We agree with the Block Commission that a targeted survey of individuals who are at the higher end of the earning scale, and who could be objectively identified as outstanding potential candidates for judicial appointments, should be the focus of such a study. Linking that information with an analysis of whether the number of high-earning appointees is increasing or decreasing over time would be useful.
>
> 231. The Government and the Association and Council should consult on the design and execution of those types of studies to ensure that future Commissions receive useful information derived in a manner agreed upon by the parties.
>
> 232. Given the need for consultation and agreement on such an approach, we will not make a formal recommendation at this time.[43]
>
> [Emphasis added.]

III. Impact of the Conclusions of Previous Commissions and the Requirements of Procedural Fairness on Recommendation 8(5)(c)

44. The Judiciary's surprise and objection to Recommendation 8(5)(c), as well its approach of first engaging with the Government at the November 23, 2022 meeting before returning to this Commission, are not only genuine but well-founded, given: (i) the conclusions of the Block and Rémillard Commissions, (ii) the established doctrine and practice that future Commissions will not depart from the conclusions of a previous Commission absent valid reasons and (iii) that the Government did not seek to reopen the issue of PAI data before this Commission.

45. Without notice that the Commission was considering making a recommendation on PAI data, the Judiciary was not afforded the opportunity to provide the Commission with the full context and history surrounding this issue[44] and the

[43] Rémillard Report [BDAC tab 13].

[44] The only submissions made on this point are found in the Appendix to the Joint Submission of the CSCJA and CJC (March 29, 2021), which summarizes the history of the Triennial and Quadrennial Commission

Commission was not "fully informed before deliberating and making its recommendations".[45] In addition, the Commission did not provide any reasons or context for Recommendation 8(5)(c), and so the Judiciary is left in the dark as to the reasons – valid or not – the Commission may have relied upon for departing from the conclusions of previous Commissions. The Judiciary does not even know whether the Commission was aware that it was departing form the conclusions of previous Commissions, and that it was doing so in respect of a highly controversial issue.

46. Moreover, without any prior proposal or consultation with respect to the type of study to be conducted (as urged by both the Block and Rémillard Commissions), the Judiciary is unable to assess and adduce evidence regarding the reliability and usefulness of any such study and to make submissions to assist the Commission in determining whether and how such a study should be conducted.

47. For all the above reasons, the Judiciary respectfully submits that implementation of Recommendation 8(5)(c) should be deferred until such time as the parties have consulted and agreed on an approach to PAI data that is in keeping with the conclusions of the Block and Rémillard Commissions. Absent agreement, if the Government wishes to raise the issue of PAI data before this Commission or a future Commission, the Government should make a full and transparent proposal setting forth:

    1. the type of data that will be collected;
    2. how the consent of appointees will be obtained prior to collecting their PAI data;
    3. how the data will be collected so as to both protect appointees' privacy and ensure the data can be reliably tested;
    4. the use the Government intends to make of the data; and

processes and refers to the conclusions of the Block Commission on the lack of usefulness of PAI data and the Judiciary's concerns for "individual privacy, the unreliability of the data and its lack of relevance" (p. 83) [BDAC tab 25].

[45] *PEI Reference*, para. 173 [BDAC tab 5].

5. the reasons advanced for seeking to depart from the conclusions of previous Commissions as regards the relevance and usefulness of PAI data;

the whole so as to give the Judiciary – and the Commission – a proper opportunity to review the proposal, potentially with the assistance of experts, as has been done before previous Commissions.

D ORDER SOUGHT

48. The Association and the Council respectfully request that this Commission defer Recommendation 8(5)(c) in accordance with paragraph [47], above.

The whole respectfully submitted on behalf of the
Canadian Superior Courts Judges Association and
the Canadian Judicial Council

Montreal, April 6, 2023

Pierre Bienvenu, Ad.E.
Audrey Boctor
Étienne Morin-Levesque

IMK LLP / s.e.n.c.r.l.

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

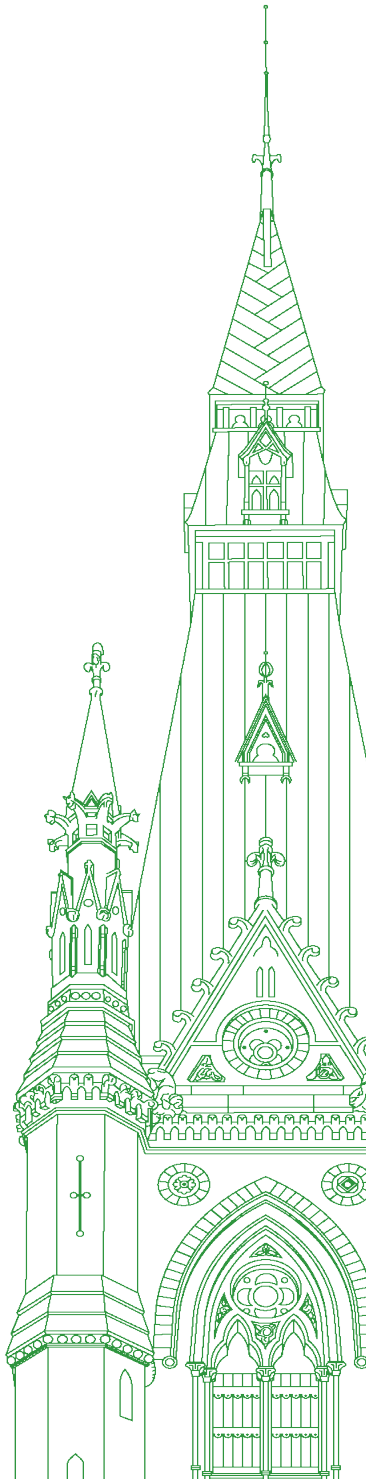
44th PARLIAMENT, 1st SESSION

Standing Committee on Justice and Human Rights

EVIDENCE

NUMBER 099

Thursday, March 21, 2024



Chair: Ms. Lena Metlege Diab

Standing Committee on Justice and Human Rights

Thursday, March 21, 2024

● (0820)

[*English*]

The Chair (Ms. Lena Metlege Diab (Halifax West, Lib.)): Good morning.

I call the meeting to order.

Welcome to meeting number 99 of the House of Commons Standing Committee on Justice and Human Rights.

Pursuant to the order adopted by the House on February 15, the committee is meeting in public to study the subject matter of the supplementary estimates, 2023-24, under the Department of Justice.

Today's meeting is taking place in a hybrid format. Members are attending in person in the room and remotely using the Zoom application.

Witnesses are all attending in person today. The members attending by video conference have been sound-tested and are aware of our procedure, including interpretation, so I won't go through that lengthy explanation this morning.

I want to inform the members that we're studying the subject matter of the supplementary estimates for the first hour. There will be no votes on the items.

I want to welcome today the Honourable Arif Virani, Minister of Justice and solicitor general of Canada.

It's not solicitor general. Solicitor general was back in the 1980s. The reason I know that is that I was in high school and I participated in the first model Parliament. I was nominated or elected—I don't know if it was a nomination or an election—as the solicitor general. After that, they deleted solicitor general from the books.

Welcome Attorney General.

Mr. Rhéal Éloi Fortin (Rivière-du-Nord, BQ): Was Mr. Virani already a member of Parliament at that time?

The Chair: I'm not sure he was even born.

Also, with Minister Virani, we have officials assisting us today.

Thank you for being here.

[*Translation*]

We have with us Shalene Curtis-Micallef, Deputy Minister and Deputy Attorney General of Canada; Michael Sousa, Senior Assistant Deputy Minister, Policy Sector; Bill Kroll, Chief Financial Officer and Assistant Deputy Minister, Management Sector; and Elizabeth Hendy, Director General, Programs Branch, Policy Sector.

Welcome to you all.

[*English*]

Thank you all for being with us today.

We will do the normal round of questioning and I will call witnesses.

Before we start, I want to say to the minister and his department that the letter was received from Nova Scotia Legal Aid thanking us for the support of a project for supporting racialized inmates incarcerated in federal and provincial correctional institutions in Nova Scotia. I want to put that on record.

Minister, you're ready to make a statement first. Please proceed.

[*Translation*]

Hon. Arif Virani (Minister of Justice and Attorney General of Canada): Thank you, Chair, and members of the Committee.

Thank you for inviting me to join you today.

I would like to begin by acknowledging that we are meeting on the traditional unceded territory of the Algonquin Anishinaabe Nation.

As I am sure you have seen, a few weeks ago, I introduced Bill C-63, the Online Harms Act. I want to both explain the vital importance of the Online Harms Act and dispel misunderstandings about what it does and doesn't do.

The premise of this legislation is simple: we all expect to be safe in our homes, neighbourhoods and communities. We should be able to expect the same kind of security in our online communities. We need to address the online harms that threaten us, and especially our children, every day.

Let me start by talking about our children.

[*English*]

There are currently no safety standards mandated for the online platforms that kids use every day. In contrast, my children's LEGO in our basement is subject to rigorous safety standards and testing before my two boys get their hands on it. I know that these days my children spend much more time online than playing with their LEGO. The most dangerous toys in my home right now and in every Canadian home are the screens our children are on. Social media is everywhere. It brings unchecked dangers and horrific content. This, frankly, terrifies me. We need to make the Internet safe for our young people around the country.

As parents, one of the first things we teach all of our kids is how to cross the road. We tell them to wait for the green light. We tell them to look in both directions. We trust our children, but we also have faith in the rules of the road and that drivers will respect the rules of the road. We trust that cars will stop at a red light and obey the speed limit. Safety depends on a basic network of trust. This is exactly what we are desperately lacking in the digital world. The proposed online harms act would establish rules of the road for platforms so that we can teach our kids to be safe online, with the knowledge that platforms are also doing their part.

● (0825)

[*Translation*]

Now, let's talk about hate crimes.

The total number of police-reported hate crimes in Canada has reached its highest level on record, nearly doubling the rate recorded in 2019.

[*English*]

Police across the country are calling the increase “staggering”. Toronto Police Chief Myron Demkiw said this week that hate crime calls in Toronto have increased by 93% since last October. Communities and law enforcement have been calling on governments to act.

Bill C-63 creates a new stand-alone hate crime offence to make sure that hate crimes are properly prosecuted and identified. Under our current legal system, hate motivation for a crime is only considered as an afterthought at the sentencing stage; it is not part of the offence-laying itself. The threshold for criminal hatred is high. Comments that offend, humiliate or insult do not hit the standard of hatred. They are what we call awful but lawful. The definition of hate that we are embedding in the Criminal Code comes straight from the Supreme Court of Canada in the Keegstra and Whatcott decisions. We did not make up the definition of hatred that we are proposing.

It has been disappointing, though not surprising, to see the wildly inaccurate assertions made by some commentators about how sentencing for this new hate crime provision would work. I have heard some claim that, under this provision, someone who commits an offence under the National Parks Act would now be subject to a life sentence. That is simply false.

In Canada, judges impose sentences following sentencing ranges established through past decisions. Judges are required by law—and every member of this committee who is a lawyer will know this—to impose sentences that are proportionate to the offence committed. In other words, the punishment must always fit the crime. If judges impose sentences that are unfit, we have appeal courts that can overturn those sentences.

You may be asking, “Well, why not specify that, Minister? Why put a maximum sentence of life in the new hate crime offence-laying provision?”

Let me explain.

First, it's important to remember that a maximum sentence is not an average sentence; it's an absolute ceiling.

Second, the new hate crime offence captures any existing offence if it was hate-motivated. That can run the gamut from a hate-motivated theft all the way to a hate-motivated attempted murder. The sentencing range entrenched in Bill C-63 was designed to mirror the existing sentencing options for all of these potential underlying offences, from the most minor to the most serious offences on the books, such as attempted murder, which can attract, right now, a life sentence.

[*Translation*]

This does not mean that minor offences will suddenly receive extremely harsh sentences. This would violate all the legal principles that sentencing judges are required to follow. Hate-motivated murder will result in a life sentence. A minor infraction will certainly not result in it.

Another criticism I have heard is that this bill could stifle freedom of expression. This is simply not true. On the contrary, this bill strengthens freedom of expression. There are people in Canada who cannot speak out because they legitimately fear for their safety. When they speak out, they are mistreated and subjected to truly despicable threats, intimidation and harassment.

[*English*]

This is carefully balanced. We consulted. We looked abroad.

We do not automatically take down material within 24 hours except for child sexual abuse material or revenge pornography. We do not touch private communications. We do not affect individual websites that do not host user-generated content.

● (0830)

[*Translation*]

This bill protects children and gives everyone the tools they need to protect themselves online. We do not tolerate hate speech in the public square. Nor must we tolerate hate speech online.

We have seen the consequences of unchecked online hate and child sexual exploitation. Ask the families of the six people killed at the Quebec City mosque by someone who was radicalized online.

[*English*]

Ask the young boy orphaned by the horrific attack on four members of the Afzaal family in London, Ontario. Ask the parents of young people right across this country who have taken their own lives after being sextorted by online predators.

Finally, let me set the record straight on the peace bond provision in Bill C-63. Peace bonds are not house arrests. Peace bonds are not punishments. Peace bonds are well-established tools used to impose individually tailored conditions on someone when there is credible evidence to show that they may hurt someone or commit a crime. The proposed peace bond here would operate very similarly to existing peace bonds.

As an example, if someone posts online about their plan to deface or attack a synagogue to intimidate the Jewish community, members of the synagogue could take this information to the police and the court. They could seek to have a peace bond imposed after obtaining consent from the provincial attorney general. Decades of case law tell us that conditions must be reasonable and linked to the specific threat. Here conditions imposed on the person could include staying 100 metres away from that synagogue for a period of 12 months. If the person breached that simple condition, they could be arrested. If they abided by the conditions, they would face no consequences.

I ask you this: Why should members of that synagogue, when facing a credible threat of being targeted by a hate-motivated crime, have to wait to be attacked or to have a swastika graffitied on the front door before we act to help them? If we can prevent some attacks from happening, isn't that much better? Peace bonds are not perfect, but we believe they can be a valuable tool to keep people safe. In the face of rising hate crime, our government believes that doing nothing in an instance like this would be irresponsible.

I think that's what explains both CIJA's and the special envoy on anti-Semitism's support of Bill C-63.

[*Translation*]

As always, I am open to good faith suggestions to improve this legislation. My goal is to get it right. I look forward to debating the Online Harms Act in the House of Commons and following the committee's process as it reaches that stage. I am convinced that we all have the same goal here: we need to create a safe online world, especially for the most vulnerable members of our society—our children.

[*English*]

Thank you for your time.

I'm happy to take your questions.

The Chair: Thank you.

[*Translation*]

We will now begin the first round.

Mr. Van Popta, you have the floor for six minutes.

[*English*]

Mr. Tako Van Popta (Langley—Aldergrove, CPC): Thank you, Madam Chair.

Thank you, Mr. Attorney General and all of the rest of the witnesses, for being with us here today.

Mr. Attorney General, you're the top lawyer in the land. It's good to have you here at the justice committee.

Canada is a rule-of-law nation. We function well only if citizens of the nation have confidence in the administration of justice. That's your job. This is true for the criminal justice system, as it is for the civil justice system.

That's why it's so shocking to hear from a credible organization like the B.C. branch of the Canadian Bar Association, in a letter from four years ago that was addressed to your predecessor, Mr. Lametti, the following:

> Our Supreme Court of British Columbia is presently 7 judges below complement. As a result, parties are regularly arriving at court for trials and hearings [and they're] being sent away because of a lack of judges to hear the cases. [The] parties have...spent substantial time and money preparing for court appearances, and witnesses have also been inconvenienced.

Then it goes on to talk about the financial and emotional costs.

There's an example from a lawyer. You'll appreciate this, of course, being a lawyer yourself. It was, “I have had this problem [of delays] five times I can remember in the last 18 months. [...] It happened twice in Cranbrook [Supreme Court] resulting in the client being unable to enforce a restrictive covenant” before it expired. It's difficult enough to enforce a restrictive covenant, but this person never even had an opportunity to try, so they feel that justice has been denied.

My question to you, Mr. Attorney General, is why is justice being denied to people in my home province of British Columbia?

● (0835)

Hon. Arif Virani: I would say to you that I am acutely aware of the need to fulfill judicial vacancies. I would note for the record that in seven months in office I have appointed 74 judges thus far, and there are more to come in the immediate days to follow.

I think it's important, for comparison purposes, to reflect on the record of the previous government, which we replaced in 2015. The average number of appointments annually by that government was 65. By that metric, I'm working twice as fast as the previous government.

It's important to understand how delays occur in the criminal justice system and the civil justice system, but also who is responsible for the delays. The administration of justice in this country is, in the main, the purview of the provinces, and delays are also caused by a lack of courts and a lack of court staffing across provinces in this country.

You mentioned “confidence in the administration of justice”. I share your concern. It's entrenched in our charter, and it's a fundamental part of what I do. What I've seen fit to do is ensure that our JACs—our judicial appointments committees—have quorum and that they are able to do the work they are required to do in terms of nominating judges, such that they present recommendations to me.

Alternatively, what I have seen in provincial levels of government in terms of their own judicial appointments processes is stacking judicial appointments committees with staffers of the governing party. That relates to my province, not yours, but I think that actually undermines confidence in the administration of justice, because it injects partisanship in the appointments process. That's not what we need. We have ensured a non-partisan process that is robust and that helps us establish judges of the highest quality to represent the diversity of the country. I'll continue to appoint people of that nature.

Mr. Tako Van Popta: Thanks for that answer.

You've said that you are appointing a record number of judges. Fair enough—I don't argue with that—but the chief justice of Canada, Richard Wagner, talked about the government's inertia regarding vacancies and the lack of satisfactory explanations for these delays.

This is what he says: “The slowness of appointments is all the more difficult to understand since most judicial vacancies are predictable.”

Now, you've said that you're appointing more judges than the Conservatives ever did, but of course, sir, the circumstances are quite different than they were a decade ago, when the Conservatives were the governing party. You have the reality of a demographic of a large number of aging baby boomers, so it is your job to fill those vacancies. It is your job to stand up to the challenge of the day. My question is whether your government is up to those challenges.

Hon. Arif Virani: In terms of the number of judges we have appointed since 2015, it's over 700. Last year, David Lametti and I appointed 100 judges in total. That's never been done in Canadian history. As I said to you, I've appointed 74 in seven months. That is a faster pace than has ever been seen and twice as fast as the previous government.

Is there an issue with respect to appointing judges and the speed at which it is taking place? This is a top priority for me and has been since I took over in this job. In terms of structural changes I've done, I have convened all of the heads of the judicial appointment committees. I have written to them about the need for urgency in terms of making suggestions. I have worked with my deputy and other officials in government to facilitate the speed with which security clearances are obtained. I've made structural changes such that the JACs now sit for three years and their assessments are valid for three years. Every time I tour anywhere in this country, I talk about the need for people to apply: people of the highest quality who represent the diversity of this country.

Other aspects that relate to the need for judges are informed by the courts themselves. The courts tell me that we need a specific expertise, a family law lawyer, a person who has expertise in insolvency matters.... Sometimes, provinces that don't have significant francophone populations still require bilingual jurists, because of the need to address francophone litigants. We are always attentive to the needs of the court, we remain so and we are working very closely with those chief judges to meet the needs of their courts quickly.

The Chair: Thank you very much.

Mr. Mendicino, you have six minutes.

Hon. Marco Mendicino (Eglinton—Lawrence, Lib.): Thanks very much, Madam Chair.

Good morning, Minister.

Thank you to you and your officials for your introductory remarks with respect to this important piece of legislation. I think we're all united in wanting to see a thorough debate about this given the social harms that are at play, in particular with regard to vulnerable Canadians, young Canadians, women and others.

I really want to zero in on the part of the bill that deals with a digital safety commission because, on my first reading of this proposed legislation, the powers that would be imbued within this new commission are extensive. Again, on my first review of this legislation, it would make certain content inaccessible. It would create new investigative powers. It would create a forum in which there could be hearings that could be closed to the public given certain sensitivities that may be in play, as well as privacy considerations. The commission would have the power to create regulations and codes of conduct and also levy quite significant penalties.

Given that, would you agree, Minister, that the chair of this commission will have quite a significant authority in those areas?

● (0840)

Hon. Arif Virani: This is a big step forward for Canada. We thought really long and hard about how to structure it. We looked at different examples around the world, including the e-safety commissioner in Australia, but we also thought very hard about the confidence that I think Canadians need to have in this new officer, given the powers they will wield.

That's why you'll find in the bill what is a very pronounced declaration that we will say the confidence of Canadians will be ensured by having a vote cast in the House of Commons and the Senate in Canada to support the implementation and appointment of that new digital safety commissioner. That gives Canadians, through their elected representatives and through their parliamentarians, a direct line of accountability.

I think the measures we're taking are significant, but I would also point to the fact that most people are aware of Frances Haugen, the famous Facebook whistle-blower who testified at Congress. She described this as best-in-class, world-leading legislation for ensuring the accountability we need to see of social media companies, including the significant penalties of up to 6% or, in the case of a contravention offence, 8% of global revenue.

Hon. Marco Mendicino: On the vote, are you worried that it could become the subject of partisanship? You and I have participated in many votes, and the opposition has every right to use the tools within its reach to encourage debate.

My question is whether or not, given the functions within this particular commission, including voting on the chair of that commission is potentially susceptible to making this commission political.

Hon. Arif Virani: On the issue of protecting children, empowering adults and protecting minorities who are vulnerable, I think we have to rise above partisanship. I don't mean to sound Pollyannaish.

As a case in point, among the legislation we've consulted around the world, there's one piece that's been promoted by the Conservative government of Rishi Sunak in the last 14 months. Conservative governments around the world and Liberal governments around the world are acting in this area because the need to act is severe. That's the first point.

The second point is that I believe we can co-operate. I believe that empowering all parties—from the smallest party or an independent member to the official opposition or the government—to vote on this demonstrates that we want Canadians to have confidence, and we're determined to ensure that they have confidence in such a significant office.

Hon. Marco Mendicino: It's clear you've given a lot of consideration to the model of choosing who will be the first chair of this commission once it's in effect.

Would you agree that the chair will have powers that make the role quasi-judicial? In other words, they will be similar to the role that judges play and the role of other individuals who are responsible for the administration of tribunals, which will adjudicate on the kinds of issues that are contemplated in this bill?

Hon. Arif Virani: There is no doubt that determining whether the safety plan meets the standards that are required in issuing orders and determining whether offences have occurred and issuing penalties have aspects of quasi-judicial functions.

What's also important is that, as a lawyer should, I ascertained and verified that we would also have procedural fairness at every step of the way for the parties that are involved, as well as the possibility for judicial review in a court of law after the fact. You get Facebook making a determination. That's reviewed by the new digital safety commissioner. The digital safety commissioner's decision can also then be reviewed in a court of law.

I'm steadfast in my belief that Canadians have confidence in our world-class jurors and in their ability to execute an impartial determination about the veracity and validity of those decisions. That's important for procedural fairness. It's important for confidence in the administration of justice.

Hon. Marco Mendicino: That's quite clear through your intervention.

Are there any other positions that are quasi-judicial in their nature and are subject to a vote in the way the digital service commission is being proposed in this legislation through both the House and the Senate?

Hon. Arif Virani: I would need to consult with my officials and get back to you on that. I'm not sure if my officials have the answer to that.

● (0845)

Hon. Marco Mendicino: If you can do that, Minister, it would be very much appreciated. Thank you for your answers.

I'll yield the rest of my time to the Chair.

The Chair: Thank you very much. It's much appreciated.

[*Translation*]

Mr. Fortin, you have the floor for six minutes.

Mr. Rhéal Éloi Fortin: Thank you, Chair.

Thank you for being here, Minister.

I have several questions running through my head, but I'll have to prioritize them. I wish I had more time, but I understand that's the way it has to be done.

First, I have some questions about the legal aid system for immigrants and refugees. I'm sure you understand that this issue is of great concern to the Bloc Québécois. In Quebec, the amount owed by the federal government is a problem. In fact, the Quebec government is not getting paid, yet it continues to spend on newcomers.

There's also the question of official languages. A total of $1.2 million has been earmarked for official languages and I'm interested in hearing how that money will be distributed among the provinces.

In addition, there's obviously the whole issue of systemic racism. You want to help judges impose sentences that take this into account. How is that going to work? How are we going to define systemic racism?

There's the question of cybersecurity, in courthouses, etc.

There are plenty of important issues, essential even, that I won't necessarily be able to address this morning, unfortunately. However, I will try.

There's also Bill C-63, which you told us about in your opening remarks. I'm not sure how it relates to the Supplementary Estimates (C), but it is an important question, regardless. With respect to this bill, I am curious as to why you didn't introduce the age verification process, as proposed by Senator Julie Miville-Dechêne. Her proposal seemed relatively wise to me, but there's no mention of it at all in Bill C-63.

The Bloc Québécois is in the same boat. We've proposed abolishing the two religious exceptions in the Criminal Code, which I think is essential in the current context. How is it possible that someone can still build their defence around the idea that they committed a hate crime or spread hatred because of a religious text? That is completely absurd and contrary to the values shared by all Quebeckers and, I'm certain, by the rest of Canada too.

These are all essential questions, but I'm going to focus on two important elements.

First, our committee recently passed a bill that aims to create a commission to review errors in the justice system. This is obviously something that had to be done; congratulations. I think it was high time for a major clean-up. The commission will comprise nine members. I've tabled an amendment to the effect that these nine commissioners should be bilingual. In fact, I'm a little surprised that this wasn't planned from the outset. Still, it seems a very modest goal. Nine bilingual commissioners across Canada shouldn't be too hard to achieve. However, I've run into an objection from some of my colleagues, including one of your Liberal colleagues.

I'd like to hear your thoughts on this. If we want the justice system to be bilingual, shouldn't we necessarily make an effort by asking for bilingualism among these nine commissioners? It's not as though there are 900 of them; there are nine.

Hon. Arif Virani: Thank you, Mr. Fortin.

As far as legal aid is concerned, we've moved—

Mr. Rhéal Éloi Fortin: I'm sorry to interrupt, but I think you misunderstood. I said that these were subjects I would have liked to discuss. However, I've got about three minutes left and I'd like you to answer the question I asked you about the miscarriage of justice review commission.

Hon. Arif Virani: I'd just like to mention something quickly, Mr. Fortin.

In the last fiscal year, we've already paid out over $80 million for legal aid.

Also, our dedication to official languages is clear.

Mr. Rhéal Éloi Fortin: Minister—

Hon. Arif Virani: As for how the money is being distributed, you can ask my department.

Mr. Rhéal Éloi Fortin: No. I asked just one question and it concerned the miscarriage of justice review commission, and the idea of having nine bilingual commissioners. Are you for or against it?

Hon. Arif Virani: We are definitely in favour of Bill C-40.

We were disappointed by the Conservatives' filibustering tactics during consideration of this bill, in terms of how cases or files are handled for persons who speak French. Of course, translation will still be part of this new commission's procedures. That will be helpful to complainants or people who want to request a review.

With respect to Bill S-210, I would like to point out something that is not true—

Mr. Rhéal Éloi Fortin: Mr. Minister, you're delivering a monologue.

I asked you a simple question: Do you support bilingualism for the nine members of the miscarriage of justice review commission, yes or no?

Honestly, I appreciate your work. You're an honest and serious person. I don't understand why you're evading my question this morning. If it embarrasses you, just say so and I'll move on to the next one.

● (0850)

Hon. Arif Virani: I'm an understanding person, Mr. Fortin. You raised a number of issues.

Very briefly, in terms of the situation—

Mr. Rhéal Éloi Fortin: I said I would have liked to raise them, but I did not, Minister.

Hon. Arif Virani: The point I want to make about Bill S-210 is that Bill C-63 already contains age verification mechanisms. Furthermore, we must always protect the privacy rights of Canadians. In other words—

Mr. Rhéal Éloi Fortin: We have 40 seconds left. Are you going to continue with your monologue, Minister? Please answer my question.

Hon. Arif Virani: —if we want to use an age verification mechanism—

Mr. Rhéal Éloi Fortin: Madam Chair, I'm relinquishing my turn to speak. I understand that the minister doesn't want to answer my question. I'll therefore yield my remaining 30 seconds to one of my colleagues, who may be able to get him to talk about topics we wanted to discuss this morning.

Thank you, Minister.

Thank you, Madam Chair.

Hon. Arif Virani: May I continue, Madam Chair?

Mr. Rhéal Éloi Fortin: No. I didn't ask you about that, Minister.

Hon. Arif Virani: Madam Chair, may I continue to give my answer in the 20 seconds remaining?

Mr. Rhéal Éloi Fortin: No. My turn to speak should be mine. With all due respect, I am not interested in hearing the minister's monologue this morning.

[*English*]

The Chair: Okay. Mr. Garrison, I'm sure, will let the minister continue.

Mr. Garrison, please go ahead.

Mr. Randall Garrison (Esquimalt—Saanich—Sooke, NDP): No, I won't.

I want to thank the minister for his very clear presentation on Bill C-63.

I want to add two things to this discussion. One is that the loudest voices on this bill often do not include those who are most likely to be subjected to hate crime campaigns. When it comes before this committee, I'm looking forward to a diversity of witnesses who can talk about the real-world impacts that online hate has. We've seen it again and again. It's often well organized.

I stood outside the House of Commons and defended the rights of trans kids. Within one day, I had 700 emails with the same defamatory and hateful two-word phrase used to describe me. I am a privileged person. I have a staff. I have all the resources and support I need. However, when you think about what happens to trans kids and their families when they are subjected to these online hate crimes, it has very real consequences.

I'm looking forward to us being able to hear from diverse voices and, in particular, those who are most impacted. I know this is not really a question to you at this point.

We have other important work we've been doing in this committee. I want to turn to Bill C-332, which just passed this committee and was sent back to the House. This is the bill on controlling and coercive behaviour. This committee has been dealing with this topic for more than three years. One of the things that we quite clearly said was that the passage of this bill is a tool for dealing with the epidemic of intimate partner violence, but it's not the only tool.

I guess I'm asking two things here.

What other plans does the Department of Justice have to provide the necessary and associated supports for survivors of intimate partner violence?

What plans are there to do the educational work that will be necessary?

The bill says it will be proclaimed at a time chosen by cabinet. I'm assuming there will be a plan to get ready for this. I'm interested in what's going to happen with that plan. It has unanimous support, so I don't think it's premature to be asking about this at this point.

Hon. Arif Virani: Thank you, Mr. Garrison, for your leadership on the first part of what you talked about and the courage that you continue to show as a parliamentarian, and also for your leadership and that of Laurel Collins on coercive control.

In terms of supporting victims, we are constantly and actively thinking about how to better support victims, including victims of intimate partner violence. Please take a cue from what we did in Bill C-75 and in Bill C-48 with respect to the reverse onus on bail for survivors of intimate partner violence. Issues about support and funding are always on the table.

Also, please understand that when you talk about a 24-hour takedown of things like revenge porn, you're dealing with an aspect of coercive control that exists right now. That's in Bill C-63.

You also mentioned, in your opening, hearing from voices. I think two of the most salient voices that I heard from were the two that were at the press conference with me: Jane, the mother of a child who has been sexually abused and repeatedly exploited online, and Carla Beauvais, a woman who has been intimidated and has retreated from participating in the public space.

I would also suggest taking your cues from the groups that were also there beside me. The National Council of Canadian Muslims and the Centre for Israel and Jewish Affairs have, in the last six months, not seen eye to eye on a lot of issues. On this bill, they do see eye to eye. They both support this, as do the special envoys on anti-Semitism and Islamophobia. Those are important voices to be hearing from, and that's what I will continue to do.

● (0855)

Mr. Randall Garrison: I want to continue a little bit on the question of legal aid when it comes to intimate partner violence. I know that quite often the answer is that it's really the responsibility of the provinces. What I'm looking for here is some commitment from the federal government with perhaps new pilot programs or new funding to encourage new programs in areas of intimate partner violence and support. The change in the law will mean that intimate partners will be involved in a criminal process but they will not be the defendants. Quite often there isn't legal assistance available for people who may face appearing in court in very difficult circumstances.

I'm looking for some leadership from the federal government on this, even though I recognize it's primarily a provincial responsibility.

Hon. Arif Virani: I think we both have a role to play in providing dollars. On-the-ground delivery is often administered by provinces. We've been quite strong in terms of our support for immigration and refugee legal aid and criminal legal aid. But I would reflect back on what the chair mentioned about targeted supports to Nova Scotia for racialized communities.

I strongly believe in supporting vulnerable people who are in need of legal aid assistance so, if there are proposals that are put before me about how we can address legal aid in an acute manner that helps women in the main who are dealing with intimate partner violence, I am all ears for that kind of discussion. I think those kinds of targeted supports are necessary to really fulfill the promise of ensuring that people's rights are vindicated.

Mr. Randall Garrison: Thank you, and we will follow up with you on that.

Mr. Van Popta opened with a question about confidence in the justice system in the appointment of judges. I think we all acknowledge the whole system has to do better in terms of filling judicial vacancies, and I do acknowledge your personal efforts to do that. But there's a second part to confidence in the justice system, and that is that people have confidence in the system when they see themselves represented in the system rather than just subjected to it.

I wonder if you could comment on the nature of the judicial appointments, and the progress that's being made, if it's being made, to make the judiciary reflect the face of Canada.

Hon. Arif Virani: I'm very happy to address this.

When we took office about 30% of the Conservative government's appointments had been women, and 53% of our appointments are women. When I came into office, the record of our government was about 11% racialized candidates being appointed. I have appointed 20% racialized candidates. I believe in a strong, highly intellectually competent bench, but also a bench that reflects the diversity of our country because I believe that helps ensure confidence in the administration of justice.

The Chair: Thank you very much, Minister.

Thank you, Mr. Garrison.

We will now commence with our second round.

We'll go to Mr. Moore for five minutes.

Hon. Rob Moore (Fundy Royal, CPC): Thank you, Chair.

Minister, we're here in the estimates today. You spent your entire opening remarks on a defence of Bill C-63. I recall your predecessor, Minister Lametti, when he was here. I asked him a question on the issue of MAID, when I think 25 constitutional experts said the minister's opinion on the matter was wrong. I asked the minister who was right, him or these 25 constitutional experts. And he said he was.

That kind of hubris is probably a good reason why he's not longer here and now you are, but we're starting to see that same thing on Bill C-63with yourself, when virtually everyone has come out and said this was an effort to trample down freedom of speech. Margaret Atwood described Bill C-63 as “Orwellian”. David Thomas, who was chairperson of the Canadian Human Rights Tribunal, said:

> The Liberal government's proposed Bill C-63, the online harms act, is terrible law that will unduly impose restrictions on Canadians' sacred Charter right to freedom of expression. That is what the Liberals intend. By drafting a vague law creating a draconian regime to address online “harms”, they will win their wars without firing a bullet.

There's a diverse group of people who feel that Bill C-63 is an outrageous infringement on Canadians' rights. We also see a government that will not stand up for the most vulnerable.

You had the opportunity, Minister, to introduce a bill that would have protected children, but your government, true to form, could not resist taking aim at their political opponents. This is not about hate speech, it's about speech that Liberals hate, and shutting that down.

Now Bill C-63, if it unfortunately were to pass, will too be struck down by the courts. If you were in a position to appeal it, I have no doubt you would. That brings me to my question on your government's radical agenda.

You've decided to file a number of appeals in recent court rulings. You've appealed a ruling that found the invocation of the Emergencies Act was unconstitutional. You appealed a ruling that found that the plastic bag ban and the plastic straw ban that Canadians hate so much was unconstitutional. You were quick to appeal those. But when the Supreme Court ruled the six-month minimum sentence for the crime of child luring was unconstitutional, you chose not to file an appeal.

Why is it that, when your government's radical agenda is challenged in the courts, you're quick to appeal, but when vulnerable Canadians' lives are at stake, you choose not to appeal?

● (0900)

Hon. Arif Virani: Mr. Moore, I disagree with pretty much everything you just said in terms of how you've characterized things. What I would say to you is to actually look at the constitutional record internationally.

We looked at France, Australia, Germany and England. In France, a takedown provision across all sets of content, including hatred content, was struck down as unconstitutional. That's specifically why we are not pursuing that. We have a takedown provision within 24 hours of child pornography and revenge porn. I hope we can agree on that, Liberals and Conservatives. We do not have an immediate takedown provision over other materials. That's the first point.

The second point is that you talked about the author Margaret Atwood. I have tremendous respect for Margaret Atwood. I've invited her into conversation about the nuances of this bill. She has a concern about freedom of expression. I share that concern. I'm duty-bound to uphold freedom of expression. I swore an oath to the Constitution. I'm the only cabinet minister who does. What we've done, through a careful approach, is to look at how we can calibrate the important need to keep Canadians safe and to protect liberty of expression.

If you had listened to Carla Beauvais at the press conference, you would have heard her talk about the fact that her own speech is being curtailed because she is so intimidated from participating in public discourse. We're trying to empower that public discourse.

There are safeguards in the bill that I would urge you to look at, about how Facebook makes its determinations in terms of ensuring that they respect freedom of speech, how the digital safety commissioner must ensure that non-discrimination occurs—

Hon. Rob Moore: Thank you, Minister.

Hon. Arif Virani: —and how courts would review these processes to ensure that liberty of expression is always maintained.

Hon. Rob Moore: Thank you, Minister.

Madam Chair, we'll have lots of time to debate Bill C-63 in the future. I think the verdict is coming out very quickly on that. I want to use what's left of my time to now move my motion regarding former minister David Lametti on the issue of ex-judge Delisle, where the minister ordered a new trial.

I'm moving that motion now, Madam Speaker.

The Chair: Thank you.

I recognize Mr. Maloney.

Mr. James Maloney (Etobicoke—Lakeshore, Lib.): Are you proposing to debate the motion now, Mr. Moore?

Hon. Rob Moore: Well, I'm assuming that there would be near unanimous support for it, in light of the stories coming out of Quebec right now about Minister Lametti ordering a new trial in the case of this judge who was found guilty of murder.

If it can pass by unanimous consent, or if we can have a vote on it now—

The Chair: Hold on.

Mr. Maloney, you have the floor.

Mr. James Maloney: Thank you, Madam Chair.

Given that the minister is here at the request of all parties, and with enthusiastic support from the opposition, I would move that we adjourn debate on this motion and get back to the issues at hand. We have not only the minister here; the officials are here as well. I think we should use the time we have to discuss the issues that we're here to discuss.

The Chair: Okay.

We need to take a vote on this—

[*Translation*]

Mr. Rhéal Éloi Fortin: Madam Chair, may I intervene concerning Mr. Maloney's motion to adjourn the debate?

[*English*]

The Chair: No. We vote now.

[*Translation*]

Mr. Rhéal Éloi Fortin: We're actually voting on whether we want to adjourn debate on Mr. Moore's motion to allow the minister to answer our questions about the estimates and other matters, right?

The Chair: Yes, that's right.

Mr. Rhéal Éloi Fortin: If the minister refuses to answer, can we return to Mr. Moore's motion?

The Chair: Ha, ha! No.

The first hour of the meeting, which we are spending with the minister, isn't over yet.

[*English*]

Would you like a recorded vote?

[*Translation*]

(Motion agreed to on division: Yeas 6; Nays 5)

● (0905)

The Chair: We will therefore continue with the minister.

Mrs. Brière, you have the floor for five minutes.

Mrs. Élisabeth Brière (Sherbrooke, Lib.): Thank you, Madam Chair.

Good morning, Minister. I'd like to thank you and your entire team for being with us this morning.

We are living in an increasingly divided world. Even though everyone is entitled to their own opinion, people are either for or against different issues. We are quick to put people into categories, to see them as being on one side or another and slap labels on them. In this increasingly complex world, and perhaps as my previous role taught me, I think it would help if people were more caring, attentive and open to each other.

In your opening remarks, you referred to Bill C-63, which aims to protect children online. We have been hearing a lot about this bill. I have two questions for you.

First, do you believe that the definition of “hate speech” in Bill C-63 will really make it possible to achieve the goal of protecting children online?

Second, the bill seems to apply pre-emptively, even before a person has said or done anything. I wonder if you could tell me your thoughts on that.

Hon. Arif Virani: Thank you, Mrs. Brière.

I would like to underscore one thing, since you've raised the same topic as Mr. Moore.

[*English*]

Online hatred has real-world consequences. Again, talk to the Afzaal family and to the families of the six men who were killed at the Quebec mosque. Talk to them in terms of those real-world consequences.

Second, Conservatives seem to be operating in this make-believe world where hatred isn't already regulated in Canada. We have sections 318 and 319 of the Criminal Code. Those have been upheld in Canada as reasonable limitations on speech because hatred is not protected in this country.

The proposition we are bringing forward is this: If hatred is not protected in the real world, why should it be protected in the online world? That is where we have a difference of opinion, Mr. Moore, and I think it's something that you need to address for yourselves in terms of trying to understand why groups like the NCCM and CIJA are behind this bill. It's because they want to see a curb on that very hatred.

With respect to your question, Madam Brière, of whether the hatred definition will help to protect children, absolutely it will. Again, this is not my definition. This is the definition entrenched by the Supreme Court of Canada. I didn't make it up. The Prime Minister didn't make it up. The courts have already established this definition. That's the definition that we use, and it will keep kids safe as they move into adulthood because we need to keep everyone safe. It's not just about targeting children.

I'll point out for Mr. Moore's edification that Australia moved on children alone in 2015. Nine years later, it's moved much beyond that. That's important to understand—that the whole world is moving in that direction, including Conservatives in Britain. I'm just puzzled why Conservatives here are afraid to do so.

Lastly, Madam Brière, you asked me about prevention and the notion of prevention assisting against hate. This is a very important question. We already have, in certain defined circumstances where reasonable grounds can be made, the ability to effect a thing like a peace bond to prevent harm against a woman facing domestic violence. That includes preventative restrictions on speech, prior restraint of speech.

What am I talking about? I'm talking about a man estranged from his former wife who cannot, because of a peace bond, post revenge porn about her. In certain circumstances, we allow this. We know this is significant. That's why we've injected in this legislation the safeguard of getting the local attorney general's consent. That is critical because it serves as that safeguard to ensure that this is not used in a manner that is overly restricted, and that it will be found constitutional.

Thank you.

[*Translation*]

Mrs. Élisabeth Brière: Thank you very much.

I would like to discuss a completely different topic—the appointment of judges—even though I know you answered a question along those lines earlier.

In my riding, we are still awaiting the appointment of certain judges. I'd like you to tell me what work you're going to accomplish on this matter in the coming weeks or months.

● (0910)

Hon. Arif Virani: Mrs. Brière, the work is still ongoing. I've added people to my team and I'm working closely with my deputy minister, the departments and the Privy Council. As I mentioned, I've already contacted the judicial advisory committees and sent a letter saying that this was one of my top priorities.

I'd like to point out that, in seven months, I've already appointed over 64 judges, and that other appointments will be made in the coming days. Because the matter is extremely important, I'll keep working hard on this file, with two objectives in mind. First, we have to appoint the most intelligent lawyers possible, who also have an excellent knowledge of the law. Second, we must ensure that the judiciary reflects our nation's diversity, particularly by appointing women, like you, Mrs. Brière.

Mrs. Élisabeth Brière: Thank you.

The Chair: Thank you very much, Mrs. Brière.

I now give the floor to Mr. Fortin for two and a half minutes.

Mr. Rhéal Éloi Fortin: Thank you very much, Madam Chair.

Minister, with all due respect, you didn't have time to answer my question earlier. I'll just ask it again. I'd like a quick answer, ideally yes or no, because we only have two and a half minutes.

Are you for or against a bilingualism requirement for the nine commissioners to be appointed to the miscarriage of justice review commission under Bill C-40, that this committee has just passed?

Hon. Arif Virani: I support the bill and I agree that people must be understood in the official language they use during such a process. Translation will make this possible.

Mr. Rhéal Éloi Fortin: Saying that people must be understood in their language is a rather vague statement.

My question is simple: Are you for or against these nine members being bilingual?

Hon. Arif Virani: I support the bill. I'm against the Conservatives' filibustering—

Mr. Rhéal Éloi Fortin: Why are you refusing to answer my question?

Hon. Arif Virani: I support bilingualism and the fact that people must be understood when they make a speech or appear before the commission.

Mr. Rhéal Éloi Fortin: I'm in favour of apple pie too, Minister. There's no doubt about that.

However, I think my question is simple enough. I have to admit that I was very surprised to find myself in a situation where your Conservative colleagues supported my request, which is clearly a matter of a common sense, to use an expression that's become a little tired these days. Indeed, common sense dictates that the nine commissioners should speak and understand French and English. I don't think it's unreasonable to find nine bilingual commissioners among tens of millions of Canadian citizens.

You're dancing around my question. Furthermore, one member of your party has opposed my request, as basic as it is. Everyone in Quebec agrees with this proposal, and the same is probably true for most people elsewhere in Canada.

Minister, before my time expires, I'm going to ask you my question about bilingualism within the commission one last time. Do you agree, yes or no, that the nine commissioners should speak and understand French and English?

Hon. Arif Virani: We are strongly support bilingualism. We enacted new legislation on official languages in Canada—

Mr. Rhéal Éloi Fortin: Thank you, Madam Chair. Unfortunately, the minister's sales pitch—

Hon. Arif Virani: We want people—

Mr. Rhéal Éloi Fortin: —with all due respect, doesn't interest me this morning.

Thank you.

Hon. Arif Virani: We want everyone to be properly understood by the commission.

Mr. Rhéal Éloi Fortin: My time is up, and I'd like the minister to stop there.

Thank you.

The Chair: Thank you very much, Mr. Fortin and Minister Virani.

[*English*]

Mr. Garrison, you have two and a half minutes, please.

Mr. Randall Garrison: We are eagerly awaiting the passage of the miscarriage of justice act because of its disproportionate impacts on some communities, including indigenous communities, in Canada.

What Mr. Fortin continues to ignore is that an absolute requirement of bilingualism is in place for the commission. Imposing that on all nine commissioners would mean that well-qualified people who speak a first nations language plus one of the other official languages in Canada would be excluded from appointments, if his hard and fast rule were applied.

I want to ask more generally on that question about the progress being made on the recommendations—the calls to justice—about the missing and murdered indigenous women. There are 231 calls in the areas for which you're responsible as a minister. There has been some criticism that the result has been mostly committees and very little hard action to address those concerns.

Can you speak about the progress that's being made in the area of justice?

● (0915)

Hon. Arif Virani: Thank you, Mr. Garrison, for the question highlighting a very important subject.

With respect to MMIWG, those 230-plus calls to action are being worked on, particularly the ones in our jurisdiction. We are working diligently on all aspects of it. The UNDA action plan speaks to that. I think the work we're doing with respect to intimate partner violence and reverse onus on bail also speaks to that.

On the issue of the miscarriage of justice commission, I would return to what I said when I was here. We have a situation where we've overturned about 27 cases in 20 years. The Brits have done 500 cases in the same time span. That's statistically improbable. It's not because their system is inferior to ours; it's because we're not finding the cases.

Twenty-two of those 27 cases were white men. We know that statistically there is overrepresentation of indigenous and Black persons in our justice system. We're going to find those cases and we're going to find them with a robust commission.

Mr. Randall Garrison: Once again, I want to draw attention to real-world consequences. The delays we've had in getting this up and running mean that people who are likely not guilty of anything are continuing to serve sentences, whether that's in custody or in the community. By the delays we're having with passing legislation and getting it set up, we're perpetuating injustices. I wonder if you would agree with me that this is a serious concern.

Hon. Arif Virani: I think it's an extremely serious concern. I find it quite flabbergasting that it has become a partisan matter about keeping an innocent man or woman in prison. That should never be partisan. Again, I would say to you that, if other countries are able to overcome partisanship on such a basic fundamental premise, we should be able to as well. It's unfortunate that we are not able to.

The Chair: Thank you very much.

Do you have any concluding remarks, Minister?

Hon. Arif Virani: My concluding remarks would be, with respect to Bill S-210 proposed by Senator Miville-Dechêne, that there are very legitimate questions that relate to privacy interests. We need to understand that age verification and age-appropriate design features are entrenched in Bill C-63, something that Monsieur Fortin seemed to misunderstand.

Second, the idea of uploading the age-verification measure such as one's government ID is something that has been roundly criticized, including by people like law enforcement, who'd be concerned about what that kind of privacy disclosure would do in terms of perpetuating financial crimes against Canadians.

What we need to be doing here is keeping Canadians safe by ensuring that their age-appropriate design measures have been informed by a conversation between law enforcement, government and the platforms themselves. There are examples of how to do this, and we're keen to work on those examples and to get this important bill into this committee so we can debate the best ways forward.

Thank you.

The Chair: Thank you for those concluding remarks.

As the chair, I'm especially looking forward to having that bill come before me, particularly as a previous, I guess, justice minister who dealt with it in Nova Scotia when a young girl committed suicide because of exactly what we will be dealing with here.

Thank you very much for those concluding remarks.

Thank you to the staff.

I'm going to suspend for a minute to allow you to take your leave, and then we will continue with our motion.

● (0915)

(Pause)

● (0920)

The Chair: As we're getting ready to start with the motion, I just want to let all members know that, following up on the meeting with the Norwegian standing committee on justice members, the suggestion is that we meet them the next time we meet on Monday, which is the date they wanted, Monday, April 8, from 11:45 to 1:00. We will let you know which room that is taking place in.

If that is agreeable to you, we would have to adopt a hospitality budget, which reads as follows:

> That the committee meet, in an informal meeting, with a delegation from the Committee of Justice of Norway on Monday, April 8, 2024, at 11:45 a.m.; and that the committee defray the hospitality expenses related to this meeting.

I remind you also that Ambassador Trine Jøranli Eskedal would like to invite all the committee to a reception in the Norwegian residence on Tuesday, April 9, in the evening.

Can I have somebody move the motion that I just read, if this is all acceptable to you all?

It is moved by Mr. Maloney and seconded by Mr. Van Popta.

(Motion agreed to)

The Chair: Thank you very much.

I'm now going to go to Mr. Housefather on the motion we have before us.

Mr. Anthony Housefather (Mount Royal, Lib.): Thank you so much, Madam Chair.

Thank you to my fellow committee members.

The motion I want to put forward is the one we have in front of us:

> That pursuant to Standing Order 108(2) and in view of the alarming escalation of antisemitism in Canada, the committee undertake a study on the issue of antisemitism and the additional measures that could be taken to address the valid fears that are being expressed by Canada's Jewish community.
>
> That the study include but not be limited to the issue of antisemitism on university campuses.
>
> That the study should be at least three meetings and that the committee report its findings to the House.

Madam Chair, briefly, I had a chance on Monday to deliver a speech in the House that dealt very much with this issue. The Jewish community in Canada is feeling frightened to a level I have never seen. While, anecdotally, people are taking mezuzahs off doors and are afraid to send their kids to school, the vast majority of Jewish Canadians are affected in a broader way. Those are anecdotal, small incidents. I don't think that's happening much. What is happening is people expressing their fears to me and wondering if they're safe in this country and have a future in this country, which I never in my life believed would happen in Canada.

I don't see that anywhere near as much, frankly, when I'm in the United States. Something is happening here. Anti-Semitism is happening around the world, but the perception of the community in Canada is drastically different from what I find south of the border. I think the committee needs to look into what is happening and what we can do.

I'm going to talk about two issues very briefly, which I think are the most poignant and important ones.

One of these is the demonstrations happening, and the lack of policing related to those demonstrations. People are blocking buildings, shouting things deemed to be hateful and intimidating people entering or leaving a building, and the police are not moving people back so that there's a safe line that allows for a differentiation between the people trying to enter or leave and the protesters. That's one thing. Why are Jewish buildings a target in Canada, and how is this making people feel? I would like the opportunity to hear from Jewish Canadians and Jewish organizations about how they feel and what they think we could do as federal legislators to better protect them from a public safety aspect, a justice aspect, etc.

The second issue is what's on campus. The biggest places where you find people feeling scared and intimidated are campuses. This is happening from Newfoundland to British Columbia. It's happening in my province of Quebec. It's happening in Ontario. It's happening everywhere. Some colleagues and I wrote a letter, in December, to the presidents of the biggest universities in Canada. We have received responses from all of them, which we can table. I think we need to hear from Universities Canada and the presidents of universities on what they're doing to protect Jewish students, and we need to hear from Jewish students regarding what they're experiencing on campus. Then we can opine on what solutions we might be able to recommend to the universities and the minister.

That being said, the most important thing is this: Symbolically, the Jewish community has failed to see leadership at the federal, provincial and municipal levels—from literally everyone. I think, if they see that our committee is interested in this issue, that there is a forum for them and that we are taking their concerns seriously and listening to them, it would be a morale boost because they will think that at least someone cares and there's hope.

I'm hoping that my colleagues will agree to do this study. Of course, I'm happy to listen to amendments and yield the floor.

Thank you, Madam Chair.

● (0925)

The Chair: Thank you, Mr. Housefather.

Mr. Mendicino.

Hon. Marco Mendicino: Madam Chair, thank you.

I obviously wholeheartedly support my colleague Mr. Housefather's motion. While he is true in all aspects of his remarks, I would add one important caveat, in that there has been a tremendous demonstration of leadership on the part of Anthony Housefather on behalf of his community in the face of some of the most vile hate that I have ever seen, certainly in my lifetime, in a way that I hope that his community will take some hope and inspiration from.

I would just add that in Toronto, my hometown, the police chief there, Chief Demkiw, just reported 48 hours ago that Toronto has seen a 93% increase in the number of reported hate crimes since October 7, 2023, and that compounds the ongoing rising tide of anti-Semitism, which I think parliamentarians, regardless of partisan stripe, have an obligation to deal head-on with.

I would also say that the anecdotes that Mr. Housefather referred to are the same stories that I hear from the community that I represent in Eglinton—Lawrence. The fear, the profound sense of anxiety and, most of all, the deep sense of abandonment that the Jewish community is feeling not only in Canada but around the world in the face of this hate should be a red flag and should sound the alarm for all of us.

There are many things that we need to do in order to push back against this, but I think that having a study that examines carefully some of the issues that Mr. Housefather has already highlighted is one way in which I believe this committee can contribute, and if we don't take this opportunity, I think it will see us take more steps backwards as a democracy.

I certainly hope that all members of this committee will see the value in putting some energy into this report so that we can come together to stem this trend and to reverse it and to continue to see Jewish Canadians and all Canadians live in a society that is free from hate.

Thank you.

The Chair: Next is Ms. Gladu, please.

Ms. Marilyn Gladu (Sarnia—Lambton, CPC): Thank you, Chair.

I just want to say that I also am extremely concerned about the rise of anti-Semitism in the country. We just had the justice minister here telling us that we already have hate laws, hate speech laws, but people are calling “death to Jews” across the country and not a single charge has been filed.

I'm quite alarmed, when I see the protests, the violence and the targeting of Jewish businesses, that the reaction from the police is not the same as it is in.... We've just seen a fishers' protest going on. The police are there making sure that the protest remains peaceful and are bringing in their horses, but here in Ottawa when we're having pro-Palestinian demonstrations and they're calling out things that are anti-Semitic and kicking in cars and breaking off mirrors, the police are standing by and doing nothing. What is the point of having federal law if you don't have the enforcement of law?

I think that this has come to a crisis point, and I'm very supportive of doing a study to figure out what exactly we can do to use the existing laws and enforce them, and what else we can add to that, because Jews don't feel safe in this country. I'm alarmed at the demise of what was Canada: a free nation where people could feel safe and worship. I think people don't feel safe, and we need to address it.

● (0930)

[*Translation*]

The Chair: Thank you, Ms. Gladu.

[*English*]

Next is Mr. Van Popta.

Mr. Tako Van Popta: Thank you, Madam Chair.

Thank you to Mr. Housefather for your courage in standing up for the Jewish community and putting forward this motion. I think it's a very important study, and I support that we undertake that.

In my home province of British Columbia, at my university, the University of British Columbia, there was a referendum or a threat of one recently to terminate the lease that Hillel House has had on campus for many years. It's a very significant presence in the university. It is a haven for the Jewish student body there. Thankfully, the referendum didn't go ahead, with the good leadership of the student association; but just the fact that the referendum was even suggested, I think, has been very disturbing for not only people in my home province of British Columbia but throughout the country.

The motion also would have included BDS sanctions—boycott, divestment and sanctions—against Israel and anything to do with Israel, and that's just the newest form of anti-Semitism. I find it all very disturbing.

I'm very supportive of having this study to better understand what is going on here in Canada with anti-Semitism, which is something I never thought I would see in my lifetime, and also to demonstrate to the Jewish community that we stand with them and that they are an important part of Canadian culture.

Thank you.

The Chair: Thank you, Mr. Van Popta.

Mr. Moore.

Hon. Rob Moore: Thank you, Madam Chair. We've had this motion before us for quite some time, and I think it should be a concern for all Canadians and all parliamentarians.

I'll speak briefly on, as Mr. Housefather was mentioning, the lawlessness around some of these protests and the fear that that's instilling in many Canadians. I can't imagine the fear that it would instill in Canada's Jewish community. Every Canadian, every person, should feel safe in Canada, and there's no place in Canada or anywhere in the world for anti-Semitism.

I think this motion is timely and important. I certainly support Mr. Housefather's motion.

The Chair: Thank you very much, Mr. Moore.

[*Translation*]

Mr. Fortin, you have the floor.

Mr. Rhéal Éloi Fortin: Thank you, Madam Chair.

I'd like to begin by thanking Mr. Housefather for moving his motion. I think it expresses a concern that many of us share, more or less everywhere throughout Quebec and Canada.

Each and every person should be able to live out their religious beliefs in peace and freedom. I don't think that religious or moral beliefs, apostolic or otherwise, should divide people. Whatever the religion, it should be a set of values that brings people together, not divides them.

I have a great deal of respect, fondness and sympathy for members of the Jewish community, given what they're going through at the moment. I don't want to stray too far from the debate, but Quebec has a state secularism law. I've had discussions with many friends of the Jewish faith, as well as some of the Muslim faith. There are extremists in all faiths, but I would say that 99% of people agree that the state should be secular and that everyone should be able to practice their religion in peace, respect and solidarity.

I don't have anything to add to the debate, but I would like to say that I agree with what Mr. Housefather and Mr. Mendicino have said. These things are important.

You can count on the support of the Bloc Québécois on these issues.

● (0935)

The Chair: Thank you, Mr. Fortin.

[*English*]

Mr. Garrison.

Mr. Randall Garrison: Thank you, Madam Chair. I, too, would like to commend Mr. Housefather for his tireless work against anti-Semitism and bringing the attention of this committee and all of Parliament to the rise of anti-Semitism. I have seen the evidence of this in my own constituency and again on campus at two educational institutions that I've been long associated with in my community. Jewish students have approached me saying they no longer feel safe just being on campus, not in doing anything on campus, and I have an extreme level of concern about this. I am completely supportive of this study.

However, I take very seriously what Mr. Housefather said about leadership, and a necessity for providing leadership, so I am going to propose an amendment to his motion, not to diminish in any way the study of anti-Semitism, but for our committee to provide the same leadership with the parallel rise of Islamophobia in this country.

On my proposed amendment, I have a text in both official languages. I will read the technical...and we have a version as it would read. I think my staff will give it to the clerk at this point.

The Chair: Please proceed.

Mr. Randall Garrison: The proposal would expand the number of sessions from three to six, so that we can devote an equal amount of time to the rise of Islamophobia in Canada and provide leadership on opposing all forms of religious-based hatred in this country.

The technical amendment has five parts. It would add “and Islamophobia” after each mention of anti-Semitism on line two. It would add “and” before “additional measures” on line three. It would replace the text on line four with “Canada's Jewish and Muslim communities.” It would add “and Islamophobia” after “anti-semitism” on line five. Finally, it would replace the number of meetings from “three” to “six” on line seven.

We have the final version as it would read. I think that's easier for people to deal with. It's really only adding the parallel study of Islamophobia to the study of anti-Semitism.

With that, I move my amendment, Madam Chair.

The Chair: We're going to suspend the meeting for two or three minutes. That seems to be the best move, while everyone's reading it and taking a look at it.

Thank you.

● (0940)

_____(Pause)_____

● (0945)

The Chair: I call the meeting back to order.

We're now speaking on the amendment.

Mr. Housefather, I will commence with you.

Mr. Anthony Housefather: Thank you, Madam Chair.

I appreciate Mr. Garrison's amendment. Of course, Islamophobia is also a very important form of hate, but they are two very distinct and separate forms of hate, so I want to make sure that it is clear that the meetings that we're going to have on one versus the other and the report that we're going to do are going to be clear that we're doing something on anti-Semitism and something on Islamophobia and that they're not two tropes that are together. Too many times, people feel that one is equal to the other, and when an act of anti-Semitism occurs, they feel necessary to mention Islamophobia in the same breath and vice versa. In the same way, anti-Black racism is not the same as anti-gay racism. They are all different tropes, so my proposal would be to subamend Mr. Garrison's amendment to add the following words.

It would now read, in line two, “Undertake a study on the issue of anti-Semitism and”, and add the words, “a study on the issue of Islamophobia”. I'm adding the words “a study on the issue of” after the end of line two.

In line five at the beginning of the second paragraph, we would replace the word “study”, the third word, with “independent studies”. Then, on line seven at the beginning of the third paragraph, instead of saying “that the study”, it should say “that each study”. Then, instead of “that it should be at least six meetings”, it would be “that each study should be at least two meetings”. I've heard from colleagues that six meetings means that we're not studying anything else for a prolonged period of time, so instead of three meetings each, it would be two meetings each: two meetings on anti-Semitism and two meetings on Islamophobia.

Then, “that the committee report its findings on both studies”. So, after the word “findings”, it would be “on both studies to the House”.

Thank you, Madam Chair and Mr. Clerk.

● (0950)

[*Translation*]

Mr. Fortin, I apologize for not having drafted this in French, but I can give you the—

Mr. Rhéal Éloi Fortin: No, that's fine.

Mr. Anthony Housefather: Okay, thank you.

The Chair: Yes, we understand.

[*English*]

Mr. Rhéal Éloi Fortin: I calculate it as anti-francophonia.

Some hon. members: Oh, oh!

The Chair: Does anyone on the committee need to have it reread, or did you follow that?

[*Translation*]

Mr. Rhéal Éloi Fortin: It might be a good idea to reread the text, please.

Could you read it again, Mr. Clerk, to make sure we're all working from the same version?

The Chair: Okay.

Could you do that, Mr. Clerk?

The Clerk of the Committee (Mr. Jean-François Lafleur): Yes, of course, Mr. Fortin.

Thank you, Madam Chair.

I'll read it first in English, because that's the original language in which the amendment was drafted. I'll then try to read it in French.

Mr. Rhéal Éloi Fortin: It's Canada's official language, I think.

The Clerk: The subamendment would therefore apply at the end of the second line.

[*English*]

At the end of line two, if I start after the comma, “the committee undertake a study on the issue of antisemitism and”, and we introduce the subamendment here, “a study on the issue of Islamophobia”. Then we continue the text.

The second amendment is on line five. It says, “that the independent studies include but not be limited”. That's the second part of the subamendment. The rest of the second paragraph reads as is.

The third part of the subamendment—

[*Translation*]

Mr. Rhéal Éloi Fortin: I just want to make sure I understand the fifth line correctly.

[*English*]

It's “That the independent study include”, correct?

[*Translation*]

The Clerk: It simply adds the word “independent” before “study”, and changes “study” to the plural. That's what this does.

Mr. Rhéal Éloi Fortin: Okay, but it appears a little further on in the same sentence.

[*English*]

Is it “include but not be limited to the issue of antisemitism and independent study on Islamophobia”?

[*Translation*]

Are there any changes to the second time it's mentioned?

The Clerk: No. Now I no longer have it in front of me, but—

Mr. Rhéal Éloi Fortin: Okay. I thought that's where it was.

The Clerk: While we're at it, Mr. Housefather, when you say “independent studies”, you're talking about the fact that these two studies will be independent, not other theoretical studies, right?

● (0955)

Mr. Anthony Housefather: I'm talking about the fact that we're going to have two meetings on anti-Semitism and two completely separate meetings on Islamophobia. We'll prepare a report on anti-Semitism and a separate report on Islamophobia, and then table them in the House for a response.

The Clerk: So you're talking about the two studies that will be undertaken by the committee, and not about existing theoretical studies.

Mr. Anthony Housefather: Yes, I'm talking about the two studies mentioned here. This is just to clarify that they will be independent of one another.

The Clerk: Okay, perfect.

The Chair: I understand. Now we've written it down. I think everyone understands, right?

[*English*]

Mr. Maloney.

Mr. James Maloney: I would only add that maybe we should include the word “consecutive” so that they go one after the other. That way you don't complete one and then interrupt it with something else. They should go one after the other.

The Chair: There would be two meetings and two meetings.

Mr. James Maloney: There would be four consecutive meetings, yes.

The Chair: Yes, that's the intent.

Mr. James Maloney: It's the intent, but it doesn't say that as amended.

The Chair: Okay, “each study should be at least two meetings, for a total of four consecutive meetings, and that the committee report its findings on both studies to the House.” We're adding “for a total of four consecutive meetings”.

I'm receiving nods from everybody; everybody seems to be in agreement.

Ms. Gladu, you have your hand up.

Ms. Marilyn Gladu: Yes, Madam Chair.

I recognize that Islamophobia is certainly continuing to be an issue in the country, but I would like to just point out that there was a significant study on it after M-103. The Senate also completed a study. The Canadian government did a summit with many recommendations.

At the same time, I don't want to exclude other religions. We know there have been 80 Christian churches torched, pastors locked up without bail. The Hindu community has reached out to me to let me understand that they are receiving hate speech and death threats.

So, while all religions appear to be under attack, I don't want to dilute Mr. Housefather's original motion that talks about the crisis we're facing right now with the rise of anti-Semitism. You know, it's rising by as much as 700% in some places. There are violent crimes; people are unsafe.

I'll defer to the will of the committee, but I do think that has to be the priority.

The Chair: Thank you, Ms. Gladu.

Mr. Moore.

Hon. Rob Moore: Thank you, Madam Chair.

We have a number of studies that have been proposed by members around the table, one of which—and I think it's a very important one—is the study proposed by Mr. Housefather dealing with anti-Semitism.

I'm prepared to support his study without any amendment. I think the original motion is one that was brought to us some time ago. It's kind of in the queue with other studies that have been proposed. If other people want to have other studies on other issues, they're welcome to bring those forward for consideration by the committee.

In light of Mr. Housefather's willingness to get consensus around the table, I am happy to also support his amended version. I'll note that it gives us one less day to study anti-Semitism, but I think it's a goodwill effort for us to not monopolize all the remaining time left on studies when there are others that are in the queue that are also important.

I do want to make it clear that I'm happy to support Mr. Housefather's original motion that we study anti-Semitism, but I'm also willing to support this amended and subamended motion as currently written.

The Chair: Thank you, Mr. Moore.

Mr. Maloney, go ahead, please.

Mr. James Maloney: Thank you, Madam Chair.

I want to pick up on something Mr. Mendicino said earlier.

I want to add my voice and thank Mr. Housefather for being a strong, vocal leader on the issue.

An hon. member: Hear, hear!

Mr. James Maloney: I would add that I would also like to thank Mr. Mendicino for the same reason, because he's been right by Mr. Housefather's side, along with all of us on this issue.

I fully support the original motion proposed by Mr. Housefather. I also agree with Mr. Garrison's amendment. I think both issues need to be addressed by this committee. I think the proposed amendment—and I want to thank Mr. Housefather for his willingness to compromise on the number of meetings—is an elegant solution to address the concerns raised by all. The “four consecutive meetings” component eliminates any concern people have with respect to not being able to address both issues.

Thank you, Madam Chair.

● (1000)

The Chair: Thank you very much, Mr. Maloney.

I will just alert you all that it's 10:01. We want to conclude with this, but there are going to be three votes on this one. We have a bit of a steering committee scheduled, as well.

Mr. Fast, please go ahead.

Hon. Ed Fast (Abbotsford, CPC): Madam Chair, as a non-permanent member of this committee, I want to add my voice in support of the motion Mr. Housefather brought forward and the very legitimate concerns he's raised. I want to commend him for his passionate, appropriate speech in the House of Commons this week, where he articulated the fears and threats that are part of Jewish life in Canada today. This is not a Canada that I grew up with. It shouldn't be the Canada we have going forward. I hope this study will allow us to identify alternatives to address this very pernicious problem within our society.

I will also be speaking at an event in support of the Jewish community this Sunday in Vancouver. I want to assure Mr. Housefather that I will be sharing his concerns at that event.

I support the elegant solution Mr. Maloney suggested, which has been presented to this committee: Conduct, effectively, two studies—one on Islamophobia and one on anti-Semitism. However, I also want to articulate my strong support for the original motion Mr. Housefather brought forward.

Thank you.

The Chair: Thank you very much to all committee members. I very much appreciate the comments.

I'm now going to ask that we vote on the subamendment by Mr. Housefather.

Mr. James Maloney: Can we read it, so we understand perfectly what it says now?

The Chair: Yes. The subamendment is to say, “for a total of four consecutive meetings”.

Mr. Anthony Housefather: There's much more to it than that.

The Chair: How about I read the whole thing?

> That pursuant to Standing Order 108(2) and in view of the alarming escalation of antisemitism and Islamophobia in Canada, the committee undertake a study on the issue of antisemitism and a study on the issue of Islamophobia, and the additional measures that could be taken to address the valid fears that are being expressed by Canada's Jewish and Muslim communities.
>
> That the independent studies include but not be limited to the issue of anti-semitism and Islamophobia on university campuses;
>
> That each study should be at least two meetings for a total of four consecutive meetings; that the committee report its findings on both studies to the House; and that the committee request a government response to these reports.

Mr. Anthony Housefather: Mr. Garrison is suggesting we pass it on division.

(Subamendment agreed to on division)

The Chair: Now I'm going to ask for a vote on the amendment as amended.

Does it pass on division?

● (1005)

Mr. Anthony Housefather: I think everybody is in favour of that.

(Amendment as amended agreed to [*See Minutes of Proceedings*])

The Chair: It's unanimous.

Now we're on the main motion as amended.

(Motion as amended agreed to [*See Minutes of Proceedings*])

The Chair: That is passed unanimously.

Thank you very much.

I do have to say the following. We request that witness names be sent as soon as possible, up to and including Thursday, April 4. This will allow enough time for the clerk in the weeks that we're not here.

Mr. Randall Garrison: I'm sorry, Madam Chair. This is predetermined by the steering committee—

The Chair: I guess now we'll deal with scheduling.

Okay, that's fine. I assumed that we would be scheduling it as soon as we return, but I suppose we could deal with that at the steering committee level.

Having no other committee business, I will now adjourn and wish everybody a safe rest of today, a safe tomorrow and a safe time when you all go back to your constituencies with your loved ones.

Happy Palm Sunday.

Happy Naw-Rúz.

Happy so many things that are going on and Happy Easter and everything else.

I would ask the members who are on the steering committee to please stay. We will have a 10-minute in camera meeting.

Thank you very much.

Department of Justice Canada
Ministère de la Justice Canada

REPORT AND RECOMMENDATIONS OF COMMISSION ON JUDGES' SALARIES AND BENEFITS

1983

Submitted to the Minister of Justice of Canada

Canada

Cat. No. J42-2/1983

ISBN 0-662-52720-8

Pursuant to Section 19.3 of the *Judges Act*, I am now tabling the Report and Recommendations of the Commission on Judges' Salaries and Benefits, appointed on April 6, 1983 to inquire into the adequacy of salaries and other amounts payable under the *Act* and into the adequacy of judges' benefits generally. In accordance with Standing Order 46(4) of the House of Commons, this document shall be deemed to be referred to the Standing Committee on Justice and Legal Affairs.

The Honourable Mark MacGuigan
Minister of Justice and
Attorney General of Canada

REPORT AND RECOMMENDATIONS OF COMMISSION ON JUDGES' SALARIES AND BENEFITS

TABLE OF CONTENTS

REPORT AND RECOMMENDATIONS OF COMMISSION ON JUDGES' SALARIES AND BENEFITS

MEMBERS: The Honourable Otto Lang, P.C., Q.C.,
Chairman
Mr. E. Sydney Jackson
Mr. Paul E. Martin
Mrs. M.L. Basta, Secretary

TERMS OF REFERENCE

On April 6, 1983, the Minister of Justice, the Honourable Mark MacGuigan, appointed the members of the first triennial Commission on Judges' Salaries and Benefits, as required by a 1981 amendment to the *Judges Act*. The terms of reference of the Commission are as follows:

> The Commission shall, pursuant to Section 19.3 of the *Judges Act* inquire into the adequacy of the salaries and other amounts payable under the *Act* and into the adequacy of judges' benefits generally.
>
> Without restricting the generality of the foregoing, the Commission shall inquire into and report upon the following matters:
>
> 1. The adequacy of allowances paid under the *Act*, and their relationship to judges' salaries and benefits.
> 2. The adequacy of allowances paid under the *Act*, and more particularly
>   a) allowances for incidental expenditures and non-accountable allowances paid pursuant to Section 20 of the *Act*;
>   b) removal allowances paid pursuant to Section 21.1 of the *Act*; and
>   c) conference allowances paid pursuant to Section 22 of the *Act*.
> 3. Sabbatical or educational leaves of absence for judges.
> 4. The granting of annuities pursuant to Subsection 23(1) of the *Act*.
> 5. The adequacy of Section 20.3 of the *Act* pertaining to the election of a chief justice or chief judge to cease to perform the duties of a chief justice or chief judge as the case may be.
>
> The Commission shall report to the Minister of Justice upon the results of the inquiry in accordance with Subsection 19.3(2) of the *Act*.

Pursuant to the statutory conditions set out in Section 19.3, the Commission is required to report to the Minister of Justice within six months of its appointment. The Minister is thereafter required to place its report before Parliament within ten sitting days.

STATEMENT OF PRINCIPLES

The Commission believes the position of judge in our society and in our political framework to be unique and vital. A free and independent judiciary is the single greatest guarantee of our constitutional rights and liberties. Under the Canadian Constitution, the judiciary exercises its authority independently of the executive and the legislature. The *Constitution Act* itself evidences this intent, by fixing the power to appoint the judges of the superior, district and county courts of the provinces upon the Governor General, and by imposing the duty upon Parliament to fix and provide their salaries, pensions and allowances.

The place of the judiciary has increased in importance in the light of recent constitutional developments in Canada, particularly the enactment of a Charter of Rights and Freedoms. The judiciary also plays a greater role in shaping our lives because of the growing complexity of our social and economic relationships. The independence of the judiciary is part and parcel of their unique position. For this reason, the salaries and benefits of judges must continue to be dealt with by Parliament and only by Parliament, in a manner both as to amount and as to debate which respects judicial independence.

Parliament should fix judicial salaries and benefits in a manner and in an amount which ensures financial security for a judge and his family. The level of salary and benefits should also be such that the most able members of the practising bar may be induced to accept appointment to the bench without being expected to accept a major reduction in their standard of living. The office of judge has attached to it security, public service, the power to contribute to legal development and prestige. That prestige might not persist in full, however, should a marked difference in the level of remuneration of lawyers and judges continue, particularly if this were perceived to be a major factor in leading many able counsel to refuse appointment to the bench.

It must be remembered too, that the office of judge has constraints upon it in regard to many social and economic activities which the rest of us take for granted. The Dorfman Committee, reporting to the Minister of Justice in November 1978, said in this context:

> He must devote himself exclusively to his judicial duties. He may not, as may others, supplement his income by engaging directly or indirectly in any form of business activity or speculative venture. He is required to exercise self-imposed restraints in the market place, and must avoid all manner of extra-judicial private or public disputes or involvements. He is deprived of the right to vote. He must refrain from being a litigant. He may not participate in any tax shelter or other method of lessening the burden of taxation that is available to other members of the public. He should not be a landlord nor a lessor of goods. He may express no opinion concerning, nor endeavour to influence, the taxation or spending policies of any level of government. Even after retirement he will be precluded, for ethical reasons, from returning to practice as a barrister.

Clearly the office carries serious limitations upon it. It is against this background that the Commission has considered judges' salaries and benefits.

SUBMISSIONS TO THE COMMISSION

The Commission would here like to acknowledge the representations made to it by interested individuals and the formal submissions made by the Joint Committee on Judicial Benefits of the Conference of Chief Justices and the Canadian Judges Conference (supported by the Canadian Institute for the Administration of Justice), the Special Committee of the Canadian Bar Association, and Mr. Justice T.D. Marshall on behalf of the northern judges. The Commission also had available to it the reports of the Dorfman Committee in 1978, and of the de Grandpré Committee in 1981, both of which were valuable aids to the work of this Commission.

JUDICIAL SALARIES

The Commission accepts the principle that the salaries of the judiciary should be adequate to preserve the role, dignity and quality of Canada's judges, and to enable them to provide their families with a standard of living commensurate with their position in Canadian society. We wish to emphasize that the issue of judicial salaries should not be addressed as though judges were subject to the conditions of service of federal government employees. It is our view that the judiciary are public servants in the highest sense, and that their salaries, pensions and allowances should reflect the esteem in which they must be held.

We have considered a number of factors and bases for comparison in attempting to formulate what we feel is a proper level of remuneration for the judiciary. In so doing, we have had the assistance of extensive briefs and representations by the Joint Committee on Judicial Benefits of the Conference of Chief Justices and the Canadian Judges Conference, and by the Special Committee of the Canadian Bar Association. We have also examined current levels of compensation for senior public servants and members of Parliament, and the data available on the income levels of the Canadian legal profession. For further comparison, we have examined income data for the judiciary in the United States and in the United Kingdom, as it relates to the income of senior public servants and legal practitioners in both nations.

After examining this material, we have concluded that the most appropriate basis for comparison is with the salaries or incomes of members of the legal profession of comparable experience, and with the salaries of senior deputy ministers.

It is the Commission's view that the salary of a superior court judge should bear a reasonably close relationship to that of an above average lawyer, because it is the above average lawyer who should be attracted to the bench. This does not mean that we consider that judges should be totally recompensed for their notional loss of income from legal practice. While judges are precluded from obtaining the financial benefits and perquisites which they might expect as senior practitioners, they also avoid the problems, financial and managerial, involved in the operation of a modern law practice. What we do advocate is establishing a salary figure which is not totally disproportionate with that which senior members of the bar may reasonably expect to derive from their legal practices, while at the same time recognizing that the satisfaction to be derived from public service is both an incentive to judicial office and an incalculable part of judicial compensation.

The submission of the Canadian Bar Association also reminded us of the words of the Honourable R.B. Bennett, K.C. (as he then was) in a 1927 article in the Canadian Bar Review:

> "...it is important that judges should be appointed to the Bench who are first of all men of experience and learning, men of character and men of worth, because the administration of

justice has rightly been said once to be almost an attribute of the Godhead itself. Now if men enjoying large incomes have no ambition to go upon the Bench, it follows that you have to fall back upon the second line, and instead of appointing the best men to the judiciary, you have recourse to men of indifferent qualifications in their professions..."

We chose, therefore, to look at the third quartile income range of lawyers in Canada, as found in the *Economic Survey of Canadian Law Firms 1982*, commissioned by the Canadian Bar Association. We did not find this source fully satisfactory, since the response rate was only 6.32% and very few of the large firms participated, but it did appear clear that lawyers in the age group from 40 to 65, the prime years for judicial service, could also be expected to be earning their highest income in these years. Further, it appeared from statistics supplied by the Canadian Bar Association that lawyers' incomes in recent years have risen more rapidly than the Industrial Composite Index. Nor do these comparisons take into account the more stringent tax implications for a salaried person, as compared to the taxation of one who is self-employed.

Following is a table submitted to us by the Canadian Bar Association showing the 1981 income of lawyers by year of admission to the bar:

TABLE II

1981 Income of Lawyers in Private Practice by Year Admitted To the Bar

PARTNERS AND PROPRIETORS

Year admitted	No. positions	Average	First quartile	Median	Third quartile	No. firms
1935-39	14	$55,396	$28,983	$53,327	$82,875	14
1940-44	14	90,616	35,103	62,500	136,350	14
1945-49	61	92,720	50,000	69,800	134,500	50
1950-54	107	100,578	48,552	80,000	154,300	84
1955-59	153	99,744	51,596	84,500	142,700	116
1960-64	176	98,026	52,250	89,400	126,750	126
1965-69	298	88,687	58,300	79,000	120,036	176
1970	100	77,549	50,000	72,228	103,523	79
1971	108	71,990	42,297	65,700	95,269	94
1972	130	68,489	41,382	58,975	80,325	111
1973	113	59,963	35,350	59,000	78,900	93
1974	129	58,312	37,060	52,000	73,800	103
1975	147	53,722	35,000	48,684	68,000	122
1976	126	50,409	29,824	42,000	62,750	107
1977	99	43,855	25,000	40,000	55,000	83
1978	100	35,770	22,000	34,128	44,550	88
1979	88	29,444	15,000	29,000	40,000	73
1980	36	27,748	15,000	28,000	35,375	34
1981	14	25,205	14,000	20,000	35,000	14

Source: 1982 Altman & Weil Survey, at page 61

The minimum requirement for consideration for appointment to the bench is ten years of practice. According to this study, the average income of a lawyer in the third quartile, the standard we have adopted for purposes of comparison, was $95,269 for a practitioner who had just completed ten years at the bar. Judges are generally appointed from lawyers having 10 to 22 years at the bar. If reference is made to the more senior end of the scale in this quartile, reported income in 1981 was considerably higher. A superior court judge, in that same year, received a salary of $74,900. On the other hand, we are aware that the value of a judicial annuity must be weighed and that it constitutes a significant portion of total judicial compensation (See Appendix A). Nonetheless, the prospect of an annuity, which may or may not be realized for the reasons discussed later in this report, is not sufficient to compensate for salary deficiencies in the present. In any event, we know that the level of compensation has increasingly stood in the way of some top quality lawyers agreeing to become judges.

This view, and our opinion of the importance of the third quartile, would lead us to make recommendations for greater increases than we think can be made at one time. We are led to a more modest approach by the inadequacy of the statistical base (although we have received informal data on income levels which, if anything, would indicate that those set out in the Canadian Bar Association table err on the side of modesty), by the possibility that we may be looking at an income peak in 1981, in view of the economic recession and its impact upon at least some firms, and by the substantial value of judges' annuities.

In contrast, the salary situation up to 1975, particularly as brought up to date by Parliament in that year, was not considered a significant impediment to appointment. In its appearance before the Commission, the Joint Committee supported the conclusion that workable salary relationships had been achieved in that year. While we do not wish to relate judges' salaries to any in the public service on principle, it is worth noting that the historic relationship between the salaries of superior court judges and deputy ministers was restored in 1975, and has since deteriorated from the point of view of the judiciary: see Table 3, Brief of the Joint Committee, reproduced on page 6. The formula we propose to adopt would restore that relationship.

In the course of our inquiry, our attention was drawn to recent increases in the salary of the judiciary in the United Kingdom, which have provided British judges with substantial increments. In the U.K., the salaries of the higher judiciary are determined by the Lord Chancellor with the consent of the Minister for the Civil Service, pursuant to section 9 of the *Administration of Justice Act 1973*. Following is a comparison of the salaries of the judiciary with those of senior grades of the British civil service:

	Current Salary	Salary Aug.1/83	Salary Jan.1/84
Secretary of the Cabinet Permanent Secretary to Treasury	£42,000	45,000	48,000
Permanent Secretary	37,750	40,500	42,750
Second Permanent Secretary	35,000	37,500	39,500
Deputy Secretary	30,250	32,500	34,250
Under Secretary	25,000	26,750	27,750
Lord Chief Justice	52,500	56,500	60,000
Master of the Rolls Lord of Appeal	48,250	51,750	55,000
Vice Chancellor Lord Justice of Appeal	45,500	49,000	52,000
High Court Judge	42,500	45,500	48,000

We note that our recommendations, which would bring the salary of a superior court judge to approximately that of a DM3, are consistent with the salary scale adopted in the United Kingdom, by which it has been determined that a High Court Judge should be paid the same as the Secretary to the Cabinet.

We accept the 1975 level as satisfactory for that year and recommend that a new base be established in 1985 by applying the Industrial Composite Index to the 1975 figure for the years 1976-83, capped by a 6% and 5% increase for 1983 and 1984, respectively. The statutory increase provided by Section 19.2 of the *Judges Act* can then apply for 1986, at which time a further review will be undertaken.

TABLE III

Comparison of salaries of senior deputy ministers (DM3) and Superior Court judges (1969-1982)

		Annual Salary		
	Judges	Deputy Ministers (DM3's)		
Year		($Min)	($Mid)	($Max)
1967	$28,000		$28,750*	
1968	28,000		**	
1969	28,000		**	
1970	28,000	$40,000	$42,000	$44,000
1971	38,000	42,000	44,000	46,000
1972	38,000	45,000	45,000	50,000
1973	38,000	47,500	47,500	55,000
1974	45,500	50,500	51,250	60,500
1975	53,000	50,500	51,250	60,500***
1976	53,000	54,000	60,000	66,000
1977	55,000	56,400	64,100	70,800
1978	57,000	58,800	66,500	73,200
1979	57,000	63,100	70,900	78,700
1980	70,000	68,900	77,300	85,700
1981	74,900	84,300	91,750	99,200
1982	80,100	89,350	97,250	105,150

(Pay Research Bureau: Rates of Pay in the Public Service of Canada)

* In 1967, a Deputy Minister's salary was fixed without reference to a range

** No figures are available for 1968 and 1969

*** Deputy Ministers' salaries were frozen at the 1974 rate for 1975, due to Wage and Price Controls

The effect of this recommendation upon judicial salaries will be as follows:

Salaries	1975	1983[1]	1983[2]	1985[3]
Superior Court	$53,000	$84,900	$107,300	$119,000[4]
Chief Justice	58,000	92,100	117,430	131,000
Supreme Court of Canada	63,000	98,100	127,550	142,380
Chief Justice	68,000	106,600	137,670	153,680

[1] Actual
[2] Adjusted by ICI to 1982 plus 6%
[3] Based on an increase of 126% for the period 1975 to 1985, i.e., Industrial Composite with 6% and 5% maxima for 1983 and 1984
[4] As opposed to approximately $95,000, if legislation remained unchanged

We note that the merger of county and district courts with the superior courts of the provinces will shortly result in only three provinces — Ontario, British Columbia and Nova Scotia — retaining courts at this level. We also note that the jurisdiction of such county courts as remain is coming increasingly closer to that of the superior courts.

We recommend that the salaries of judges of the county and district courts should be calculated by reference to the same formula as has been applied with respect to the salaries of the judges of the superior courts, but that an absolute differential between the county and district courts and the superior courts be fixed at $5,000, such differential to be retained until review by the next triennial commission. Accordingly, a Chief Judge would receive the salary of a Chief Justice of a superior court less $5,000, while the other judges would receive $5,000 less than puisne judges.

At present, the judges of the Federal Court of Canada receive a taxable allowance of $2,000 to offset provincial subventions paid to members of the superior courts in four provinces. We believe that our recommendations represent a full salary proposal for federally-appointed judges. We also believe that it is undesirable for such judges to receive any extra compensation from the provinces. Federally-appointed judges should be entirely federally-paid. To deal with both points, **we recommend that the present taxable allowance paid to judges of the Federal Court be eliminated. We also recommend that the four provinces which pay similar allowances to federally-appointed judges be asked to discontinue the practice.**

We do this, even though we recognize that provincial payments might partly offset the high cost of living in some jurisdictions. We believe these variations from one part of the country to another do create difficulties. This is particularly obvious in the large urban centres, where there is the additional factor that judicial salaries cannot seriously compete with the incomes of lawyers in the major firms. On the whole, however, we have concluded that we should not recommend regional variations in judicial salaries, so as to avoid the creation of different classes within the judiciary. We also see a practical problem in determining the criteria which might justify such variations. We nonetheless recognize the difficulty of setting average salaries appropriate to all areas of the country, and **recommend that the next triennial commission address this issue further.**

THE TAXATION OF NEW JUDGES

In the course of its discussions with the Joint Committee on Judicial Benefits of the Conference of Chief Justices and the Canadian Judges Conference, and with the Special Committee of the Canadian Bar Association, the Commission was apprised of the disincentives to accepting judicial appointment brought about by our present system of taxation. If the newly-appointed judge is not aware of the tax implications of winding up his practice on accepting judicial office, he may find himself faced with a crippling tax bill in his first year as judge which may largely deplete the investment of his professional lifetime. If a practitioner approached to accept a judicial appointment is aware of the tax implications, he may determine that he cannot afford to become a judge. Either situation is undesirable. **We accordingly adopt the recommendation of the Dorfman Committee that alleviation of the current burden of taxation imposed upon a judge in his first year in office be effected by a specific amendment to the *Judges Act*.**

The income for tax purposes of a newly-appointed judge may include proceeds of the disposition of his practice, his 1971 receivable reserve at the end of the the preceeding year and the income from more than one year if the practice in which he was engaged had a fiscal year other than the calendar year. The first of these may include some capital gain, and all of these impacts of appointment occur in the nature of things rather peremptorily without much scope for tax planning.

In some cases the taxable income does not represent current cash flow and hence presents tax payment problems. We therefore believe a simple approach giving some tax relief to the newly appointed judge is desirable.

We recommend that, if possible by amending the *Judges Act*, a maximum tax rate for provincial and federal income taxes together of about 25% be imposed on the following types of income:

—1971 account receivable reserve

—unbilled work in progress calculated at the date of appointment

—depreciation recapture on disposition of business assets

—deferred practice income, i.e., practice income earned prior to January 1 of the year of appointment, but not taxed in a preceding year (determined on a proration basis)

Thus a new judge appointed in a year whose partnership year-end was January 31, would be entitled to the special rate on 11/12 of his practice income for the year ended January 31.

We believe the best way to achieve this nearly 25% rate would be to deem one-half of the forms of taxable income of the sort referred to above to be non-taxable, so as to bring into play Section 81(1) of the *Income Tax Act*. We recommend that Quebec be asked to make a similar provision in relation to its taxation of these forms of income.

We also believe that it would be useful for those considering appointment to have available to them a description of the tax and other implications of accepting an appointment. The nature of the judicial appointment process does not give the candidate much time for consideration of these matters, and hence **we recommend that the Minister have prepared and available for candidates such an information bulletin.**

JUDICIAL ANNUITIES

At present, Section 23 of the *Judges Act* authorizes the conferral of an annuity equal to two-thirds of the salary annexed to the office of a judge at the time of his resignation, removal or ceasing to hold office, upon any judge who

(a) has continued in office for fifteen years and has attained the age of 65, if he resigns his office;

(b) has continued in office for fifteen years but has not attained the age of 65, if his resignation is conducive to the better administration of justice or is in the national interest;

(c) resigns or is removed as a result of becoming afflicted with a permanent disability preventing him from executing his office; or

(d) has reached the age for mandatory retirement, if he has held office for at least ten years.

If a judge reaches mandatory retirement age without fulfilling the last condition, he is entitled to an annuity pro-rated on the basis of the number of years he has held office.

Section 29.1 of the *Judges Act*, enacted in 1975, initiated the imposition of contributions by the judiciary towards their annuities, which to that point had been wholly non-contributory. Although the measure did not receive Royal Assent until December 20, 1975, it was made retroactive to require all judges appointed from the date the bill was first introduced in Parliament (February 17, 1975) henceforth to contribute at the rate of 6% of salary towards their own annuities and at the rate of a further 1½% towards annuities for spouses and dependents. Judges appointed before February 16, 1975 were required to contribute only at the rate of 1½%.

The Commission views judges' annuities as an important part of their total compensation. We do not consider the issue of contributions to annuities as in any way affecting the independence of the judiciary. As has been the conclusion of previous advisory committees, however, we consider a long-standing differential between judges doing the same work to be inappropriate, and as leading to the creation of two classes of judges. **We therefore believe that all judges should contribute at a rate of 1½%, the rate now applicable to judges appointed prior to February 16, 1975.**

With the Dorfman and de Grandpré Committees, **we feel that those judges who have contributed at the higher rate since 1975 should be reimbursed the excess of their contributions over 1½% with interest at National Revenue tax refund rates compounded annually. We further recommend that the non-tax paid part of such contributions should be transferrable to a Registered Retirement Savings Plan** in order to minimize the negative tax effect of the lump sum payment, without otherwise affecting the rights a judge may have with regard to an R.R.S.P. in the year of refund.

We indicated earlier that the value of a judicial annuity was to be taken into consideration in any examination of total compensation for the judiciary. The table in Appendix A shows that in some cases the value of an annuity is very high, a factor which might have led us to suggest salaries at a level lower than we have recommended. However, it is our view that the emphasis in any consideration of judicial salaries and benefits should be on current salary, rather than on prospective benefits. For many judges, particularly those in the large urban centres and in areas with a high cost of living, cash flow is an increasing problem. We therefore feel that salaries should be significantly increased, while less emphasis should be placed upon the value of an annuity. We believe that some of the very high values of annuity should be modified accordingly, and that **15 years is a better minimum period than ten for entitlement to a full annuity. Similarly, we would recommend that the annuity of those who retire with fewer than 15 years of service should be based on the proportion of their years of service to the 15 year minimum.**

We have been made aware of at least one recent case in which a judge, after holding office for over ten years but less than fifteen, resigned his office and was thereby disentitled from receiving any benefit apart from the return of his contributions. We feel it is unfair that an individual who has performed dedicated service to the public in the execution of his office should not be entitled to some pension benefit with respect to his years of service.

We accordingly recommend that a judge with no final qualification for retirement should be entitled to a partial annuity after completing ten years of service on the bench, that annuity to be calculated on the basis of his number of years of service expressed as a fraction of the total number of years he would have served had he remained on the bench for a minimum of fifteen years or until age 65, whichever is the later. He would thereupon be entitled to a partial annuity at age 65 based upon the product obtained by applying that fraction to the annuity he would have been entitled to had he been eligible for retirement in the year he left the bench, with indexing commencing in the year in which he first receives payment of annuity benefits. Widow's and dependents' annuities would be calculated on the same basis.

Such a measure would prevent abuse of ss.23(1)(b), and at the same time provide an incentive to a judge to make a commitment to his office for a minimum term of ten years. We were impressed by submissions from the judiciary that a judgeship should be considered a lifetime career. We would not be in favour of vesting for judicial annuities after a period shorter than ten years, despite the current trend towards immediate vesting in both the public and the private sector, in order to discourage the possibility that a judgeship be viewed merely as a stepping-stone in a legal career. We feel that our recommendation for partial annuities is justified in light of the comparative youthfulness of many judges appointed over the past ten years. These appointments have resulted in the establishment of a cadre of young men and women on the bench who will still be far short of the usual age for retirement after completing fifteen years in office. The provision of a partial annuity would compensate them in some measure if, after serving a minimum of ten years as judge, they should determine to relinquish their judicial office. Despite our hope that these judges would remain until normal retirement, we feel that a judge ought not to be penalized unduly by reason of his age, nor should he be kept unwillingly in office.

Finally, we agree that a spouse's annuity should not be suspended in the event she remarries. **We accordingly adopt the recommendation of the de Grandpré Report that ss.25(3) of the *Judges Act* be repealed.**

REPRESENTATIONAL ALLOWANCES

An aggregate allowance for representational expenses incurred by the chief justice of a court or by a judge acting on his behalf, by a puisne judge of the Supreme Court of Canada, by a chief judge of a county court, and by the senior judges of the Supreme Court of the Yukon Territory and of the Supreme Court of the Northwest Territories is presently provided by subsections 20(4) and (5) of the *Judges Act*. The current aggregate permitted for each category is as follows:

(a)	the Chief Justice of Canada	$5,000
(b)	each puisne judge of the Supreme Court of Canada	2,500

(c)	the Chief Justice of the Federal Court of Canada, the chief justice of each province, and the Chief Justice of the Supreme Court of Prince Edward Island	3,500
(d)	each other chief justice of a court	2,500
(e)	the senior judge of the Supreme Court of the Yukon Territory and the senior judge of the Supreme Court of the Northwest Territories, each	2,500
(f)	each chief judge of a county or district court	2,500
(g)	the senior county court judge of a province	2,500

This allowance is designed to reimburse a judge for expenses actually incurred by him for travelling, hospitality and related amounts in connection with the extra-judicial obligations and responsibilities that devolve upon him by virtue of his office.

The Commission heard with considerable disquiet of the inadequacy of the present scale of allowances. We consider it unseemly that a chief justice should be required to absorb from his after-tax resources expenses he has incurred on behalf of his court or on behalf of the government of his province or country. In view of the wide regional variation in such expenditures, no further attempt should be made to establish a scale for such allowances. **It is our recommendation that in place of the present ceiling on representational allowances, actual expenses certified by the chief justice be reimbursed under this head. We further recommend that the Canadian Judicial Council be asked to develop guidelines for the use of the representational allowance.**

CONFERENCE ALLOWANCES

Section 22 of the *Judges Act* authorizes payment of the expenses incurred by judges for attendance at two kinds of conferences, meetings or seminars. With respect to the first category, those a judge is expressly authorized by law to attend, he is entitled to be reimbursed for his reasonable travelling and other expenses actually incurred in so attending. With respect to the second category, those a judge may attend with the approval of the chief justice or chief judge of the court, he is entitled to be reimbursed as above, subject to the imposition of an aggregate amount by court. In the case of judges of the provincial superior and county courts, the aggregate amount available as a conference allowance in any year is the greater of the product obtained by multiplying the number of judges of that court by the sum of $350, and $3,000.

In terms of the cost of transportation alone, the Commission feels that the present amount is inadequate. While it might logically be assumed that the current maximum would impose greater constraints upon the smaller courts, in fact the larger courts suffer at least equally by reason of having to establish individual priorities for attendance at such conferences among a greater number of judges. A judge in such circumstances may be prevented from attending a meeting from which both he and his court would benefit through lack of resources in the conference budget. **We recommend that the product be increased by establishing a multiplier of $500, and a minimum of $5,000 per court.**

REMOVAL ALLOWANCES

A removal allowance is payable to a judge under Section 21.1 of the *Judges Act* for moving and other expenses incurred in assuming his duties as judge or by reason of his being reassigned to a place other than that at which he resided prior to his reassignment. A certain measure of flexibility is afforded to this allowance by providing that the types of expenses contemplated shall be prescribed by regulation. Pursuant to this authority, the *Judges Act* (Removal Allowance) Order has been enacted. The Order deals in a comprehensive fashion with the expenditures which shall be reimbursable out of this allowance, and has the additional advantage of being readily amended, as required from time to time.

We are informed that the removal allowance is functioning adequately. **Accordingly, we have no general recommendations to make, apart from the suggestion that the terms of the Removal Allowance Order continue to be closely monitored, so that it may respond quickly to changing economic conditions.**

We do have a specific recommendation to make, however, with respect to its application to the judges appointed to the Yukon Territory and the Northwest Territories. Unlike all other members of the federally-appointed judiciary, the northern judges may normally expect to be reassigned after a number of years to the bench of another jurisdiction. In such a case, moving expenses incurred in taking up his new appointment would be reimbursable to a judge under the Removal Allowance Order. However, should a judge remain in the north until his retirement, there is presently no provision in the *Judges Act* which would permit him to be reimbursed for his expenses in returning to the south. Similarly, should a northern judge die in office, his widow and dependents are not entitled to assistance in relocating. **We recommend that these anomalies be removed by an appropriate amendment to the *Judges Act*.**

INCIDENTAL AND OTHER ALLOWANCES

The 1981 amendments to the *Judges Act* introduced, effective April 1, 1979 and for subsequent years, an accountable allowance in the amount of $1,000 "for reasonable incidental expenditures that the fit and proper execution of his office as judge may require". The allowance was originally intended to be applied against the cost of court attire, law books and periodicals, membership in legal and judicial organizations, and other like expenditures. These categories have now been broadened to include other expenses not recoverable under any other provision of the *Judges Act* and which may relate to the execution of judicial functions.

We approve the greater flexibility which is being addressed to the administration of this allowance. In view of the fact that it is a recent innovation, **we recommend no change in the base amount at this time.**

We received the benefit of separate representations by Mr. Justice T.D. Marshall of the Supreme Court of the Northwest Territories on behalf of himself and his northern colleagues as to the adequacy of the $4,000 non-accountable allowance provided by ss.20(2) of the *Judges Act*. In view of the higher cost of living in the north, and the difficulties northern judges and their families encounter as to transportation and housing, this allowance does not adequately compensate the judges for the increased level of their expenses. The most immediate problem appears to be the availability of adequate housing.

At present, judges in the north are entitled to rental accommodation in federally-owned housing on the same basis as civil servants posted to the north. We were unimpressed by the quality of housing made available to members of the judiciary in the north. We feel that it is important for the dignity of the office which they hold that the judges be given accommodation appropriate to their stature in the community. **We strongly recommend that the quality of housing made available to the judiciary be considerably upgraded,** and that it be reasonably comparable, by northern standards, to the housing of judges elsewhere in the country. If such accommodation cannot be obtained on a rental basis, we are prepared to recommend that the judges be permitted to obtain their own housing, and that the northern allowance be increased to offset the loss of any subsidy of which they may now have the benefit.

SABBATICAL OR EDUCATIONAL LEAVES

It is the understanding of the Commission that a system of periodic educational leaves is to be instituted on a trial basis, under the general supervision of the Canadian Judicial Council. We have studied the proposal made by the Conference of Chief Justices dated September 14, 1982, and agree with the Joint Commitee on Judicial Benefits of the Conference of Chief Justices and the Canadian Judges Conference that it would be premature to deal further with this issue at this time.

ELECTION OF CHIEF JUSTICE OR CHIEF JUDGE

Clause 5 of the itemization in the terms of reference of the Commission required that we inquire into the adequacy of Section 20.3 of the *Judges Act*, whereby the chief justice or associate chief justice of a provincial superior court, or the chief judge of a county or district court, could elect to relinquish his duties as such and thereafter assume only the duties of a puisne or ordinary judge of the court. At the time the Commission was appointed, a minimum term of ten years as chief justice or chief judge was required before this option could be exercised. However, Bill C-166, which became law in June 1983, contains an amendment reducing the term required under Section 20.3 to five years. The Commission accordingly feels that it is unnecessary at this time to make any recommendation on this item.

ALTERNATIVES FOR FIXING JUDICIAL COMPENSATION

We were greatly impressed by the procedure which has been adopted by the State of New South Wales in Australia, whereby an independent Remuneration Tribunal is empowered to address the issue of salaries for the judiciary, amongst others. The Tribunal thereafter makes its report, and unless there is specific objection to its recommendations by fifty per cent of the legislature, after the passage of a fixed time the recommendations become law. This procedure, known as proceeding by way of a negative resolution, would appear to be a desirable innovation in dealing with judicial salaries and benefits.

Section 100 of our *Constitution Act* states:

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

We are advised that the wording of this section precludes the adoption of the negative resolution procedure in Canada. The section is interpreted as requiring the active participation of Parliament in fixing the level of judicial salaries, allowances and pensions. We do not feel, however, that this should be a final barrier to the adoption of such a procedure. The New South Wales procedure appears to be an efficient way of dealing with judicial salaries. **We therefore recommend that the possibility be addressed of developing a similar formula for the adjustment of judicial remuneration, including the need for a constitutional amendment, which formula would in no way derogate from Parliament's overall control.**

All of which is respectfully submitted, this sixth day of October, 1983.

Otto Lang
Sydney Jackson
Paul Martin

SUMMARY OF RECOMMENDATIONS

1. That a new base for the salaries of superior court judges be established in 1985 by applying the Industrial Composite Index to 1975 salary levels for the years 1976-83, capped by 6% and 5% increases for 1983 and 1984, respectively.

2. That the salaries of county and district court judges be calculated by reference to the same formula as has been applied with respect to the salaries of judges of the superior courts, but with an absolute differential of $5,000.

3. That those provinces which continue to provide extra compensation to members of the federally-appointed judiciary be asked to discontinue this practice, and that the $2,000 allowance to Federal Court judges be removed.

4. That the next triennial commission address the issue of regional and cost of living variations for judicial salaries and allowances.

5. That one-half of the income additionally taxable in the year of appointment be deemed exempt from taxation for purposes of Section 81(1)(a) of the *Income Tax Act* and that the Province of Quebec be asked to make a similar provision in regard to its income tax law.

6. That the Minister of Justice have an information booklet prepared and distributed to all lawyers who may be approached to accept judicial appointment.

7. That judges who have contributed to annuities since 1975 be reimbursed the excess of their contributions over 1½% with interest at National Revenue tax refund rates compounded annually, and that the non-tax paid part of such contributions be transferrable to a Registered Retirement Savings Plan without otherwise affecting the rights a judge may have with regard to an R.R.S.P. in the year of refund.

8. That a judge be entitled to a full annuity only after serving a minimum of fifteen years in office.

9. That partial annuities be provided to any judge who leaves the bench after serving at least ten years, such annuities to be calculated by reference to his years of service expressed as a fraction of the total number of years he would have served had he remained on the bench for a minimum of fifteen years or until age 65, whichever is the later.

10. That subsection 25(3) of the *Judges Act*, which suspends a spouse's annuity in the event she remarries, be repealed.

11. That actual expenses certified by the chief justice be reimbursed from the representational allowance, and that the Canadian Judicial Council be asked to develop guidelines for the use of this allowance.

12. That the conference allowance be increased by establishing a multiplier of $500, and a minimum of $5,000 per court.

13. That the *Judges Act* be amended to provide for payment of a removal allowance to a northern judge upon retirement, and to the spouse and dependents of a northern judge who has died in office, to assist relocation.

14. That the quality of housing made available to northern judges be considerably upgraded, and that it be reasonably comparable, by northern standards, to the housing of judges elsewhere in the country.

15. That the possibility be addressed of developing a formula for the adjustment of judicial remuneration similar to that in effect in New South Wales, which formula would in no way derogate from Parliament's overall control.

REPORT AND RECOMMENDATIONS OF THE 1986 COMMISSION ON JUDGES' SALARIES AND BENEFITS

February 27, 1987

Submitted to the Minister of Justice of Canada

Cat. No. J2-69/1987

ISBN 0-662-55058-7

Pursuant to Section 19.3 of the *Judges Act*, I am now tabling the Report and Recommendations of the 1986 Commission on Judges' Salaries and Benefits, appointed as of September 1, 1986 to inquire into the adequacy of the salaries and other amounts payable under the *Act* and into the adequacy of judges' benefits generally. In accordance with Standing Order 67(4) of the House of Commons, this document shall be deemed to be referred to the Standing Committee on Justice and Solicitor General.

The Honourable Ray Hnatyshyn
Minister of Justice and
Attorney General of Canada

REPORT AND RECOMMENDATIONS OF THE 1986 COMMISSION ON JUDGES' SALARIES AND BENEFITS

TABLE OF CONTENTS

1986 COMMISSION ON JUDGES' SALARIES AND BENEFITS

I. Background

Members: Mr. H. Donald Guthrie, Q.C. (Chairman)
Mr. Edward H. Crawford
Mtre Jeannine M. Rousseau
Mr. Eldon M. Woolliams, Q.C.

Executive Secretary: Mr. Harold Sandell

Terms of Reference

The 1986 Commission on Judges' Salaries and Benefits was appointed as of September 1, 1986, by the Honourable Ray Hnatyshyn, Minister of Justice and Attorney General of Canada, pursuant to section 19.3 of the *Judges Act*, and was given the following terms of reference:

> "The Commission shall, pursuant to section 19.3 of the *Judges Act*, inquire into the adequacy of the salaries and other amounts payable under the *Act* and into the adequacy of judges' benefits generally.
>
> Without restricting the generality of the foregoing, the Commission shall inquire into and report upon the following matters:
>
> 1. The adequacy of salaries and allowances paid under the *Act*, having due regard for the adjustments made by S.C. 1985, c. 48.
> 2. The granting of annuities provided to judges and pursuant to subsection 23(1) of the *Act*, and more particularly
>   (a) the criteria for retirement with full benefits under the Act;
>   (b) the pro-rating of annuities for judges who resign without qualifying for full benefits under the *Act*;
>   (c) the contributions payable by judges towards annuities payable on the terms fixed by the *Act*.
> 3. The granting of annuities provided to surviving spouses and children pursuant to sections 25, 26 and 27 of the *Act*.
>
> The Commission shall report to the Minister of Justice upon the results of the inquiry in accordance with subsection 19.3(2) of the *Act*."

Further to these terms of reference, the Minister wrote to the Chairman on December 8, 1986 requesting that the Commission examine, as part of its statutory terms of reference, the matter of a removal allowance for judges of the Supreme Court of Canada, the Federal Court of Canada and the Tax Court of Canada who wish to leave Ottawa and live in another part of Canada on retirement.

The Commission held meetings and/or hearings as follows:

September 17, 1986 – Toronto
November 26, 27 and 28, 1986 – Ottawa
December 16, 1986 – Toronto
January 17 and 18, 1987 – Toronto
January 24 and 25, 1987 – Toronto
February 6, 7 and 8, 1987 – Toronto
February 17, 1987 – Telephone conference
February 18, 1987 – Telephone conference
February 24, 1987 – Telephone conference

Notice to the Public, Submissions and Hearings

The Commission published a Notice in 21 newspapers across Canada, during September and October, 1986, inviting written submissions and presentations at oral hearings, in either official language, concerning matters within the Commission's terms of reference. Notice was also given to a number of interested organizations and individuals. The Commission offered to conduct oral hearings in Halifax, Vancouver, Edmonton, Montreal and Ottawa during October and November, 1986.

Copies of the Notice in English and French are reproduced as Appendix "A". The Notice was published in the following newspapers:

St. John's Evening Telegram
Charlottetown Guardian
Halifax Chronicle-Herald
Le Courrier
Saint John Telegraph Journal
Le Soleil
La Presse
Montreal Gazette
Le Droit
Ottawa Citizen
The Globe and Mail
The Lawyers Weekly
Winnipeg Free Press
Regina Leader Post
Calgary Herald
Edmonton Journal
Le Franco-Albertain
Vancouver Province
Le Soleil de Colombie
The Yellowknifer
Whitehorse Star

Written submissions were received from the groups and individuals listed in Appendix "B".

The only requests for oral hearings were for Ottawa. These hearings took place on November 27 and 28, 1986, at the Canada Council Hearing Room, 99 Metcalfe Street. The following organizations, with the counsel indicated, made oral presentations to the Commission:

1. The Joint Committee on Judicial Benefits of the Conference of Chief Justices and Chief Judges and the Canadian Judges Conference

Counsel Appearing: John J. Robinette, Q.C., Toronto
Yves Fortier, Q.C., Montreal

2. Justices of the Supreme Court of Ontario

Counsel Appearing: John F. Howard, Q.C., Toronto

3. The Canadian Bar Association Standing Committee on Pensions for Judges' Spouses and Judges' Salaries

Counsel Appearing: Bryan Williams, Q.C., Vancouver
(President of the Association)
S.J. Safian, Q.C., Regina
(Chairman of the Standing Committee)
H.A.D. Oliver, Q.C., Vancouver
Thomas J. Walsh, Q.C., Calgary
Robert B. Goodwin, Winnipeg
John Fortier, Charlottetown
George A. Allison, Q.C., Montreal

Previous Committees and Commissions

The 1986 Commission on Judges' Salaries and Benefits is the fifth federal committee or commission established in recent years to inquire into and make recommendations to the Minister of Justice with respect to judicial salaries, allowances and benefits. It is the second commission appointed pursuant to section 19.3 of the *Judges Act*.

In September, 1974, a Special Advisory Committee, under the chairmanship of the Honourable Mr. Justice Emmett Hall, a retired member of the Supreme Court of Canada, reported to the Minister. The Dorfman Committee on Judicial Compensation and Related Matters, under the chairmanship of Irwin Dorfman, Q.C., (hereinafter, the "Dorfman Committee") reported to the Minister in November, 1978. The de Grandpré Committee on Judicial Annuities, under the chairmanship of Jean de Grandpré, Q.C. (hereinafter, the "de Grandpré Committee"), reported in December, 1981. The 1983 Commission on Judges' Salaries and Benefits, which was the first of the "Triennial Commissions" established pursuant to section 19.3 of the *Judges Act*, was chaired by the Honourable Otto Lang, P.C., Q.C. (hereinafter, the "Lang Commission") and it reported to the Minister in October, 1983.

Acknowledgements

The Commission wishes to thank Pierre Garceau, Q.C., Commissioner for Federal Judicial Affairs, and the members of his staff, in particular André Gareau and Louise Fox, for their support throughout the Commission's mandate.

We also thank Walter Riese, F.C.I.A., F.S.A., Chief Actuary of the Department of Insurance of Canada, and Claude Gagné, F.C.I.A., F.S.A., an Actuary on his staff, for their valuable assistance.

The Commission retained the services of Clarkson Gordon in connection with taxation matters discussed in this report and expresses its thanks to William E. Crawford, C.A. and Jennifer L. Shaw, C.A., for their excellent assistance.

The Commission was fortunate indeed to have had assigned to it as Executive Secretary, Harold Sandell of the Department of Justice in Ottawa. We wish to express our sincere appreciation for his enthusiastic, diligent and dedicated service, without which our task could not have been accomplished as effectively and expeditiously. His extensive knowledge of the Canadian legal and judicial systems and relevant statute law has been of immeasurable assistance.

II. Introduction

The principle that the judiciary exercises its authority independently of the executive and the legislature is fundamental to our democratic system.[1] The *Constitution Act, 1867* recognizes this principle by conferring on the Governor General, and not on the Governor in Council, the authority to appoint the judges of the provincial superior, district and county courts, as well as the authority to remove superior court judges, and then only following a joint address of the Senate and House of Commons. The *Constitution Act, 1867* further recognizes this fundamental principle by imposing on Parliament, and not on the executive, the duty to fix and provide the salaries, allowances and pensions of superior, district and county court judges. The concept of judicial independence is also implicit in the *Canadian Charter of Rights and Freedoms* and in the *Canadian Bill of Rights.* Furthermore, the law of Canada, in the form of doctrine and jurisprudence, has long recognized the concept of the independence of the judiciary, as have our inherited legal traditions. In addition, Canada is obligated to maintain an independent judiciary pursuant to the International Covenant on Civil and Political Rights[2], and the principle is further recognized in other international instruments.

One of the essential elements of judicial independence depends upon Parliament's duty to fix and provide judicial salaries, allowances and pensions. This remuneration should provide the element of financial security. The process and institutions whereby judicial compensation is fixed and provided must preclude the arbitrary interference of the executive in the determination and granting of judges' salaries and benefits. The actual monetary amounts involved must be sufficient to permit a judge and his or her family to be and to be perceived by society to be financially secure bearing in mind the statutory requirement that a judge not engage in any occupation or business, but rather devote himself or herself exclusively to judicial duties. Furthermore, the level of salaries and benefits should make appointment to the bench sufficiently attractive to the best qualified lawyers.

It is within this overall context that the Commission has inquired into the adequacy of judges' salaries and benefits.

---

1. See *Her Majesty the Queen* v. *Marc Beauregard*, [1986] 2 S.C.R. 56, at pp. 69-76.
2. (1967), 61 A.J.I.L. 870.

III. The Review Process

Section 19.3 of the *Judges Act* provides for the appointment by the Minister of Justice, every third year, of not less than three and not more than five Commissioners "to inquire into the adequacy of the salaries and other amounts payable under [the *Judges Act*] and into the adequacy of judges' benefits generally". The section further provides that within six months of their appointment, the Commissioners must submit a report to the Minister of Justice "containing such recommendations as they consider appropriate". The Minister of Justice causes the report to be laid before Parliament "not later than the tenth sitting day of Parliament after he receives it".

Parliament has therefore legislated a time limit of six months from appointment for the Commissioners to report, as well as a time limit of ten days from receipt for the Minister to table the report in Parliament.

It is our understanding that the underlying purposes of the legislation providing for the review, by Triennial Commissions, of the adequacy of judges' salaries and other amounts payable under the *Judges Act* and of the adequacy of judges' benefits generally, are to reduce the element of partisan politics in the adjustment of judicial compensation and to reinforce the principle of judicial independence by obtaining the recommendations of "persons with experience and expertise after a full and independent review".

Delay in implementing or substantial disregard of the recommendations of a Triennial Commission threatens the integrity of the review process and materially reduces its effectiveness. Regrettable delays in coming to decisions concerning the reports of the Dorfman and de Grandpré Committees and the Lang Commission should be avoided in the future.

We therefore **recommend that Parliament either agree promptly with and implement quickly the individual recommendations of this and subsequent Triennial Commissions or, if necessary, indicate promptly its disagreement with any of such recommendations.**

IV. Judicial Salaries

In addition to a process of careful selection, a vital means of ensuring the competence and independence of the judiciary is the provision in our constitution requiring Parliament to fix and provide the salaries, allowances and pensions of judges. It is equally clear that the need for judicial independence, for attracting to the bench the best qualified lawyers, and for maintaining the morale and financial security of the judiciary means that judges are a distinct group with compensation requirements that set them apart from the public service, with which they are often erroneously compared.

Canada has been fortunate in the quality of its judges, a standard which it is most important to maintain.

Three quotations are as *à propos* today as when they were originally stated. The first, regarding the need for security and independence, is from a speech made by the Lord Chancellor, Viscount Sankey, to the House of Lords in 1933:

> "It is we think beyond question that the Judges are not in the position occupied by civil servants. They are appointed to hold particular offices of dignity and exceptional importance. They occupy a vital place in the constitution of this country. They stand equally between the Crown and the Executive, and between the Executive and the subject. They have to discharge the gravest and most responsible duties. It has for two centuries been considered essential that their security and independence should be maintained inviolate."[1]

The second, taken from the same speech by Viscount Sankey, pertains to the competence of the judiciary:

> "... we cannot avoid expressing a fear that if the salary and prestige of a High Court Judge are to remain as at present, those who will succeed us will probably not, as in the past, be drawn from the leaders of the Bar. There is now so little attraction to them to accept a seat upon the Bench, that it will be impossible to induce leading members of the Bar to make the necessary sacrifice.
>
> "The consequences ... will be far-reaching and detrimental to the true interests of the country."[2]

The third, also concerning competence on the bench, is from an often-quoted portion of a speech reprinted in the Canadian Bar Review of 1927, by the Honourable R.B. Bennett, K.C. (as he then was), later to be Prime Minister:

> "Now if men enjoying large incomes have no ambition to go upon the Bench it follows that you have to fall back upon the second line, and instead of appointing the best men to the judiciary you have recourse to men of indifferent qualifications in their profession ...".[3]

Recent constitutional changes have reinforced this need for our courts to remain attractive to men and women of the highest calibre. The role of the judiciary as a result of the *Canadian Charter of Rights and Freedoms* is of revolutionary significance in the legal history of Canada, and it has thrust our judiciary into the forefront of law-making, alongside Parliament itself.

We consequently reiterate and affirm the comment in the report of the Lang Commission (page 2) that:

> "The place of the judiciary has increased in importance in the light of recent constitutional developments in Canada, particularly the enactment of a Charter of Rights and Freedoms. The judiciary also plays a greater role in shaping our lives because of the growing complexity of our social and economic relationships. The independence of the judiciary is part and parcel of their unique position."

The Supreme Court of Canada, in the recent *Beauregard* decision, affirmed that since as far back as the *Act of Settlement* in 1700, independence of the judiciary has been predicated on both security of tenure and financial security.[4]

These considerations underlie the Commission's examination and conclusions with respect to judicial salaries.

As a result of 1975 amendments to the *Judges Act*, the salary level of superior court puisne judges was made roughly equivalent to the mid-point of the salary range of the most senior level (DM3) of federal deputy minister. This was not intended to suggest equivalence of factors to be considered in the salary determination process, for no other group shares with the judiciary the necessities of maintaining independence and of attracting recruits from among the best qualified individuals in a generally well-paid profession. In 1975, judicial salary equivalence to senior deputy ministers was generally regarded, however, as satisfying all of the criteria to be considered in determining judicial salaries. At that salary level, a sufficient degree of financial security was assured and there were few financial impediments to recruiting well-qualified lawyers for appointment to the bench.

Like the Lang Commission, we believe the 1975 judicial salary scale was satisfactory for that year and we **recommend that a new salary base be established as of April 1, 1986, by applying the Industrial Composite Index to the 1975 salary level for the years 1976 to 1986, capped by a 6% and 5% increase for 1983 and 1984, respectively** (while the *Public Sector Compensation Restraint Act* was in force). The annual salary adjustment provided for by section 19.2 of the *Judges Act*[5] would then apply for 1987 and 1988, to a maximum of 7% in each of those years, following which the 1989 Commission on Judges' Salaries and Benefits would again review salary levels.

Indexing is the only means yet devised to permit Parliament to discharge its constitutional duty under section 100 of the *Constitution Act, 1867* without the presentation of salary amendment bills on each occasion. In addition, it provides a relatively non-contentious means of adjusting judicial salaries between parliamentary action on Triennial Commission recommendations.

The income of judges has failed to keep pace with other groups in our society. The importance of calculating a base salary which is fair to judges cannot be over-emphasized, since successive annual shortfalls in income are built in and compounded if either the original or a subsequent base salary is lower than it should be. The Lang Commission made a calculation error in applying the Industrial Composite Index for the years 1976 to 1983 to the 1975 base salary of $53,000. The April 1, 1985, base salary figure for superior court puisne judges should have been $123,400, rather than $119,000 (see Appendix "C", submitted in evidence by the Joint Committee on Judicial Benefits, which states the accurate calculation for 1985 to be $123,500. This Commission arrives instead at a 1985 corrected figure of $123,400). On the basis of our recommendation to apply the Industrial Composite Index to the 1975 salary (of $53,000) for each of the years 1976 to 1986 (capped at 6% and 5% for 1983 and 1984), the salary calculations in Column 4 of the following table result.

1 Year	2 Actual	3 % change in industrial composite	4 Salary calculation[6] in accordance with industrial composite index
1975	$ 53,000[7]	—	—
1976	53,000	14.17	$ 60,500
1977	55,000	12.14	67,800
1978	57,000	9.61	74,300
1979	57,000	6.16	78,800
1980	70,000	8.65	85,600
1981	74,900	10.08	94,200
1982	80,100	11.93	105,400
1983	84,900	9.99 (6% cap)	111,700
1984	89,100	7.37 (5% cap)	117,200
1985	105,000	5.31	123,400
1986	108,700	3.53	127,700

The recommended levels of salary as of April 1, 1986 are therefore as follows:

Judges, Federal Court of Canada and Superior Courts – $127,700
Chief Justices and Associate Chief Justices, Federal Court of Canada and Superior Courts – $139,700
Judges, Supreme Court of Canada – $151,700
Chief Justice of Canada – $163,800

These recommended salaries for the Federal Court of Canada and superior court Chief Justices and Associate Chief Justices, and for the Judges and Chief Justice of the Supreme Court of Canada, would restore the relationships which existed in 1975 *vis-à-vis* the salary of Federal Court of Canada and superior court puisne judges (then $53,000, now recommended to be $127,700 as of April 1, 1986).

The Commission has independent knowledge of eminently qualified lawyers who have declined appointment to the bench due to the loss of income that would result. If implemented, these recommended salaries would satisfy to a much greater extent the dual requirements of ensuring financial security for the judiciary and attracting well-qualified lawyers to the bench. The Burns Report on Executive Compensation in the Public Service (May, 1985)[8], which dealt with rates of pay and conditions of service for managers in the federal public service, recommended salary ranges at the senior deputy minister level of between $106,500 (minimum) and $132,500 (maximum), effective April 1, 1985.

The Peat Marwick Compensation Study undertaken for the federal Department of Justice in 1985 (portions of which are reproduced below) surveyed associates and partners of law firms (75% of the

sample) and lawyers of corporations and municipal and provincial governments (25% of the sample). The Peat Marwick Study indicates that the average income (including salary, bonuses and the value of stock (for in-house corporate counsel) or share of profits (for law firm partners)) for lawyers called to the bar between 1960 and 1964 (the years of call of lawyers likely to be approached currently for appointment to the bench) was $124,548 in 1985:

Total Average Income by Year of Call to Bar for Associates/Partners for all Sectors

Year Admitted to the Bar	Average Income	(sample size)
1970-1974	$100,789	(457)
1965-1969	106,206	(194)
1960-1964	124,548	(140)
1955-1959	124,493	(125)
1954 and earlier	102,457	(117)

The Peat Marwick Study also shows that the average income for partners (called to the bar between 1960 and 1964) surveyed in large law firms (defined as 20 or more lawyers) was $155,056 in 1985, which is significantly more than we are recommending be paid to judges as of April 1, 1986:

Average Share of Profits per Partner by Year of Call to Bar for Large Law Firms (20 or more lawyers)

Year Admitted to the Bar	Share of Profits	(sample size)
1970-1974	$121,725	(63)
1965-1969	136,537	(34)
1960-1964	155,056	(30)
1955-1959	151,060	(22)
1954 and earlier	120,161	(30)

The Commission has considered the current salaries of judges in the United Kingdom, as well as the recently proposed (January, 1987) salary increases of federal judges in the United States. We feel that comparisons with British or American judicial salaries are not particularly helpful because of differences in economic and social conditions and fluctuating exchange rates.

The Lang Commission recommended that this Commission address the issue of regional and cost of living variations for judicial salaries. Having considered the matter, we are not disposed to recommend any changes.[9]

---

1. Parliamentary Debates, Lords, 1932-33, Vol. 88, p.1209 (July 27, 1933).
2. *Ibid.*, p. 1211.
3. (1927) 5 Can. Bar Rev. 272, at p. 272.
4. *Supra.*, at pp. 74-75.
5. We note that the salary adjustment formula based on the Industrial Composite will have to be modified in view of the discontinuance of the publication of that index by Statistics Canada. We should mention that the Industrial Aggregate Index has already been adopted, by statutory amendment, in lieu of the Industrial Composite Index for purposes of adjusting benefits under the *Canada Pension Plan*, and salaries under the *Senate and House of Commons Act* and the *Salaries Act*.
6. Lowered to the closest multiple of one hundred dollars (see *Judges Act*, subsection 19.2(3)).
7. Includes the $3,000 additional salary provided under what was then subsection 20(1) of the *Judges Act* (since repealed).
8. The Advisory Group on Executive Compensation in the Public Service (Mr. James W. Burns, Chairman) presented its Eleventh Report to the Prime Minister on May 13, 1985.
9. Pursuant to subsection 20(2) of the *Judges Act*, the judges on the territorial Supreme Courts receive a non-accountable annual allowance of $4000 as compensation for the higher cost of living in the two territories.

V. Salary Differential between the County and District Courts and the Superior Courts

The Lang Commission recommended that the salaries of judges of the county and district courts "should be calculated by reference to the same formula as has been applied with respect to the salaries of the judges of the superior courts, but that an absolute differential between the county and district courts and the superior courts be fixed at $5,000, such differential to be retained until review by the next triennial commission". Bill C-78 (which received Royal Assent on December 12, 1985 as Chapter 48 of the Statutes of Canada, 1985) gave effect to that recommendation and established as at April 1, 1985, an absolute differential of $5,000 between the salaries of county and district courts and those of superior courts.

Only three provinces, Ontario, British Columbia and Nova Scotia, retain county or district courts. Although the jurisdictional differences between the two levels of courts continue to narrow, the responsibilities of the superior court judges in terms of the subject matter of their jurisdiction and the requirement for travel in the performance of their duties are nevertheless significantly heavier than in the county and district courts. It may be noted that the status of the District Court in Ontario is currently under review as part of Mr. Justice Thomas Zuber's study into the courts of that province, undertaken at the instance of the Attorney General of Ontario. There was no compelling evidence before us and we see no compelling reason to narrow the differential at this time. We therefore **recommend that the present differential of $5,000 be maintained.**

VI. Incidental Allowance

In 1981, subsection 20(1) of the *Judges Act* was amended to provide, with effect from April 1, 1979, an accountable annual allowance for judges in the amount of $1,000, separate from salary, "for reasonable incidental expenditures that the fit and proper execution of his office as judge may require". The allowance applies against the cost of repair and replacement of court attire, the purchase of law books and periodicals, membership in legal and judicial organizations and other similar expenses not recoverable under any other provision of the *Judges Act*.

The inadequacy of the present allowance and the effects of inflation have resulted in the $1,000 maximum being exhausted or even exceeded by many judges. For example, the cost of judicial robes alone (in those provinces where robes are not provided by the provincial authorities) in the first year in office, or periodically thereafter, would exhaust the allowance. Similarly, the purchase of legal texts required by a judge, particularly when the judge is sitting in an outlying judicial centre where the court house library may be less than adequate, could quickly consume a significant portion of the current allowance.

We recommend that the present incidental allowance be increased to $2,500 annually.

VII. Removal Allowances

In 1985, Bill C-78 extended to retiring judges of the Supreme Courts of the Yukon and Northwest Territories, and to the surviving spouse and children of judges of those courts who die in office, the benefit of the removal allowance in order to facilitate their relocation to one of the provinces (*Judges Act*, paragraphs 21.1(1)(c) and (d)). The concurrent addition of subsection 21.1(1.1) of the *Judges Act* placed a limitation upon eligibility for the use of the removal allowance by a judge of a northern Supreme Court. In order to qualify for the allowance, the judge must have been resident in one of the provinces before his or her appointment to the northern Court.

The 1985 amendments were designed to alleviate possible hardship for any judge, or the family of any judge, in the circumstances provided for therein. Substantially the same potential hardship could occur with respect to a judge (or the family of a judge) who is required to move to Ottawa upon appointment, and who does not want to remain in Ottawa after retirement (or after the judge's death). The judge and his or her family are currently entitled to a removal allowance upon appointment pursuant to section 21.1. However, they are not entitled to an allowance should they wish to leave Ottawa and live in another part of Canada upon retirement or death.

Federal legislation compels the judges of three section 101 [1] courts (the Supreme Court of Canada, the Federal Court of Canada and the Tax Court of Canada) to reside in or near the National Capital Region (with the exception of judges on the Tax Court of Canada who were formerly members of the Tax Review Board resident outside of the National Capital Region). In order to alleviate the potential hardship referred to above, we **recommend that the removal allowance be extended to retiring judges of the three section 101 courts who are required upon appointment to change their place of residence to the vicinity of the National Capital Region, and as well to the surviving spouses and eligible children of these judges who die in office.** We also **recommend that the removal allowance permit such retiring judges, and/or the family, to move to a place of residence in any one of the ten provinces or two territories.** We further **recommend that there be a requirement whereby all removal allowances must be utilized within a reasonable period following the relevant event.**

---

1. *Constitution Act, 1867.*

VIII. Judicial Annuities

Section 23 of the *Judges Act* provides for the granting of an annuity equal to two-thirds of the salary annexed to the office of a judge at the time of his or her resignation, removal or ceasing to hold office, to a judge who

(a) has continued in office for fifteen years and has attained the age of 65, if he or she resigns his or her office;

(b) has continued in office for fifteen years but has not attained the age of 65, if his or her resignation is conducive to the better administration of justice or is in the national interest;

(c) resigns or is removed as a result of becoming afflicted with a permanent disability preventing him or her from executing his or her office; or

(d) has reached the age of mandatory retirement, if he or she has held office for at least ten years.

If a judge reaches mandatory retirement age without having served for ten years, he or she is entitled to an annuity pro-rated on the basis of years of completed service (to the nearest one-tenth of a year) as a proportion of ten years.

In addition, rather than leave the bench after attaining the minimum qualification for retirement, the option exists pursuant to sections 20.01, 20.1 and 20.2 of the *Judges Act*, for a judge to elect supernumerary status. Under this arrangement, a puisne judge who qualifies for non-mandatory retirement and who is entitled to an annuity may opt instead to continue in office (with a reduced caseload in most instances) while remaining entitled to full salary until the judge is mandatorily retired or otherwise leaves the bench, at which time he or she would receive the annuity. A Chief Justice or Associate Chief Justice who elects supernumerary status is entitled to receive only the salary of a puisne judge during his or her supernumerary service, although the subsequent annuity is based on the salary then in effect of a Chief Justice or Associate Chief Justice. The supernumerary programme promotes continuity on the bench, while making available positions which could not otherwise be filled until the mandatory retirement of the incumbents. All federally appointed judges except the members of the Supreme Court of Canada are entitled to opt for supernumerary status. Approximately 10% of the federally appointed bench are currently supernumerary judges.

A. Judges' Contributions towards Annuities

The *Beauregard* decision of the Supreme Court of Canada has settled the constitutional authority of Parliament to require reasonable contributions by judges towards their annuities. This authority is not unlimited, as the following passage from the reasons of the Chief Justice of Canada in the *Beauregard* judgment makes clear:

> "The power of Parliament to fix the salaries and pensions of superior court judges is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges *vis-à-vis* other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be *ultra vires* s.100 of the *Constitution Act, 1867*."[1]

Pursuant to section 29.1 of the *Judges Act*, enacted in 1975, judges appointed before February 17, 1975 contribute towards their statutory annuities (which include annuities for surviving spouses and

children) at a rate of 1½% of salary.[2] Judges appointed after February 16, 1975 contribute towards their statutory annuities at a rate of 6% of salary, and they contribute a further 1% of salary towards the cost of the indexation of their statutory annuities. The *Beauregard* decision also upheld the legality of this distinction in contribution rates which is based on date of appointment.

The Dorfman Committee recommended that judges should not be required to contribute towards their statutory annuities, and that all judges should be required to contribute towards the cost of supplementary retirement benefits (indexation) at a rate of 1% of salary. The de Grandpré Committee recommended that judicial annuities, including survivors' benefits, and supplementary retirement benefits should all be provided without any judicial contributions. The Lang Commission recommended that all judges should contribute at a rate of 1½% of their salaries towards their statutory annuities, and, one may assume, that they not contribute at all towards the cost of supplementary retirement benefits. Furthermore, the de Grandpré and Lang reports recommended the retroactive reimbursement (with interest) to judges of all (de Grandpré) or a portion (Lang) of the pension contributions theretofore paid. In their written and oral submissions to this Commission, both the Joint Committee on Judicial Benefits and the Canadian Bar Association recommended the repeal of the requirement for contributions to the cost of annuities and the retroactive reimbursement of contributions made since 1975.

We do not agree with the recommendations of the earlier Committees and Commission and the submissions made to us with respect to judges' contributions. Judicial pensions are not like ordinary pensions insofar as they are designed to enhance the independence and competence of the bench and to compensate in part for the high or potential earning power which lawyers forego upon acceptance of judicial appointment. The judicial annuity itself constitutes an important element in guaranteeing independence. However, the question of some judicial contribution to the costs of the pension is an entirely different matter, and we do not consider the issue of reasonable contributions to annuities as in any way affecting the independence of the judiciary. In the case of *The Judges* v. *Attorney-General for Saskatchewan*, the Judicial Committee of the Privy Council decided that a general income tax which charges the official incomes of judges on the same footing as the incomes of other citizens did not interfere with the "independence nor any other attribute of the judiciary".[3] We believe that the same principle applies with respect to contributions to judicial annuities.

The Commission is of the view that the unique character of the judiciary, and in particular the requirement for independence, is currently reflected in a number of aspects relating to judicial pensions. These include the relatively short qualifying period (as little as 10 years in some circumstances in order to qualify for full pension), the supernumerary option, the full indexation of benefits, the fact that the annuity is calculated on the basis of the salary at the time of retirement (and not on the basis of the average salary over a number of years of service immediately prior to retirement), and the disability provision in paragraph 23(1)(c) of the *Judges Act*. We feel that as this Commission is recommending judicial salaries which are more closely related to those earned by others of similar importance and stature, we must, in order to be consistent, also consider the non-salary benefits, which are unquestionably justified, in the same manner. We would emphasize that the Commission regards its recommendations with respect to salaries and pensions to be integrated components of a comprehensive compensation package. These components are seen by us to be interlinked, and the adoption of only part or parts would distort the philosophy and intent of the recommendations as a whole.

There appears to be little actuarial basis for the contribution rates presently in effect (see Appendix "D").[4] Their significance is essentially historical. The following table, prepared for the Commission in December, 1986 by the Chief Actuary of the Department of Insurance of Canada, shows, for annuities under the *Judges Act*, sample normal actuarial costs (consisting of the total of a judge's own contributions and the government contributions required to pay for that judge's pension)

expressed as a percentage of that judge's entire salary earned during his or her total years on the bench. The table is based on the actuarial assumptions set out below it.

Annuities pursuant to the Judges Act

Sample normal actuarial costs (contribution rates) expressed as a percentage of salary (payable from appointment to retirement)

Retirement Age		Years of Service 10	15	20	25	30	35
75	M	68.8	46.8	35.5	28.2	23.0	18.9
	F	70.2	46.0	33.7	26.2	21.0	17.3
70	M	79.6	53.1	39.3	30.6	24.5	20.1
	F	84.4	54.7	39.7	30.5	24.4	20.0
65	M	—	60.2	43.7	33.5	26.7	21.9
	F	—	63.0	45.3	34.7	27.6	22.6
60*	M	—	—	47.8	36.6	29.1	—
	F	—	—	50.3	38.4	30.5	—

* Illustrative of costs of retirement option not now available under the *Judges Act* but recommended in Item B below.

Actuarial Assumptions:

Rate of interest: 6.5%
Rate of increase in salaries: 5%
Rate of increase in Consumer Price Index (Indexing): 3.5%
Retirement Age: Age at which pension commences, provided a judge has survived in office to this age without becoming disabled
Mortality: 1983 GAM Table (rated up 3 years for disabled)
Disability: Probability assumed equal to rate of mortality
Proportion married: varying by age (e.g. 0.96 at 50 and 60, 0.73 at 70, 0.51 at 80 and 0.25 at 90)
Relative ages of spouses: Wife three years younger
Remarriage: Ignored
Children: Ignored
Withdrawal: 0.5% up to age 55 and 0.0% thereafter
Minimum (Return of Contributions) benefit: Ignored

Benefits Valued:

(a) annuity on disability or retirement equal to two-thirds final salary;

(b) annuity to surviving spouse equal to one half the annuity that was payable to a deceased judge or would have been payable if he or she had become entitled to a full annuity at the date of death;

(c) return of 7% contributions with interest at 4% on death without survivor prior to retirement age, or on resignation from office without entitlement to a pension.

The above table indicates, for example, that a male judge who retires at age 75 after 20 years of service will thereafter receive a full pension equal to two-thirds of his final salary, the full cost of which would have required a contribution of 35.5% of the salary he received in each of his 20 years on the bench. Of that 35.5% contribution required each year, the judge would have contributed 7% (assuming he was appointed after February 16, 1975) and the Crown would have contributed 28.5% in absolute terms.[5] In other words, even the higher judicial contribution rate of 7% of salary, while significant, is a modest contribution indeed in terms of the overall cost of the pension scheme, and seems eminently fair for newly-appointed judges.

We regret the impact which the imposition of judicial contributions has had on judges, yet any partial remedy is likely to create as many inequities as it cures. The unfortunate passage of time has probably rendered a simple solution impractical in any case. In November, 1986, there were 795 judges holding office, of whom 253 (32%) were appointed before February 17, 1975, and are therefore contributing 1½% of salary towards the costs of statutory annuities, and 542 (68%) were appointed after February 16, 1975, and are therefore contributing 6% of salary towards annuities and a further 1% towards supplementary benefits. When these statistics are related to the comparable figures at the time of the de Grandpré Report, when 360 judges (54%) contributed 1½% and 310 judges (46%) contributed 7%, it is evident that the inequities resulting from the "two classes of judges" is being remedied by the passage of time. It should also be mentioned that the present figure for judges contributing 1½% includes virtually all of the approximately 80 supernumerary judges. It is our view that the 1975 decision of Parliament to impose judicial contributions, whereby it created "two classes of judges", and the manner in which it was done, are now history. Parliament has not seen fit to act again notwithstanding the recommendations for change made in the Dorfman, de Grandpré and Lang reports and all things considered, maintenance of the *status quo*, as time removes the present anomaly, may well be the most realistic approach.

For the above reasons, we do not adopt the recommendations of the past with respect to lowering to 1½%, or to any other rate, or abolishing altogether, judicial contributions towards the cost of statutory annuities and supplementary benefits, or reimbursing contributions.

We therefore **recommend that the present rates of judicial contributions towards the costs of both statutory annuities and supplementary benefits (indexing) be maintained (including the February 16-17, 1975 contribution rate differential) and that contributions of the judiciary not be reimbursed.**

We note that significant future relief from the double taxation aspect of judicial contributions toward the cost of annuities has now been provided by amendment to the *Income Tax Act* (see Item G below).

B. "Rule of Eighty"

In the past, appointments of superior, district and county court judges were customarily made from the ranks of more senior members of the bar, i.e., in the age range of 50 years and upwards. However, commencing about 20 years ago, there began a practice of appointing on occasion younger men and women to judicial office, e.g., persons in their late 30's and early 40's. This has been well received and has produced a group of younger people who are able to give periods of long service to the judiciary and meet the increasing demands of the busy court systems. By all appearances, this practice has been successful but because of the longer period of service, some problems have appeared respecting supernumerary status and annuities. The present law was apparently premised on the expectation of more senior appointments and does not readily take into account those who accept an appointment to the bench in the early forties or younger. The Commission believes that

long periods of service, regardless of age, merit certain entitlements. The Commission also holds the view that age 60 should be the minimum age at which a judge qualifies for a full pension of two-thirds of salary.

We accept that professional "burnout" may manifest itself within the judiciary, and that retirement from the bench, but not election of supernumerary status, should be available as a solution for judicial "burnout".

We therefore **recommend that retirement at full pension, but not the election of supernumerary status, be permitted at the following combinations of age and years of service on the bench: 60 years of age and 20 years of service; 61 and 19; 62 and 18; 63 and 17; and 64 and 16.**

Age 75 is fixed by subsection 99(2) of the *Constitution Act, 1867* (as amended in 1960) for the retirement of judges of provincial superior courts, and a recent court decision[6] has held that the current requirement that judges of the Federal Court retire at age 70 was unconstitutional. We therefore **recommend that for the sake of equality and uniformity, the mandatory retirement age be standardized at 75 for all federally appointed judges, and that the mandatory retirement age of judges on the Federal Court of Canada, the Tax Court of Canada and the county and district courts be raised to 75.** We also **recommend that the supernumerary provisions be standardized for all federally appointed judges except the members of the Supreme Court of Canada.**

C. Adequacy of Pension Benefits

Paragraph 25(1)(a) of the *Judges Act* provides an annuity to the surviving spouse of a judge who dies, equal to one-third of the judge's salary, and paragraph 25(1)(b) of the Act provides an annuity to the surviving spouse of a retired judge who was in receipt of an annuity at the time of death, equal to 50% of the amount of the retired judge's annuity. Both these types of survivor's pensions are indexed pursuant to the provisions of the *Supplementary Retirement Benefits Act* (R.S.C. 1970, c. 43 (1st Supp.)).

In order to better reflect current values of survivors' benefits provided by many private pension plans and by recent federal and provincial pension benefits and standards legislative reforms, we **recommend that the surviving spouse of a judge who dies in office be entitled to an annuity equal to 40% (instead of one-third) of the judge's salary at the time of death.** We further **recommend that the surviving spouse of a retired judge who dies while in receipt of a pension be entitled to an annuity equal to 60% (instead of 50%) of the amount of the retired judge's pension at the time of death.** The benefits of eligible children should be adjusted accordingly. These increases in survivors' benefits should apply only with respect to survivors not in receipt of benefits upon the coming into force of the necessary amendments to the *Judges Act*.

There are provisions in the *Judges Act* (paragraphs 29.2(1),(2) and (3)) and in the *Supplementary Retirement Benefits Act* (section 6) for the return of pension contributions to a judge. Pursuant to paragraph 29.2(4)(b) of the *Judges Act*, interest is payable upon the return of contributions made under that Act, at 4% compounded annually. We believe this rate has been unfair and can be unrealistic. We **recommend that compound interest be payable upon the return of all contributions at a rate to be varied as and when necessary to reflect the "prescribed rates".**[7] If no prescribed rate was in effect, then a rate comparable to the average equivalent yield obtainable during each year on 90-day Government of Canada Treasury Bills should be used.

When a judge dies while in office, a lump sum "gratuity" equal to one-sixth of the judge's annual salary at the time of death is payable immediately to the surviving spouse pursuant to Treasury

Board Minute 757563 dated May 18, 1978. **We recommend that this gratuity be made a statutory entitlement by provision in the *Judges Act*.**

The Commission was invited to examine the proportion of salary (presently two-thirds) which forms the basis for the annuity. In view of the many favourable aspects of existing judicial annuities referred to previously, and of the recommendations we are making for several other improvements, we do not recommend an increase in the basic pension.

D. Early Retirement and Pro-rated Annuities

Judicial annuities are part of an overall compensation plan designed to reinforce the principle of judicial independence and to help make appointment to the bench attractive to the best qualified among lawyers. Notwithstanding that appointments at younger ages are now being made, appointment still generally comes later in life, often in the fifties (see Appendix "E"), and therefore a relatively short qualification period for full pension entitlement is necessary. All judges are precluded from receiving other salary or remuneration, or engaging in any occupation or business, while holding judicial office (section 36 and subsection 38(1) of the *Judges Act*). Moreover, it is considered inappropriate for a retired judge to return to active practice in the courts. Society, and particularly the bench and bar, have traditionally taken the view that appointment to the bench should continue to be regarded as the culmination of a lawyer's career, and not as a stepping stone to career advancement. For this reason, judicial pensions should provide sufficient income to obviate the need of a retired judge to return to full practice, but at the same time they should not have the effect of encouraging the early retirement of a serving judge. Furthermore, with respect to a lawyer who was appointed to the bench at a comparatively young age, he or she would probably not have had the opportunity, prior to appointment, to build up a retirement fund. Consequently, the eventual judicial pension must be sufficiently generous as it may be the only source of income upon retirement from the bench.

These considerations appear to be the foundation of the pension provisions presently contained in the *Judges Act*, and underlie the recommendations contained in this report.

It would not be inconsistent with these principles, and it would add an element of fairness to the situation, if the *Judges Act* were to entitle a judge to some benefit, other than the simple return with interest of accumulated pension contributions, should he or she choose to depart from the bench without otherwise qualifying for an annuity. Neither the Joint Committee on Judicial Benefits nor the Standing Committee of the Canadian Bar Association made submissions on this point, but it is specifically referred to in paragraph 2(b) of the Commission's Terms of Reference and was the subject of submissions by individuals.

We consequently **recommend that a judge who has held office for at least ten years and who retires without being entitled to an annuity should have the option of receiving an annuity, payable at age 65 should he or she retire before that age.** We further **recommend that the annuity of a judge who has served for ten or more but fewer than 15 years, when payable, should be pro-rated on the basis of years of service as a proportion of 15, with the resulting fraction being multiplied by two-thirds of the salary which the judge was earning when he or she retired.** We **recommend that in the case of this deferred annuity payable to a former judge at age 65, there be no "banking" or accumulation of indexing credits during the deferment, and that indexing commence only when the annuity becomes payable.** We **recommend that should the former judge die before attaining the age of 65, his or her surviving spouse should be entitled to an annuity equal to 60%** (consistent with our recommendation in Item C above) **of the annuity that the former judge would have received, payable when the former judge would have reached age 65.**

In our view, the deferral of the pension would discourage early retirement and the ten-year minimum qualifying period would provide an incentive for a judge to remain in office. The recommendations also reflect the spirit of recent federal and provincial legislative reforms with respect to pension benefits and standards.

E. Judges of the Supreme Court of Canada

Judges of the Supreme Court of Canada cannot elect to hold office as supernumerary judges. We appreciate that supernumerary status is inappropriate for the judges of our highest court, and inconsistent with the Court's unique role as the final arbiter of the country's legal values.

Nevertheless, we feel that by themselves, the retirement provisions of the *Judges Act* do not offer sufficient flexibility to the members of the Court, and that an additional retirement option should be made available. Because of the immense workload of Supreme Court judges combined with the heavy responsibility inherent in membership on that Court, we believe that a retirement option exercisable upon attaining the minimum age of 70, if the judge has served for at least ten years on the Supreme Court, is reasonable.

A Supreme Court judge who chooses to retire under this proposed provision should not be placed at a disadvantage in comparison to a judge on a lower court who elects to hold office as a supernumerary judge. Thus, a Supreme Court judge who takes up this option should be entitled to an income which is not significantly lower than what his or her salary would have been had he or she remained on the Supreme Court, and this income should continue until the judge reaches age 75, which would otherwise have been his or her mandatory retirement age.

The Commission therefore **recommends that a judge who has served on the Supreme Court of Canada for at least ten years and has attained the age of 70 years be eligible to retire and receive an income payable until age 75 equal to 90% of the salary that would have been received from time to time by that judge had he or she remained on the Supreme Court, and thereafter an indexed annuity equal to two-thirds of the salary annexed to the office formerly held by that judge at the time he or she attains the age of 75.**

In the event of the death of the retired judge before attaining age 75, 54% (60% of 90%, if our recommendation under Item C above is adopted) of the salary annexed to the office formerly held would be payable to the retired judge's surviving spouse, with the appropriate percentage for eligible children, until the time when the judge would have reached age 75, and thereafter the survivors' pensions would be in accordance with the applicable general rules.

F. Guaranteed Annuity Option

Should a judge in receipt of an annuity die, his or her surviving spouse is entitled to an annuity equal to one-half (or 60%, if our recommendation in Item C above is implemented) of the judge's annuity, pursuant to paragraph 25(1)(b) of the *Judges Act*. Thus, should the former judge die soon after commencing retirement, the retirement benefits to which he or she would have been entitled had he or she survived would be halved (or reduced by 40% under our recommendation) in the hands of the surviving spouse, with the former judge having received very little of what otherwise would have been payable. We believe this could result in unfair situations arising, particularly where the judge contributed towards the costs of the judicial annuity over very many years on the bench and then died shortly after retiring. We therefore **recommend that a retiring judge be given the one-time option of receiving an actuarially reduced annuity for a ten-year guaranteed period.** Following the expiry of the ten-year guaranteed period, a surviving spouse's pension would be reduced to 50% (or

60% pursuant to our recommendation in Item C above) of the initial (actuarially reduced) pension amount. The initial pension amount would continue for a ten-year period in favour of a surviving spouse, eligible children or the estate, as the case may be.

Our recommendation for a guaranteed annuity option is patterned after a benefit commonly available under private pension plans. There would be no additional cost to the public treasury for an option of this kind. A current sample of an actuarially reduced pension amount (based for illustration purposes on a purely hypothetical standard pension of $1,000 per month and assuming the adoption of our recommendation in Item C above), at different age levels, is shown below:

Age at Retirement and Monthly Amounts at Retirement

	Judge age 65 Spouse age 62	Judge age 70 Spouse age 67	Judge age 75 Spouse age 72
a) Joint Life reducing by 40% on judge's death	$1,000.00	$1,000.00	$1,000.00
b) Actuarial Equivalence of a joint life pension reducing by 40% at the later of the judge's death and the expiry of a 10-year guaranteed period	980.95	966.37	940.71

Note: The above figures are illustrative and based upon the 1983 Basic Mortality Table with projection scale G and 1983 year of purchase with interest at 10.75% for 20 years and 6% thereafter with a loading for expenses. This is an individual annuity purchase basis current at the time of our report. The figures also assume that the judge is a male with a spouse three years younger. The amounts will vary with assumptions used and ages and sex of the lives involved. The initial pension amount will continue for a 10-year period even if both lives die immediately.

G. Double Taxation

The salary deduction for a judge's contribution to judicial annuities and supplementary benefits is deemed to be contributed to or under a registered pension fund or plan, pursuant to subsection 29.1(3) of the *Judges Act*. For 1986 and subsequent taxation years, the entire contribution ($7,609 as of April 1, 1986, for a superior court judge appointed after February 16, 1975) is deductible in calculating federal income tax.[8]

Prior to 1986, only a portion of the contribution, namely $3,500, was deductible in calculating taxable income even though the annuity itself is fully taxable as income in the hands of the judge when received. Thus, the judge is potentially subject to double taxation on the amount of the contributions made in years prior to 1986 that exceeded $3,500 per annum; i.e., the amount is taxed as income as part of his or her salary in the year in which it was earned, despite the fact it was never received, and payments of the annuity are taxed again when received.

With the release of Interpretation Bulletin No. IT-167R5 in 1985, Revenue Canada's administrative practice was changed to permit a taxpayer to carry forward any registered pension plan contributions in excess of $3,500 made in respect of current service, and to deduct such excess in subsequent taxation years at the maximum rate of $3,500 per year, i.e., subject to the standard

$3,500 limit. Thus, over time, all pre-1986 pension contributions that were previously ineligible for deduction will be deductible from taxable income, as long as there are sufficient years in which actual contributions are less than $3,500.

This administrative position permitting a carry forward of excess contributions will be of assistance only where contributions for a subsequent year are less than $3,500. Thus, judges will not be able to avail themselves of this deduction for amounts carried forward from years prior to 1986 while they are making current contributions in excess of $3,500 to the pension plan, since both current service contributions and excess contributions carried forward must be aggregated for purposes of the $3,500 limit. It may therefore be some years after judges have been taxed on pre-1986 excess contributions before these contributions become fully deductible, i.e., only during retirement.[9] In fact, where death occurs before all amounts have been deducted, some amounts may never be deductible.

In view of the substantial measure of relief from double taxation afforded by the 1986 amendment for post-1985 contributions and the possibility of relief, though limited, pursuant to Interpretation Bulletin No. IT-167R5 for pre-1986 contributions, we do not feel it necessary to make any recommendation for further change in the *Income Tax Act* with respect to pension contributions at this time. We note however that provincial tax legislation may have to be amended where applicable to achieve the same result.

We understand that in addition to the above, judges are treated for certain income tax purposes as self-employed professionals, and consequently are now permitted to deduct up to $7,500[10] for contributions to their Registered Retirement Savings Plans, with no reduction for amounts contributed towards the cost of judicial annuities and supplementary benefits pursuant to subsections 29.1(1) and (2) of the *Judges Act*.

H. Indexation of Annuities

The indexing of judicial salaries is provided for in the *Judges Act*. On the other hand, judicial annuities, including those of surviving spouses and eligible children, are indexed pursuant to the *Supplementary Retirement Benefits Act*. That Act applies to many branches of the public service, as well as to judges, and it is administered by the President of the Treasury Board.

The separate status of the judiciary, the principle of judicial independence and the unique recruiting requirements of the judiciary, all suggest that the indexation of judicial annuities should likewise be provided for in the *Judges Act*, so that it be distinct from the indexation of other public service pensions and to place all legislative provisions relating to judges in the one statute. For the judiciary, and uniquely so, indexation of annuities is a factor that should be regarded within the overall constitutional guarantees of security of tenure and security of salary and pension. We therefore **recommend that the provisions for indexing judicial annuities, including those of surviving spouses and eligible children, and for the return of judges' contributions, should be transferred to the *Judges Act* from the *Supplementary Retirement Benefits Act***.

We do not accept the suggestion that judicial annuities be linked to the salary of a judge current from time to time, with the exception of the income which we recommend (in Item E above) be payable to former members of the Supreme Court of Canada between the ages of 70 and 75 who elect to retire following ten years of service on that Court.

I. Suspension of Surviving Spouse's Annuity on Remarriage

Subsection 25(3) of the *Judges Act* suspends the pension entitlement of a surviving spouse during his or her remarriage. In the event of a decree of nullity or divorce, or upon the death of the spouse of the remarriage, payment of the annuity would be resumed by virtue of subsection 25(3.1).

We feel, as did the de Grandpré Committee, that subsection 25(3) "underscores a socially inappropriate and invidious policy". Furthermore, failure to amend the *Judges Act* to permit continuation of survivors' benefits upon remarriage may raise serious legal questions involving equality rights. We therefore **recommend the repeal of subsections 25(3) and 25(3.1) of the *Judges Act*.**

We also **recommend the removal of the words "is unmarried" from paragraph 25(1.3)(b) of the *Judges Act*,** thereby eliminating the criterion of a child's marital status in the consideration of eligibility for benefits.

We further **recommend that consequential amendments be made in the terms of eligibility for applicable group insurance, medical and other benefit plans.**

---

1. *Supra.*, at p. 77. The *Beauregard* case dealt with the constitutionality of the *Judges Act* amendments requiring judges to contribute towards the costs of their pensions, and the legality of requiring higher contributions from judges appointed after the date of first reading of the amendments.

2. In a letter dated February 17, 1975, sent by the then Minister of Justice to inform all judges already in office of the decision of the Government to implement the new policy, he referred to their contribution of 1½% as being "in respect of the cost of the improved annuities for widowed spouses and other dependants". Subsection 29.2(2) of the *Judges Act* (which provides for the return of this (1½%) contribution to the judge should the spouse pre-decease him or her and should children (if any) no longer be eligible for annuities) confirms this limited purpose of the 1½% contribution made by judges appointed before February 17, 1975.

3. (1937), 53 T.L.R. 464, at p. 466.

4. The pension plan established by the *Judges Act* is among those of which the Chief Actuary is required to conduct periodic actuarial reviews and to file cost certificates and valuation reports pursuant to the *Public Pensions Reporting Act* (S.C. 1986, c. 16).

5. We have noted that in the *Beauregard* decision (*supra.*, at p. 95), the pleadings of the parties, as amended by the agreed statement of facts, are quoted as follows:

> "Upon his retirement, the Plaintiff's minimum contribution of $3,815.00 per annum with interest compounded annually using a rate of interest of ten per cent per annum will have established in the hands of the defendant a capital sum in the order of $400,000.00 an amount more than sufficient to take care of the Plaintiff's retirement annuities and the Plaintiff's supplementary retirement benefits."

Respectfully, we are curious as to whether the calculations and conclusion had ever been actuarially tested.

6. *Addy* v. *The Queen in Right of Canada* (1985), 22 D.L.R. (4th) 52 (F.C. (T.D.)).

7. See Part XLIII (sections 4300 - 4301) of the *Income Tax Regulations.*

8. Paragraph 8(1)(m) of the *Income Tax Act* permits a deduction for $3,500 of contributions to a registered pension plan. Paragraph 8(1)(m.1) of the *Act* permits the deduction of non-voluntary contributions in excess of $3,500 to a defined benefit registered pension plan, effective for 1986 and subsequent years.

9. Revenue Canada has stated in its Interpretation Bulletin that an excess contribution may be deducted in a subsequent year (subject to the $3,500 limit) even if employment ceases prior to that year.

10. The limit of $7,500 will increase for 1988 and subsequent years if current proposals to amend the *Income Tax Act* are enacted.

IX. An Alternative for Fixing Judicial Compensation

Both the Joint Committee on Judicial Benefits and the Canadian Bar Association recommended to the Commission that action be taken with a view to the adoption of a formula for fixing judicial compensation similar to that in place with respect to the federal judiciary in the Australian state of New South Wales. Under the "New South Wales formula", a remuneration tribunal is required to make an annual determination with respect to the remuneration to be paid to office-holders specified in the governing legislation, which includes judges. This determination takes effect after a fixed period unless either House of Parliament passes a resolution disallowing it. This procedure is known as proceeding by way of a negative resolution.

No evidence was submitted to the Commission on the experience, favourable or otherwise, of the "New South Wales formula", particularly as it applies to the judiciary. A particular concern we have is as to the nature of the relationship between the Houses of the New South Wales Parliament and the remuneration tribunal.

The Commission is of the view that to apply the formula in Canada would in any case quite likely require an amendment to section 100 of the *Constitution Act, 1867*, which requires Parliament to fix and provide the salaries, allowances and pensions of essentially all federally appointed judges. We are not convinced that the "New South Wales formula" would be such an improvement on the present system as to justify a constitutional amendment.

X. Taxation of New Judges

Identification of Problem

Newly appointed judges often face a serious cash flow problem in the two years following their appointment to the bench. The problem stems from the substantial income tax payments that may be required in those two years with respect to professional income earned prior to appointment. The problem is often compounded by actual or deemed dispositions that are unavoidable when a new judge withdraws from practice. Previously untaxed professional income would include not only professional income for the year, but also earnings from the last fiscal year-end to the date of appointment (" 'stub' period earnings"), unbilled work in progress ("WIP") and the 1971 accounts receivable reserve. Taxable capital gains and recaptured capital cost allowance on assets deemed disposed of and taxable capital gains on the disposition of the partnership interest may also result in a substantial income inclusion for tax purposes. Since these inclusions are added to judges' salaries, they are effectively taxed at the highest tax rate. The tax payments may, in some cases, exceed the net remuneration received by the judge. Appendix "F" illustrates this problem with an Ontario example that is not untypical.

Any solution must recognize that the problem is not strictly a taxation problem (although it does result in all previously untaxed amounts being taxed at the new judges' highest tax rate), but rather a cash flow problem arising from the acceleration of the recognition of income for tax purposes without a corresponding increase in cash flow. As a result, reducing the tax liability through tax shelters or Registered Retirement Savings Plans (RRSP) which require a cash outflow are not viable alternatives. While a reduction in the tax rate applicable to certain types of professional income which are included in taxable income in the year of or the year following appointment might mitigate the problem, the real solution would appear to lie in the deferment of the recognition of income to future taxation years.

Possible Solutions

Several possible solutions have been identified. The first three alternatives have been proposed in the past and may not address the real issue. These proposals together with their principal disadvantages are summarized below:

1. Tax Rate Reduction or Tax Credits

Proposal —

Certain types of deferred professional income which cause the "bunching up" of income in the year of or year following appointment would be subject to tax at one-half the normal rate of tax. Alternatively, the income would be subject to the normal rates of tax but a tax credit would be allowed to effectively reduce the tax to one-half of what would otherwise be payable on those sources of income.

Disadvantage —

While this will reduce the amount of tax payable and hence reduce the cash flow problem, it will not eliminate the problem altogether.

2. "Rollover" to RRSP

Proposal —

It has been suggested that certain amounts of deferred professional income be treated as a "retiring allowance" and therefore qualify for a transfer to a RRSP. Consequently, $3,500 per year of previous "employment" (partnership) could be transferred to a RRSP and escape immediate taxation.

Disadvantage —

Since the problem is normally one of cash flow, many newly appointed judges would not have sufficient funds to make a large RRSP contribution unless they had significant other capital.

3. Average the Tax Over the Previous Five Years

Proposal —

The aggregate of certain components of deferred professional income would be notionally added back to the incomes of the new judge for the five years prior to appointment and the additional taxes likewise aggregated as a tax liability. A variation on this proposal would be to compute the average rate of tax over the previous five years and apply this average to the previously untaxed professional income.

Disadvantage —

These proposals would not be of much benefit to most lawyers as they would likely be at the peak of their career during those years and would be taxed at the top marginal rate. Therefore averaging the income would not produce significant benefits and would do little or nothing to alleviate the cash flow problem. Also, those lawyers who had taken advantage of tax shelters might receive a benefit not available to others.

4. Permit Judges to Report Salary on a Fiscal-Year Basis

Proposal —

A new judge would have the option of reporting his or her salary income on a fiscal-year basis with the year-end corresponding to the fiscal period of the professional practice from which he or she retired. Assuming that the judge was a partner in a firm with a January 31 year-end, he or she would be allowed to report salary on that basis as well.

Disadvantage —

This would solve the major cash flow problem, but there would still be tax on unbilled WIP, 1971 receivable reserve and the other special inclusions which would come into income in the year following appointment to the bench. To be totally effective, this solution would have to be combined with a reserve, similar to that described below. This in turn might add undue complexity.

Recommended Solution — Tax Deferral over a Number of Years

The recognition of certain types of income could be deferred over a period of, say, 15 years. This could be accomplished by having all amounts included in income under the general rules and

allowing a judge to claim a special reserve for deferred professional income, 1/15th of which must be included in income each year. The balance of the reserve in the year of death or retirement from the bench would be included in income in that year, and in the case of death, subsection 159(5) of the *Income Tax Act* ("*ITA*") would be made applicable, allowing payment over a maximum period of ten years. This proposal would dramatically reduce the cash flow problems in the first few years and would spread the tax burden over 15 years. The structure could be as follows:

1. Income Inclusions

It is therefore **recommended that a judge be required to include in income in the year of appointment all of the following amounts relating to his or her professional practice:**

(i) professional income for the fiscal year (i.e., repeal s. 24.1 of the *ITA*)

(ii) professional income for the "stub" period (i.e., provide that s. 99(2) and s. 96(1.1) of the *ITA* not be applicable to judges in year of appointment)

(iii) unbilled work in progress (special rules would be required to include this in income in the year of appointment rather than in the subsequent year)

(iv) 1971 Accounts Receivable reserve (special rules would be required to include this in income in the year of appointment rather than in the subsequent year)

(v) taxable capital gains and recaptured capital cost allowance on professional assets deemed disposed of

(vi) taxable capital gain on disposition of partnership interest, and

(vii) judge's salary for calendar year.

2. Special Reserve

A special reserve could then be claimed for such of the above amounts as are listed below. 14/15ths of such amounts would qualify for a special reserve in the year of appointment, with 1/15th included in income in each of the following 14 years. The balance of the reserve would be included in income in the year of death or retirement should either occur within 15 years of appointment.

3. Qualifying Amounts for Reserve

The amounts which would qualify for the special reserve would be:

(i) a portion of the professional income for the fiscal year of the professional practice computed as follows:

$$\text{Income for fiscal year} \times \frac{\text{\# of months in calendar year while a judge}}{\text{\# of months in fiscal year}}$$

(This is similar to s. 24.1 of the *ITA*.)

(ii) professional income for the "stub" period

(iii) unbilled work in progress

(iv) 1971 Accounts Receivable reserve

(v) taxable capital gains and recaptured capital cost allowance on professional assets deemed disposed of, and

(vi) taxable capital gain on disposition of partnership interest.

Rationale

The solution recommended above would, as illustrated in Appendix "G", alleviate the cash flow problem in the early years and spread the tax burden over the 15 years following appointment, which is the usual minimum period in office before retirement at full pension. This solution would also ensure that over an extended period, all income is taxed at the judge's normal tax rates.

Information Booklet

We recommend that the Minister of Justice have prepared an information booklet outlining the tax treatment of lawyers' income on their appointment to the bench together with details of judges' salaries, allowances, pensions and other benefits, and that such booklet be provided to all those who are approached to accept judicial appointment.

XI. Conclusion

Judges are not in a position to make representations to or bargain with government for adjustments to their salaries, allowances and pensions. For this reason, Parliament has provided for the appointment of Triennial Commissions. Two of the purposes of Triennial Commissions are to reduce the element of partisan politics in the adjustment of judicial compensation and to reinforce the principle of judicial independence. The Commissions make recommendations to the Minister of Justice, not as it were on the judges' behalf, but certainly mindful of the needs of an independent judiciary.

It is in this context that we have made the recommendations contained herein, and we reiterate our concern that this report be read as a whole and that the main thrust of our recommendations not be so altered as to seriously compromise their interrelationships.

XII. Summary of Recommendations

1. That Parliament either agree promptly with and implement quickly the individual recommendations of this and subsequent Triennial Commissions or, if necessary, indicate promptly its disagreement with any of such recommendations (Chapter III).

2. That a new judicial salary base be established as of April 1, 1986, by applying the Industrial Composite Index to the 1975 salary level for the years 1976 to 1986, capped by a 6% and 5% increase for 1983 and 1984, respectively. The recommended salary levels as of April 1, 1986 are as follows (Chapter IV):

Judges, Federal Court of Canada and Superior Courts —	$127,700
Chief Justices and Associate Chief Justices, Federal Court of Canada and Superior Courts —	$139,700
Judges, Supreme Court of Canada —	$151,700
Chief Justice of Canada —	$163,800

3. That the differential of $5,000 between the salaries of judges of county and district courts and those of superior courts be maintained (Chapter V).

4. That the incidental allowance be increased to $2,500 annually (Chapter VI).

5. That the removal allowance be extended to retiring judges of the three section 101 courts who are required upon appointment to change their place of residence to the vicinity of the National Capital Region, and as well to the surviving spouses and eligibile children of these judges who die in office (Chapter VII).

6. That the removal allowance permit these retiring section 101 judges, and/or the family, to move to a place of residence in any one of the ten provinces or two territories (Chapter VII).

7. That there be a requirement whereby all removal allowances must be utilized within a reasonable period following the relevant event (Chapter VII).

8. That the present rates of judicial contributions towards the costs of both statutory annuities and supplementary benefits (indexing) be maintained (including the February 16-17, 1975 contribution rate differential) and that contributions of the judiciary not be reimbursed (Chapter VIII, Item A).

9. That retirement at full pension, but not the election of supernumerary status, be permitted at the following combinations of age and years of service on the bench: 60 years of age and 20 years of service; 61 and 19; 62 and 18; 63 and 17; and 64 and 16 (Chapter VIII, Item B).

10. That the mandatory retirement age be standardized at 75 for all federally appointed judges, and that the mandatory retirement age of judges on the Federal Court of Canada, the Tax Court of Canada and the county and district courts be raised to 75 (Chapter VIII, Item B).

11. That the supernumerary provisions be standardized for all federally appointed judges except the members of the Supreme Court of Canada (Chapter VIII, Item B).

12. That the surviving spouse of a judge who dies in office be entitled to an annuity equal to 40% of the judge's salary at the time of death (Chapter VIII, Item C).

13. That the surviving spouse of a retired judge who dies while in receipt of a pension be entitled to an annuity equal to 60% of the amount of the retired judge's pension at the time of death (Chapter VIII, Item C).

14. That compound interest be payable upon the return of all contributions at a rate to be varied as and when necessary to reflect the "prescribed rates", and that if no prescribed rate was in effect, then a rate comparable to the average yield obtainable during each year on 90-day Treasury Bills should be used (Chapter VIII, Item C).

15. That the lump sum gratuity payable to the surviving spouse of a judge who dies in office be made a statutory entitlement by provision in the *Judges Act* (Chapter VIII, Item C).

16. That a judge who has held office for at least ten years and who retires without being entitled to an annuity should have the option of receiving an annuity, payable at age 65 should the judge retire before that age (Chapter VIII, Item D).

17. That the annuity of a judge who has served for ten or more but fewer than 15 years, when payable, should be pro-rated on the basis of years of service as a proportion of 15, with the resulting fraction being multiplied by two-thirds of the salary which the judge was earning when he or she retired (Chapter VIII, Item D.)

18. That in the case of a deferred annuity payable to a former judge at age 65, there be no "banking" or accumulation of indexing credits during the deferment, and that indexing commence only when the annuity becomes payable (Chapter VIII, Item D).

19. That should the former judge die before attaining the age of 65, his or her surviving spouse should be entitled to an annuity equal to 60% of the annuity that the former judge would have received, payable when the former judge would have reached age 65 (Chapter VIII, Item D).

20. That a judge who has served on the Supreme Court of Canada for at least ten years and has attained the age of 70 years be eligible to retire and receive an income payable until age 75 equal to 90% of the salary that would have been received from time to time by that judge had he or she remained on the Supreme Court, and thereafter an indexed annuity equal to two-thirds of the salary annexed to the office formerly held by that judge at the time he or she attains the age of 75 (Chapter VIII, Item E).

21. That a retiring judge be given the one-time option of receiving an actuarially reduced annuity for a ten-year guaranteed period (Chapter VIII, Item F).

22. That the provisions for indexing judicial annuities, including those of surviving spouses and eligible children, and for the return of judges' contributions, should be transferred to the *Judges Act* from the *Supplementary Retirement Benefits Act* (Chapter VIII, Item H).

23. That subsection 25(3) of the *Judges Act*, which suspends a surviving spouse's annuity in the event of remarriage, and subsection 25(3.1) be repealed (Chapter VIII, Item I).

24. That the criterion of a child's marital status be eliminated in the consideration of eligibility for benefits (Chapter VIII, Item I).

25. That amendments consequential to the two recommendations immediately above be made in the terms of eligibility for applicable group insurance, medical and other benefit plans (Chapter VIII, Item I).

26. That a judge be required to include in income in the year of appointment certain amounts relating to his or her professional practice, and that a special reserve should then be claimable for 14/15ths of such amounts in the year of appointment with 1/15th included in income in each of the following 14 years (Chapter X).

27. That an information booklet be prepared and provided to all those who are approached to accept judicial appointment (Chapter X).

All of which is respectfully submitted this 27th day of February, 1987.

H. Donald Guthrie, Chairman

Edward H. Crawford

Jeannine M. Rousseau

Eldon M. Woolliams

APPENDIX "A"

Commission on Judges' Salaries and Benefits

CANADA

OTTAWA, K1A 1E3

Commission sur le traitement et les avantages des juges

1986 COMMISSION ON JUDGES' SALARIES AND BENEFITS

NOTICE

This Commission was appointed on September 1, 1986 by the Minister of Justice and Attorney General of Canada, pursuant to section 19.3 of the Judges Act, to inquire into the adequacy of the salaries and other amounts payable under the Act to federally-appointed judges and into the adequacy of federally-appointed judges' benefits generally, including the granting of annuities provided to judges and to their surviving spouses and children.

The Commission invites written submissions in either official language concerning the matters within the Commission's terms of reference. Written submissions must reach the Commission by October 20, 1986, in eight copies. A party intending to file a written submission with the Commission may also request an opportunity to make a presentation at an oral hearing. The Commission must be notified by October 10, 1986 of the party's desire to appear at an oral hearing and if so, of the city and official language in which the presentation will be made. A party filing a written submission need not request to appear at an oral hearing, and any such request will not be considered if the party has not filed a written submission by October 20, 1986.

The Commission proposes to conduct oral hearings, if required, in the following cities and on the following dates:

Halifax	October 23
Vancouver	October 29
Edmonton	October 30
Montreal	November 21
Ottawa	November 27 and 28

Copies of the Commission's terms of reference are available upon request.

1986 Commission on Judges' Salaries and Benefits,
110 O'Connor Street
Room 1114
Ottawa, Ontario
K1A 1E3

H. Donald Guthrie, Q.C.
Chairman

Commission on Judges' Salaries and Benefits

CANADA

Commission sur le traitement et les avantages des juges

OTTAWA K1A 1E3

COMMISSION DE 1986 SUR LE TRAITEMENT ET LES AVANTAGES DES JUGES

AVIS

La Commission de 1986 sur le traitement et les avantages des juges a été instituée le 1er septembre 1986 par le ministre de la Justice et procureur général du Canada, en application de l'article 19.3 de la Loi sur les juges. Elle a pour mandat de déterminer si le traitement et les avantages des juges nommés par le gouvernement fédéral, et plus spécialement si les pensions auxquelles ceux-ci, leur conjoint et leurs enfants ont droit, sont satisfaisants.

La Commission invite toute personne intéressée à lui soumettre par écrit ses vues sur les sujets qu'elle a reçu pour mission d'examiner. Ces interventions doivent prendre la forme d'un document écrit, établi dans l'une ou l'autre des deux langues officielles, et être déposées auprès de la Commission en huit exemplaires au plus tard le 20 octobre 1986. Quiconque dépose un tel document écrit peut en outre demander à la Commission d'être entendu par celle-ci. En pareil cas, il convient d'aviser la Commission au plus tard le 10 octobre 1986 du souhait de présenter des observations orales, ainsi que de la ville et de la langue officielle dans lesquels cette intervention aura lieu. Il convient de noter que le dépôt de documents écrits n'oblige nullement à présenter les observations orales. Quoi qu'il en soit, nul ne se verra accorder l'autorisation d'exposer verbalement ses vues à moins d'avoir remis un document écrit à la Commission avant la date limite du 20 octobre 1986.

La Commission, s'il y a lieu, tiendra des audiences dans les villes et aux dates qui suivent :

Halifax	23 octobre
Vancouver	29 octobre
Edmonton	30 octobre
Montréal	21 novembre
Ottawa	27 et 28 novembre

Il est possible d'obtenir le texte définissant le mandat de la Commission sur simple demande.

Commission de 1986 sur le traitement et les avantages des juges
110, rue O'Connor
Bureau 1114
Ottawa (Ontario)
K1A 1E3

Le président de la Commission

H. Donald Guthrie, c.r.

APPENDIX "B"

LIST OF WRITTEN SUBMISSIONS

1. The Joint Committee on Judicial Benefits of the Conference of Chief Justices and Chief Judges and the Canadian Judges Conference
2. Justices of the Supreme Court of Ontario
3. The Honourable Mr. Justice Patrick T. Galligan (Supreme Court of Ontario (High Court of Justice))
4. The Honourable Mr. Justice Doane Hallett (Supreme Court of Nova Scotia (Trial Division))
5. The Honourable Mr. Justice Donald S. Thorson (Supreme Court of Ontario (Court of Appeal))
6. The Honourable Mr. Justice Thomas G. Zuber (Supreme Court of Ontario (Court of Appeal))
7. The Honourable Judge Fernand L. Gratton (District Court of Ontario)
8. The Honourable Judge Hugh M. O'Connell (District Court of Ontario)
9. The Canadian Bar Association Standing Committee on Pensions for Judges' Spouses and Judges' Salaries
10. The Law Society of Alberta (R.P. Fraser, Q.C., President)
11. The Nova Scotia Barristers' Society (L.K. Evans, Q.C., President)
12. Le Barreau du Québec (Mtre Serge Ménard, Bâtonnier, and Mtre Louis-Philippe de Grandpré, Q.C.)
13. The Patent Examiners' Group of the Professional Institute of the Public Service of Canada
14. M.F. Murphy, Calgary, Alberta
15. Winnifred M. Rogalsky, Chilliwack, British Columbia

APPENDIX "C"

PIONEER GRAIN COMPANY, LIMITED

HONOURABLE OTTO LANG, P.C., Q.C.

THE PIONEER

RICHARDSON BUILDING
ONE LOMBARD PLACE, WINNIPEG, MANITOBA R3B 0X8
TELEPHONE (204) 986-5861 TELEX 075-7814

February 27, 1986

Mr. Justice A. R. Philp
Judges Chambers
Law Courts
WINNIPEG, Manitoba
R3C OV8

Dear Allen:

On the basis of your research and the information you have obtained about the calculations made for the Commission which I chaired, I am convinced that you are right in your conclusions. In short, the philosophy and logic which our Commission applied in its report should have led to a different base salary figure for 1985. It would appear that your figure based on revised and accurate calculations of $123,500 for 1985 is correct.

Yours sincerely,

Otto Lang
Executive Vice-President

/lb

APPENDIX "D"

Valuation Summary of Annuities under the Judges Act as of December 31, 1985 (Including Indexation Pursuant to SRBA)

ACTIVES

	Males		Females		Both Sexes	
Contributors	754		45		799	
Total Payroll	$ 77,372,560		$ 4,705,330		$ 82,077,890	
Judges' Contributions*	3,910,132	(5.1%)	288,734	(6.1%)	4,198,866	(5.1%)
Government Costs	17,425,957	(22.5%)	753,335	(16.0%)	18,179,292	(22.2%)
Normal Cost	21,336,089	(27.6%)	1,042,069	(22.1%)	22,378,158	(27.3%)
Actuarial Liability	145,333,135		5,237,699		150,570,834	

* Judges' contributions expressed as a percentage of payroll represent a weighted average of the 1.5% and 7.0% judicial contribution rates.

PENSIONERS

	Number	Annual Benefit	Actuarial Liability
Healthy Pensioners (all males)	131	$ 8,191,284	$ 67,703,045
Disabled Pensioners (" ")	25	1,554,240	18,405,266
Spouse Pensioners (all females)	224	6,114,180	62,909,410
Children Pensioners (both sexes)	13	86,280	141,615
Total Pensioners	393	15,945,984	149,159,336

	Total
Total Members	1,192
Total Actuarial Liability	$299,730,170

Summary of Methodology and Assumptions used for the above valuation of benefits:

A. *Valuation Method:*

The accrued benefit cost method (or the unit credit method) was used to value the benefits under the *Judges Act*.

However, in respect of the judges' disability and pre-retirement survivor benefits (available without any service requirement), only the current year cost of those benefits was included in the normal cost (on one-year term basis). Therefore, the actuarial liability ignores those benefits.

B. *Assumptions:*

1. Interest: 6.5%

2. Indexation: 3.5%

3. General Salary Increases: 5%

4. Promotional Salary Scale: None assumed, since the only promotions available are elevation to a higher court or to a position of Chief or Associate Chief.

5. Funding age: 75, or earlier for those judges retiring according to the assumed retirement incidence rates.

6. Rates of decrement for active contributors (derived from actual experience between 1981 and 1985, except for mortality):
   (a) Return of contributions: assumed at 0.005 from age 30 to 54 inclusive and at 0.0 thereafter
   (b) Disability: assumed at 0.001 from age 30 to 60, increasing by .002 each year up to 0.019 at age 69, and at 0.0 thereafter
   (c) Mortality: GAM83 (different for males and females)
   (d) Retirement: assumed at 0 from age 30 to 64, at 0.02 from age 65 to 69, at 0.12 at age 70 (reflecting this compulsory retirement age for some judges), and at 0.08 from age 71 to 74, all remaining judges retiring at 75. Since these rates are applied only to those judges with at least fifteen years of service, the experience rates derived from the entire population of judges were adjusted to be applicable to only those with this service qualification, in order to reproduce the same expected number of judges retiring.

7. Accrual period for retirement benefits: for purposes of the accrued benefit method, retirement benefits are assumed to accrue over the period from appointment age to assumed retirement age, varying according to the assumed retirement incidence rates (for entry age below 65, full 2/3 pensions accrue equally over each year of the applicable period; for entry age over 65, the same is true but for pro-rated benefits only).

8. Rates of decrement for pensioners:
   (a) Mortality: GAM 83 (rated up 3 years for disabled)
   (b) Remarriage of surviving spouses: rates varying by age at widowhood and duration since widowhood (e.g. in fifth year of widowhood that began at age 40: 0.023 for widows and .069 for widowers)

9. Proportions of deceased contributors leaving eligible spouse and/or children and average age of spouses and average duration of children's benefits: all varying by age at death, as shown in the following sample:

Age at Death	Proportion Leaving Eligible Spouse	Average Age of Spouse		Average Number of Eligible Children		Average Remaining Duration of Eligibility
		Female	Male	Male Contributor	Female Contributor	
40	0.919	38	42	1.385	2.103	17
50	0.963	47	52	0.893	1.635	12
60	0.964	56	62	0.210	0.866	8
70	0.729	65	72	0.032	0.040	0
80	0.513	73	82	0.003	0.000	0
90	0.251	78	92	0.000	0.000	0

10. Residual benefit: ignored (considered negligible).

APPENDIX "E"

Average Age of Judicial Appointees on Assuming Office

1970	—	47	1978	—	49
1971	—	48	1979	—	50
1972	—	47	1980	—	50
1973	—	49	1981	—	50
1974	—	50	1982	—	51
1975	—	48	1983	—	49
1976	—	50	1984	—	51
1977	—	47	1985	—	52

Source: Commissioner for Federal Judicial Affairs

APPENDIX "F"

Taxation of New Judges

Illustration of Cash Flow Problems

Assumptions:

1. Lawyer is a member of a partnership with a January 31 year-end. His or her share of the partnership income for the year ended January 31, 1987 is $150,000. Lawyer claimed a reserve for 1971 accounts receivable of $10,000 on January 31, 1986.

2. Lawyer is appointed to the bench on June 1, 1987, at a salary of $107,500 per annum. $7,500 per annum is deducted at source under section 29.1 of the *Judges Act* in respect of his or her pension and is fully deductible from taxable income. Tax deductions of $36,000 are also made. Lawyer retires from law firm as of May 31, 1987. The partnership agreement specifies that the partnership is not dissolved on the retirement or admission of partners.

3. Lawyer's income for the stub period of February 1 to May 31, 1987 is $50,000. Lawyer has $25,000 of unbilled work in progress (WIP) on May 31, 1987. The partners will elect to treat these items as income to the lawyer rather than as capital.

4. Lawyer has drawn against his or her partnership income in order to make the necessary income tax instalment payments and to meet living expenses.

5. Lawyer's capital account is $50,000 which is equal to its adjusted cost base. Lawyer has borrowed $40,000 against his or her other partnership interest and this loan must be repaid on withdrawal from the firm.

6. Lawyer requires after-tax income of $56,000 to meet living expenses.

Illustration of Cash Flow Problems of New Judges

	June 1 to December 31, 1987	1988	1989	1990 and thereafter
Cash Flow				
From partnership				
Unbilled WIP	$ 25,000			
Capital interest	50,000			
Less: Loan repayment	(40,000)			
	10,000			
Net from partnership	35,000	—	—	—
Salary, net of tax	$37,000	$64,000	$64,000	$64,000
	72,000	64,000	64,000	64,000
Less:				
Tax instalments and final tax payments (see next page)	(12,000)	(13,000)	(79,000)	—
Available for living expenses	$60,000	$51,000	$(15,000)	$64,000
Required for living expenses	$33,000	$56,000	$56,000	$56,000
Excess (Shortfall)	$27,000	$(5,000)	$(71,000)	$ 8,000
Cumulative excess (Shortfall)	$27,000	$22,000	$(49,000)	$(41,000)
				reducing by $8,000 per year

Calculation of Taxable Income

Taxes Payable and Timing of Taxes Payable

	In year of Appointment 1987	Following Year 1988
Taxable Income		
Income for year ended January 31 (election made under s. 24.1 of the *ITA*)	$ 62,500	$ 87,500
Income for "stub" period (s.96.(1.1) of the *ITA* applies)		$ 50,000
Unbilled WIP		$ 25,000
1971 Accounts Receivable Reserve		$ 10,000
Capital	—	—
Judge's salary (net after pension contributions)	58,000	100,000
	$120,500	$272,500
Tax	$ 49,000	$128,000
Tax withheld on salary	(21,000)	(36,000)
Tax instalment	(16,000)	—
Balance to be paid out of judge's salary	$ 12,000	$ 92,000
To be paid as instalments on		
June 30, 1987	$ 4,000	
September 30, 1987	4,000	
December 30, 1987	4,000	
March 30, 1988		$ 3,250
April 30, 1988	0	
June 30, 1988		3,250
September 30, 1988		3,250
December 30, 1988		3,250
April 30, 1989		79,000
	$ 12,000	$ 92,000

APPENDIX "G"

Taxation of New Judges

Illustration of Recommendation

	1987	1988	1989	1990
Cash Flow				
From partnership				
Unbilled WIP	$ 25,000			
Capital interest	50,000			
Less: Loan repayment	(40,000)			
	10,000			
Net from partnership	35,000			
Salary, net of tax	37,000	$ 64,000	$ 64,000	$ 64,000
	72,000	64,000	64,000	64,000
Less:				
Tax instalments	(18,000)	(8,000)	(8,000)	(8,000)
(see next page)				
Available for living expenses	54,000	56,000	56,000	56,000
Required for living expenses	33,000	56,000	56,000	56,000
Excess	$ 21,000	$ nil	$ nil	$ nil
Cumulative excess	$ 21,000	$ 21,000	$ 21,000	21,000

Taxation of New Judges
Illustration of Recommendation

	1987	1988 and thereafter
Taxable Income		
Professional income for year	$150,000	
Professional income for "stub" period	50,000	
Unbilled WIP	25,000	
1971 Accounts Receivable reserve	10,000	
	235,000	
Judge's salary	58,000	100,000
	293,000	100,000
Add: Judge's Reserve claimed in prior year	—	161,000
Deduct: Judge's Reserve end of year (note)	(161,000)	(149,500)
Taxable income	$132,000	$111,500
Tax, say	$ 55,000	$ 44,000
Tax withheld on salary	(21,000)	(36,000)
Tax instalment made	(16,000)	—
	$ 18,000	$ 8,000
To be paid as follows:		
June 30, 1987	$ 6,000	
September 30, 1987	6,000	
December 30, 1987	6,000	
March 30, 1988		$ 2,000
April 30, 1988	0	
June 30, 1988		2,000
September 30, 1988		2,000
December 30, 1988		2,000
April 30, 1989		0
	$ 18,000	$ 8,000

Note:
Amounts included in Judge's Reserve

○ Professional income for year	$ 87,500
○ Professional income for "stub" period	50,000
○ Unbilled WIP	25,000
○ 1971 Accounts Receivable reserve	10,000
	$172,500

Reserve in 1987 14/15 x $172,500 = $161,000
1988 13/15 x $172,500 = $149,500

Department of Justice Canada / Ministère de la Justice Canada

REPORT AND RECOMMENDATIONS OF THE 1989 COMMISSION ON JUDGES' SALARIES AND BENEFITS

March 5, 1990
Submitted to the Minister of Justice of Canada

Canada

REPORT AND RECOMMENDATIONS OF THE 1989 COMMISSION ON JUDGES' SALARIES AND BENEFITS

March 5, 1990

Submitted to the Minister of Justice of Canada

Cat. No. J42-4/1990

ISBN 0-662-57343-9

Pursuant to Section 26 of the *Judges Act*, I am now tabling the Report and Recommendations of the 1989 Commission on Judges' Salaries and Benefits, appointed on September 30, 1989 to inquire into the adequacy of the salaries and other amounts payable under the *Act* and into the adequacy of judges' benefits generally. In accordance with Standing Order 32(5) of the House of Commons, this document shall be deemed to be referred to the Standing Committee on Justice and Solicitor General.

The Honourable Kim Campbell
Minister of Justice and
Attorney General of Canada

REPORT AND RECOMMENDATIONS OF THE 1989 COMMISSION ON JUDGES' SALARIES AND BENEFITS

TABLE OF CONTENTS

1989 COMMISSION ON JUDGES' SALARIES AND BENEFITS

I. BACKGROUND

Members: E. Jacques Courtois, Q.C. (Chairman)
Laura Legge, Q.C.
David B. Orsborn, C.A., LL.B.

Executive Secretary: Harold Sandell

Terms of Reference

The 1989 Commission on Judges' Salaries and Benefits was appointed on September 30, 1989, by the Honourable Doug Lewis, then Minister of Justice and Attorney General of Canada, pursuant to subsection 26(1) of the *Judges Act*, and was given the following terms of reference:

> "The Commission shall, pursuant to section 26 of the *Judges Act*, inquire into the adequacy of the salaries and other amounts payable under the *Act* and into the adequacy of judges' benefits generally.
>
> Without restricting the generality of the foregoing, the Commission shall inquire into and report upon the following matters:
>
> 1. The adequacy of salaries and allowances paid under the *Act*, having due regard for the adjustments made by R.S.C. 1985, c. 39 (3rd Supp.) and S.C. 1989, c. 8.
> 2. The granting of annuities provided to judges pursuant to section 42 of the *Act*.
> 3. The granting of annuities and other payments provided to surviving spouses and children having due regard for the adjustments made by R.S.C. 1985, c. 39 (3rd Supp.) and S.C. 1989, c. 8.

The Commission shall report to the Minister of Justice upon the results of the inquiry in accordance with subsection 26(2) of the *Act*."

The Commission held meetings and/or hearings as follows:

October 19, 1989 — Montreal
November 9, 1989 — Montreal
November 21 and 22, 1989 — Ottawa
December 14, 1989 — Montreal
January 11, 1990 — Montreal
January 31, 1990 — Montreal
March 5, 1990 — Ottawa

Notice to the Public, Submissions and Hearings

The Commission published a Notice in newspapers across Canada, inviting written submissions and presentations at oral hearings, in either official language, concerning matters within the Commissions terms of reference. Specific notice was also sent to a number of interested organizations and individuals, including all of the provincial and territorial Ministers of Justice and Attorneys General.

Copies of the Notice in English and French are reproduced as Appendix "A". The Notice was published in the following newspapers:

St. John's Evening Telegram
Charlottetown Guardian
La Voix Acadienne
Halifax Chronicle-Herald
Le Courrier
Saint John Telegraph Journal
L'Acadie Nouvelle
Le Soleil
La Presse
Montreal Gazette
Le Droit
Ottawa Citizen
The Globe and Mail
The Lawyers Weekly
Winnipeg Free Press
La Liberté
Regina Leader Post
Saskatoon Star-Phoenix
Journal L'Eau vive

Calgary Herald
Edmonton Journal
Le Franco-Albertain
Vancouver Province
Le Soleil de Colombie
The Yellowknifer
Whitehorse Star

Written submissions were received from the groups and individuals listed in Appendix "B".

Hearings took place on November 21 and 22, 1989, at the Canada Council Hearing Room, 99 Metcalfe Street, Ottawa, and on January 31, 1990, at the offices of Stikeman, Elliott, 3900-1155 René-Lévesque Blvd. West, Montreal. The following organizations, with the counsel indicated, made oral presentations to the Commission:

1. The Joint Committee on Judicial Benefits of the Conference of Chief Justices and Chief Judges and the Canadian Judges Conference.

Counsel Appearing: D.M.M. Goldie, Q.C., Vancouver
Bernard A. Roy, Q.C., Montreal
Wilfrid Lefebvre, Q.C., Montreal

2. The Canadian Bar Association Standing Committee on Pensions for Judges' Spouses and Judges' Salaries.

Counsel Appearing: George A. Allison, Q.C., Montreal
(Chairman of the Standing Committee)
J. Patrick Peacock, Q.C., Calgary
(Immediate Past President of the Association)

Previous Committees and Commissions

The 1989 Commission on Judges' Salaries and Benefits is the sixth federal committee or commission established in recent years to inquire into and make recommendations to the Minister of Justice with respect to judicial salaries, allowances and benefits. It is the third "Triennial Commission" appointed pursuant to subsection 26(1) of the *Judges Act*.

In September, 1974, a Special Advisory Committee, under the chairmanship of the Honourable Mr. Justice Emmett Hall, a retired member of the Supreme Court of Canada, reported to the Minister. The Dorfman Committee on Judicial Compensation and Related Matters, under the chairmanship of Irwin Dorfman, Q.C., (hereinafter, the

"Dorfman Committee") reported to the Minister in November, 1978. The de Grandpré Committee on Judicial Annuities, under the chairmanship of Jean de Grandpré, Q.C. (hereinafter, the "de Grandpré Committee"), reported in December, 1981. The 1983 Commission on Judges' Salaries and Benefits, which was the first of the "Triennial Commissions" established pursuant to subsection 26(1) of the *Judges Act*, was chaired by the Honourable Otto Lang, P.C., Q.C. (hereinafter, the "Lang Commission") and it reported to the Minister in October, 1983. The 1986 Commission on Judges' Salaries and Benefits, which was the second "Triennial Commission", was chaired by H. Donald Guthrie, Q.C. (hereinafter, the "Guthrie Commission") and reported to the Minister in February, 1987.

Acknowledgements

The Commission wishes to thank Pierre Garceau, Q.C., Commissioner for Federal Judicial Affairs, and the members of his staff, in particular Louise Fox and Wayne Osborne, for their support throughout the Commission's mandate.

We also thank G.W. Poznanski, F.C.I.A., F.S.A., Chief Actuary, P. Treuil, F.C.I.A., F.S.A., Director, Government Services Division and L.M. Cornelis, F.C.I.A., F.S.A., Chief, Government Services Division, of the Office of the Superintendent of Financial Institutions, for their valuable actuarial assistance.

The Commission is most grateful to Harold Sandell of the Department of Justice in Ottawa who was assigned to it as Executive Secretary. Mr. Sandell's enthusiasm and dedicated service as well as encyclopedic knowledge of the Canadian legal and judicial systems rendered our task much easier and made it possible for us to complete our mandate ahead of schedule.

II. INTRODUCTION

The primary role of the judiciary is to safeguard the supremacy of the law and to uphold its rule. In recognition of that role, the authors of our Constitution, as well as the executive and legislative branches of government and the courts, have been conscious of the need to preserve and enhance the independence of judges. As a result, the principle of the independence of the judiciary is imbedded in the constitutional history of Canada. The *Constitution Act, 1867* specifically acknowledges the concept of judicial independence through the Judicature provisions respecting tenure and removal and the fixing and payment of salaries, annuities and allowances.

The seemingly ponderous process and elaborate institutions whereby judicial salaries, allowances and annuities are considered, determined, fixed, provided and paid, serve a very clear purpose. They are all designed to preclude the arbitrary interference of the executive branch in the matter of judicial compensation — a statutory and independent Triennial Commission to make recommendations to the Minister of Justice of Canada following its thorough examination of the subject; Parliament having to enact public statutes, as required by our Constitution, to fix and provide judges' salaries, allowances and annuities; and the Office of the Commissioner for Federal Judicial Affairs, another creature of statute, to administer to, and pay, the judges and their survivors. They all underscore and reflect the fundamental importance which both the principle and the manifestations of judicial independence hold in our free and democratic society.

This report and our recommendations to the Minister of Justice comprise the first step in the process. We have undertaken this task mindful of the important objective which it serves.

III. THE REVIEW PROCESS

Section 26 of the *Judges Act* requires the Minister of Justice of Canada in every third year to appoint not fewer than three and not more than five commissioners "to inquire into the adequacy of the salaries and other amounts payable under [the] Act and into the adequacy of judges' benefits generally." The commissioners are required within six months of their appointment to submit a report to the Minister "containing such recommendations as they consider appropriate". The Minister is required to "cause the report to be laid before Parliament not later than the tenth sitting day of Parliament after he receives it."

Parliament has seen fit to impose strict time limits on the entire Triennial Commission process. In our view this reflects Parliament's intentions with regard to the significance of that process and distinguishes it from non-statutory *ad hoc* commissions generally. The imposition of statutory time limits also underscores the critical importance of a prompt response to the recommendations of Triennial Commissions.

The acknowledged purpose of the Triennial Commission review process is to reduce the element of partisan politics in the determination and adjustment of judicial compensation and to reinforce the principle of judicial independence by obtaining the recommendations of persons with experience and expertise after a full and independent review. The process was instituted by Parliament in the public interest, which can only be fulfilled if the process functions effectively. Failure to adopt the recommendations of Triennial Commissions renders meaningless this independent review process and effectively thwarts the evident intention of Parliament.

The alternative to the Triennial Commission process would be to put the judiciary in the invidious position of having to engage in constant and ongoing discussions with the executive branch of government with regard to salaries and benefits. As that same branch of government also appears frequently in the courts, the mere appearance of the judges having to negotiate with the executive branch would only erode the public perception of judicial independence.

The Triennial Commission review process cannot prevent this highly undesirable result if the reports of the Commissions are not acted upon positively and with reasonable promptness. Otherwise, the integrity of the review process would be irreparably impaired, which not only would defeat the intentions of Parliament, but also would seriously attenuate the only means available to judges to provide meaningful input with regard to compensation and benefit issues.

We therefore **recommend that the Minister of the day promptly inform Parliament, following the tabling of the reports of this and subsequent Triennial Commissions, as to what action the Government proposes to take with regard to their individual recommendations or, if necessary, indicate promptly the Government's disagreement with any of such recommendations.**

We also **recommend that whenever legislation to implement Triennial Commission recommendations is introduced in Parliament, the Government should proceed to ensure its quick passage.**

IV. JUDICIAL SALARIES

The meaning of "judicial independence" is evolving. Traditionally, it has referred to the independence of the individual judge to decide an issue without interference, which implies that once a lawyer has been appointed to the bench he or she severs all professional and partisan connections and, dependent for a livelihood on his or her judicial salary alone, the judge dispenses justice with no other consideration than the facts as he or she finds them and the law as he or she interprets it.

Recently, the Supreme Court of Canada has broadened the meaning of the principle to include not only conditions which apply to judges as individuals, but conditions which must apply to the bench as a whole in its relationships to the other institutions of authority, in particular the executive and legislative branches of government.

The Court identified three objective criteria or conditions which it termed essential to the existence of an independent tribunal (in the context of paragraph 11(d) of the *Canadian Charter of Rights and Freedoms)*. These conditions are security of tenure, financial security and the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of the judicial function.[1] The Court proceeded to define the second of these conditions, financial security, to mean security of salary or other remuneration and, where appropriate, security of pension.[2]

It is clear that financial security is one of the substantive cornerstones of judicial independence and of the public's perception of that independence; and the perception, as we know, is no less important than the independence itself. The Supreme Court of Canada, in the more recent *Beauregard* decision, affirmed this essentiality of financial security to the concept of the independence of the judiciary, and traced its constitutional roots to the *Act of Settlement* of 1701.[3]

The requirement for financial security within the context of judicial independence is apparent in both the design and content of the

---

[1] *Valente* v. *The Queen*, [1985] 2 S.C.R. 673.

[2] *Ibid.*, at 704.

[3] *The Queen* v. *Beauregard*, [1986] 2 S.C.R. 56, at 74-75.

compensation scheme for federally appointed judges. The entrenchment, in section 100 of the *Constitution Act, 1867*, of the requirement that Parliament fix and provide the salaries, allowances and pensions of judges, is the most discernible manifestation. Others include the Triennial Commission review process, the statutory annual salary adjustment (section 25 of the *Judges Act*) and the administration of Part I of the *Judges Act* by the Commissioner for Federal Judicial Affairs instead of by the Deputy Minister of Justice (who is also the Deputy Attorney General of Canada).

Another practical aspect of the reality and perception of judicial independence is that the actual monetary amounts involved should be sufficient to preserve the role, dignity and quality of our judges, and to reflect the esteem which the office deserves. A judge and his or her family are entitled to a standard of living commensurate with their position in Canadian society. They must be and be seen by society to be financially secure, particularly in view of the statutory requirement (at section 55 and subsection 57(1) of the *Judges Act*) that a judge devote himself or herself exclusively to judicial duties and not engage in any occupation or business.

Furthermore, the judicial salary and benefit package should serve to make appointment to the bench sufficiently attractive to the best qualified lawyers, and to enhance the morale of those who have accepted appointment.

Both the 1983 (Lang) and 1986 (Guthrie) Commissions recommended that the salary level established by amendments to the *Judges Act* in 1975 be restored by increasing salaries to allow for inflation since 1975, with a cap of 6% and 5% in 1983 and 1984, respectively, to reflect the limit on salary adjustments for all public servants during those two years under the *Public Sector Compensation Restraint Act*. (This salary level has been described as "1975 equivalence").

The salary increase granted by Parliament in 1985 (Bill C-78) as a result of the Lang Commission, went only part way to 1975 equivalence. The three-stage increase enacted in 1987 (Bill C-88), as a result of the Guthrie Commission, established salaries at the levels recommended by that Commission ($127,700 for superior court judges), but delayed full implementation to April 1, 1988, instead of making the entire increase effective on April 1, 1986, as recommended. The effect of that delay was that the salary of a superior court judge as of April 1, 1986 became $115,000, instead of the recommended $127,700; as of April 1, 1987 it became $121,300, instead of $131,200; and as of April 1, 1988 it became $127,700, instead of $135,500.

The present salary of $133,800, which became effective on April 1, 1989, is $8,200 below 1975 equivalence, which would be achieved at an April 1, 1989 salary level of $142,000. This shortfall resulted from delay in the face of continuing inflation, and the fact that the statutory salary indexing factor for 1987 and 1988 was subsumed in and superseded by the three-stage increase enacted by Bill C-88. Furthermore, the salary base level upon which the statutory indexing formula has been applied in other years was never raised sufficiently to reach 1975 equivalence.

The reasons given by the Lang and Guthrie Commissions for recommending 1975 equivalence are still very much applicable, and we fully subscribe to them. Both previous Triennial Commissions relied in part on the fact that the salary level being recommended for superior court judges would restore the historical relationship of rough equivalence between the salaries of judges and those of senior deputy ministers in the federal Public Service. The salary level established by the 1975 amendments to the *Judges Act* did not result in a new, historically high, salary level for judges, but simply allowed for inflation that had occurred in the years prior to 1975. The fairness of that level has not been disputed.

We note that 1975 equivalence would bring judges to within 2% of the mid-point of the salaries of the most senior level (DM-3) of federal deputy ministers. The DM-3 mid-point, we believe, reflects what the market place expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges.[4] The salaries of superior court judges are now materially below that mid-point and this situation should be rectified. It might be noted that failure to maintain 1975 equivalence from 1976 to 1989 has resulted in an accumulated shortfall for a superior court judge serving during those years of over $230,000.

The recommended levels of salary as of April 1, 1989 are therefore as follows:

- **Judges, Tax Court of Canada, Federal Court of Canada and Superior Courts— $142,000**

[4] The compensation and terms and conditions of employment for senior managers in the federal Public Service, including deputy ministers, are the subject of annual advisory reports prepared for the Prime Minister by the Advisory Group on Executive Compensation in the Public Service (Mr. James W. Burns, Chairman).

• **Chief Justices (Judge) and Associate Chief Justices (Judge), Tax Court of Canada, Federal Court of Canada and Superior Courts—**	**$155,300**
• **Judges, Supreme Court of Canada—**	**$168,600**
• **Chief Justice of Canada—**	**$182,100**

V. SALARY DIFFERENTIAL BETWEEN THE COUNTY AND DISTRICT COURTS AND THE SUPERIOR COURTS

Bill C-78 (which received Royal Assent on December 12, 1985 as Chapter 48 of the Statutes of Canada, 1985) established as at April 1, 1985, an absolute differential of $5,000 between the salaries of judges of the county and district courts and those of superior courts. The Guthrie Commission recommended that the differential of $5,000 be maintained.

The matter arises again but in somewhat changed circumstances. Merger of the section 96 (of the *Constitution Act, 1867)* trial courts has occurred or is imminent in all provinces except Nova Scotia.

Furthermore, the salaries of judges and chief judges of the Tax Court of Canada, which is not a superior court, were increased in 1988 to the same levels as those of judges and chief justices of the superior courts. The salaries in the Tax Court had previously been at the same levels as those for judges and chief judges of the county and district courts.

We believe that there is no justification for different salary levels as between federally-appointed trial judges in the different courts.

We therefore **recommend that the salaries of judges and chief judges of the county and district courts be increased to the salary levels of judges and chief justices of the superior courts.** The result of such a recommendation, effective April 1, 1989, should be:

- **Judges, county and district courts— $142,000**
- **Chief Judges and Associate Chief Judges, county and district courts— $155,300**

VI. INDEXATION OF JUDGES' SALARIES

Judges' salaries are indexed pursuant to section 25 of the *Judges Act*. Under the section 25 formula, judicial salaries are automatically increased on April 1 of each year by the percentage amount which is equal to the change in the Industrial Aggregate Index of the previous year in comparison to the year before the previous year, to a maximum of 7%.

The Industrial Aggregate Index is published by Statistics Canada under the authority of the *Statistics Act*, and was adopted by statutory amendment in 1987 in lieu of the Industrial Composite Index as the basis for the salary adjustment formula for judges. The Industrial Aggregate was already in use for purposes of adjusting benefits under the *Canada Pension Plan*, and salaries under the *Parliament of Canada Act* and the *Salaries Act*. We note that in January 1990, the identical salary adjustment formula that applies to judges, namely the percentage change in the Industrial Aggregate Index to a maximum of 7%, was adopted by statutory amendment as the salary adjustment formula for the Governor General.

We feel that the percentage change in the Industrial Aggregate serves as a better adjustment formula for judicial salaries than would the Consumer Price Index. That is the case regardless of whether the Consumer Price Index would be used alone or in conjunction with the Industrial Aggregate Index on an averaging basis. We feel it is fairer and more consistent to tie judicial salary increases to variations in Canadian wages and salaries generally, as represented by the Industrial Aggregate Index, than to variations in the cost of living or the purchasing power of the dollar, as represented by the Consumer Price Index. Furthermore, the Industrial Aggregate Index, used alone, serves as the basis for the statutory salary adjustment formulae that apply to the Governor General, Lieutenant Governors, Senators, Members of the House of Commons and members of the federal Cabinet. We do not see the need or the desirability of incorporating the Consumer Price Index into the judicial salary adjustment formula.

The salary adjustment formula for judges, as well as for all of the other offices referred to in the previous paragraph, includes a cap on

annual salary increases of 7%. We feel that there are sound public policy reasons for maintaining a cap as part of an adjustment formula that provides for automatic annual salary increases. To put it simply, removing the cap would complicate the government's efforts to combat the wage-price spiral that affects virtually all periods of high inflation. Therefore, we are opposed to removing the 7% cap from the salary adjustment formula in section 25 of the *Judges Act*.

For the same reasons, we do not support any form of "banking" or "carry-forward" or inflation adjustment credits in years when the percentage change in the Industrial Aggregate Index exceeds 7%, which credits could then be applied to the salary increase in a future year or years when the Index fell below 7%. Moreover, in view of the Triennial Commission review process which (according to section 26 of the *Judges Act*) includes an examination of the adequacy of judicial salaries, we feel that a "banking" or "carry-forward" provision would be somewhat redundant.

VII. ALLOWANCE FOR NORTHERN JUDGES

The *Judges Act* was amended in 1981 to provide a non-accountable yearly allowance of $4,000 to each of the judges of the Supreme Court of the Yukon Territory and the Supreme Court of the Northwest Territories, as compensation "for the higher cost of living" in the two territories.

Subsection 27(2) of the *Judges Act* was amended in 1989 to increase the allowance to $6,000, at the same time as the annual allowance for incidental expenditures for all judges was increased from $1,000 to $2,500 per judge.[5] The reason for both increases was inflation.

In view of the 1989 increase in the allowance for northern judges, we do not recommend a further increase in that allowance for the present.

We are also opposed to extending the northern allowance to judges who are resident in remote and/or isolated areas within the provinces. This is partly due to the difficulty of determining the appropriate cut-off point for such an extension, and partly from a sensibility that the section 96 judges within a province should be accorded equal treatment to avoid problems relating to their independence and morale.

[5] The Commission notes that on December 21, 1989, the Governor in Council approved an Order in Council (P.C. 1989-2560) to amend the *Judges Act (Removal Allowance) Order* to allow home sale assistance to be paid to federally appointed judges. The Order was approved under the authority of subsection 40(2) of the *Judges Act*. Home sale assistance provides for the payment of up to 10% of the fair market value of the principal residence of a judge who suffers a loss on its sale occasioned by the necessity that he or she move elsewhere in Canada as a consequence of the requirements of service on the bench. The Commission endorses this amendment.

VIII. REPRESENTATIONAL ALLOWANCE

Chief justices and chief judges of both the section 96 and section 101 courts perform a number of functions and obligations in a representative role on behalf of their respective courts. As titular head of a court, or as symbolic head of the judiciary at the federal or provincial level, a chief justice or chief judge is invited or expected to attend state and other official and semi-official functions both within and outside the court's jurisdiction, and may be requested or expected to host certain functions, particularly those involving visiting judicial dignitaries from other countries.

Prior to 1975, expenses incurred by a chief justice or chief judge in connection with such activities were either paid personally or recovered from the departmental budget with the express permission of the Minister of Justice. The former solution was unfair, the latter undignified at best.

As a result, by virtue of amendments to the *Judges Act* in 1975, and subsequent amendments, an allowance is provided for representational expenses actually incurred by the chief justice or chief judge of a section 96 or section 101 court or by a judge acting on his or her behalf, by a puisne judge of the Supreme Court of Canada, and by the senior judges of the Supreme Court of the Yukon Territory and of the Supreme Court of the Northwest Territories. The annual aggregate representational allowance permitted for each eligible judge pursuant to subsection 27(7) of the *Judges Act* is currently as follows:

(a)	the Chief Justice of Canada	$10,000
(b)	each puisne judge of the Supreme Court of Canada	$5,000
(c)	the Chief Justice of the Federal Court of Canada and the Chief Justice of each province	$7,000
(d)	each other chief justice or chief judge of a court	$5,000
(e)	each senior judge of a territorial supreme court	$5,000

The representational allowance therefore serves to reimburse a judge for expenses actually incurred by him or her for travelling,

hospitality and related amounts in connection with the extra-judicial obligations and responsibilities that devolve upon the judge by virtue of the office.

In 1985, the *Judges Act* was amended to permit the reimbursement of expenses incurred by or on behalf of a spouse, in accompanying a chief justice or other judge entitled to the benefit of the allowance, at certain official and semi-official events. The use of the judge's representational allowance to reimburse his or her spouse is envisaged to cover situations where the presence or active participation of the spouse is required or expected. Examples of such situations are opening of the legislatures, opening of the courts, state dinners, entertainment of foreign legal dignitaries and certain conferences and seminars. The spouse's expenses are subject to the overall representational allowance limit applicable to the judge.

The amounts provided for representational allowances have not been adjusted since 1985, when the allowance was extended to cover the spouse's expenses. The amounts provided under the allowance have become generally inadequate, and some chief justices are being required to absorb expenses incurred on behalf of the court or on behalf of the federal government or of a provincial government.

We therefore **recommend that the annual representational allowance be increased to $15,000 for the Chief Justice of Canada, to $10,000 for the Chief Justice of the Federal Court of Canada and the Chief Justice of each province, and to $8,000 for each other chief justice, chief judge, senior judge or judge presently entitled to receive it.** We further **recommend that the *Judges Act* be amended to authorize the Minister of Justice of Canada to approve the payment of additional amounts as representational allowance in any given year.**

IX. CONFERENCE ALLOWANCE

Members of the federally appointed judiciary are required by federal or provincial law to attend annually a number of meetings relating to the administration of justice on their courts. In addition, there are a number of meetings, conferences and seminars relating to the administration of justice which members of the judiciary may be authorized by law to attend. Expenses incurred in connection with such meetings are properly reimbursable as a conference allowance pursuant to subsection 41(1) of the *Judges Act*. No ceiling is placed upon the amounts which may be reimbursed in any one year.

A number of other seminars, conferences and meetings are arranged by the county, district or superior court judges on a regional and a national basis for the purpose of exchanging information on court procedures, new developments in the law, and judicial education generally. As well, universities, law reform commissions and other organizations, including the new Canadian Judicial Centre, schedule conferences or seminars on particular areas of the law where it is beneficial that members of the judiciary be permitted to participate or to act as panelists or resource persons. Until 1975, there was no provision for the payment of expenses in connection with the attendance by a judge at any of these categories of conferences. Since the participation of the judiciary would enhance the quality of judicial services, subsection 41(2) [as it now is] of the *Judges Act* was enacted in that year to permit the reimbursement of reasonable expenses incurred in attending such conferences, subject to the certification of such expenses by the chief justice of the court of which the judge was a member, and to a fixed maximum for each court. This maximum was established as $250 per judge per year, with provision, however, for the reimbursement of expenses in excess of this amount (payable as an aggregate per court) with the approval of the Minister of Justice of Canada.

The section 41(2) conference allowance was amended in 1977 to permit reimbursement of the cost of obtaining materials or proceedings of such meetings, conferences and seminars in lieu of actual attendance. Also in that year, a special conference allowance of $1,000 per judge per year was established for the judges of the Supreme Court of Canada.

In 1980, the annual allowance was increased with respect to judges of the county, district and superior courts from $250 per judge to $350 per judge, payable as an aggregate per court. In view of the disadvantage experienced by some of the smaller courts in having the allowance payable on the basis of the number of judges on the court, a minimum per court was established of $3,000 per year. This minimum permitted the smaller courts to send their members to conferences which they might otherwise have been unable to attend by reason of lack of funds.

In 1985, in view of the continuing increases in the costs of travel, the allowance was increased by establishing a multiplier of $500 per judge on a court, with a minimum of $5,000 per court per year.

The establishment of the conference allowance has undoubtedly enabled federally appointed judges to improve their legal skills and knowledge through attendance at court meetings, law conferences and seminars. Frequent changes in the law brought about by judicial decisions due in large part to the advent of the *Charter*, and by legislative enactments, make it incumbent on all federally appointed judges to attend and participate in conferences and seminars to remain abreast of the law and to exchange ideas with their colleagues and members of the bar across the country.

However, the cost of travel and hotel accommodation has increased dramatically in recent years. Due to the present limitation of $500 per judge on a court (with a minimum of $5,000 for any one court), the medium-sized and larger courts in particular have had to establish individual priorities for attendance at such conferences among a great number of judges.

In order that judges maintain their standard of excellence, we **recommend that the annual conference allowance for the Supreme Court of Canada be increased to $1,500 per judge and the annual allowance for all other courts be increased to $750 per judge with a minimum of $7,500 per court.**

X. JUDICIAL ANNUITIES

Annuities Granted to Judges

Section 42 of the Judges Act provides for the granting of an annuity equal to two-thirds of the salary annexed to the office of a judge at the time of his or her resignation, removal or ceasing to hold office, to a judge who

(a) has continued in office for fifteen years and has attained the age of 65, if he or she resigns his or her office;

(b) has continued in office for fifteen years but has not attained the age of 65, if his or her resignation is conducive to the better administration of justice or is in the national interest;

(c) resigns or is removed as a result of becoming afflicted with a permanent disability preventing him or her from executing his or her office; or

(d) has reached the mandatory retirement age of 75, if he or she has held office for at least ten years.

If a judge reaches the mandatory retirement age without having served for ten years, he or she is entitled to an annuity pro-rated on the basis of years of completed service (to the nearest one-tenth of a year) as a proportion of ten years.

Supernumerary Judges

In addition, the option exists pursuant to sections 28, 29 and 30 of the *Judges Act*, for a judge to elect supernumerary status. Under this arrangement, a puisne judge who is at least 65 years of age and has served as a federally appointed judge for a minimum of fifteen years, or has reached the age of 70 years and has held office for at least ten years, may opt to continue in office (with a reduced caseload in most instances) while remaining entitled to full salary until the judge is mandatorily retired or otherwise leaves the bench, at which time he or she would receive the annuity. A Chief Justice or Associate Chief Justice who elects supernumerary status is entitled to receive the salary of a puisne judge during his or her supernumerary service, although the subsequent annuity is based on the salary then in effect of a Chief

Justice or Associate Chief Justice. The supernumerary programme promotes continuity on the bench, while making available positions which could not otherwise be filled until the retirement of the incumbents. All federally appointed judges except the members of the Supreme Court of Canada are entitled to opt for supernumerary status. Approximately 12% of the federally appointed bench are currently supernumerary judges.

A. Judges' Contributions toward Annuities

In 1975, judges for the first time were required to contribute toward the cost of their statutory annuities. The 1975 amendments to the *Judges Act* (now section 50) require judges who were appointed before February 17, 1975 (the date of First Reading of the amendments) to contribute at a rate of 1½% of their annual salary to help defray the cost of improved annuities for their surviving spouses and other dependants. These judges are not required to contribute in respect of their own annuities or for indexing the pensions to the cost of living. Judges appointed on or after February 17, 1975 must contribute at a rate of 6% of annual salary toward the cost of their own annuities as well as those of their surviving spouses and other dependants. They also contribute a further 1% of salary to help pay for indexing the pensions to the cost of living. Pension indexing is provided for by the *Supplementary Retirement Benefits Act* (R.S.C. 1985, c. S-24).

The constitutional authority of Parliament to compel reasonable contributions by judges toward their annuities, as well as the legality of the differential in contribution rates which is based on date of appointment to the bench, were settled by the Supreme Court of Canada in the *Beauregard* decision.[6]

For more than a century following Confederation, and for many years prior to Confederation, annuities were paid to Canada's federally appointed judges who had retired, or who had resigned after suffering a permanent disabling infirmity. These annuities were paid out of the Consolidated Revenue Fund. Until the enactment of section 50 of the *Judges Act* in 1975, no contribution was required from the judges for the purpose of funding their annuities.

Reference has already been made to section 100 of the *Constitution Act, 1867*, under which Parliament is required to fix and provide the salaries, allowances and annuities for judges. By an Act which

[6] *Supra.*, chapter IV, footnote 3.

received Royal Assent on May 22, 1868, Parliament acted pursuant to section 100 of the *Constitution Act, 1867* by fixing and providing the salaries, allowances, annuities and other sums of money payable to the judiciary in the Provinces of Quebec, Ontario, Nova Scotia and New Brunswick, in accordance with the schedules annexed to that Act.

With reference to annuities, it was provided that in case any of the judges therein mentioned "has continued in the Office of Judge of one or more of the Superior Courts of Law or Equity or of the Court of Vice-Admiralty, in any of the said Provinces for fifteen years or upwards, or becomes afflicted with some permanent infirmity, disabling him from the due execution of his office, then, in case such Judge resigns his office, Her Majesty may, by letters patent under the Great Seal of Canada, reciting such period of office or permanent infirmity, grant unto such Chancellor, Vice-Chancellor or Judge an annuity equal to two-thirds of the salary annexed to the office he held at the time of his resignation, to commence immediately after his resignation, and to continue thenceforth during his natural life, and to be payable pro rata for any period less than a year, during such continuance, out of any unappropriated monies forming part of the Consolidated Revenue Fund of Canada."[7]

These salaries and annuities were to replace the salaries and retirement allowances which had been previously provided under Chapter 10 of the Consolidated Statutes of the former Province of Canada.

None of the enactments of the Parliament of Canada in pursuance of the provision of section 100 of the *Constitution Act, 1867*, in the years between 1868 and 1975, a period of 107 years, required any contribution from the judges for the purpose of funding their annuities. Neither was any contribution required from judges in respect of death benefits to spouses and dependent children.

Before March 1961, the judges of the superior and county courts were not subject to a compulsory retirement age. Compulsory retirement at age 75 was introduced by a constitutional amendment enacted by the United Kingdom Parliament on December 20, 1960, to take effect on March 1, 1961.[8] A decade later, the retirement age for county and district court judges was fixed at age 70 except for judges of the county and district courts who held office on October 6, 1971, for whom the retirement age remained at 75.

---

[7] S.C. 1868, c.33, s.2 and 3. See also R.S.C. 1886, c.138, s.14 and 15; S.C. 1875, c.11, s.7; S.C. 1903, c.29; and S.C. 1944-45, c.45.

[8] 9 Eliz. II, c.2 (U.K).

All this changed with the introduction on February 17, 1975, of the *Superannuation Amendment, 1975*, which received Royal Assent on December 20, 1975.[9] The introduction of section 50 into the *Judges Act* in 1975 provided an unprecedented change in the remuneration of Canada's superior and county court judges. It provided that judges who had been appointed prior to February 17, 1975, would be required to contribute 1½% of salary to the Consolidated Revenue Fund. Judges appointed after February 16, 1975, would be required to contribute 6% of salary to the Consolidated Revenue Fund and, in addition, ½% to the Supplementary Retirement Benefits Account (to help pay for indexing the annuities to the cost of living), to be increased in January 1977 to 1%, making the total contribution for these judges 7% of salary.

By a letter from the then Minister of Justice dated February 17, 1975, judges then in office were informed that their contributions of 1½% were "in respect of the improved annuities for widowed spouses and other dependents". The letter also indicated that "with respect to a person appointed to judicial office after to-day" the annual contribution towards the annuities that may be paid subsequently to the judge as well as to his dependents would be fixed at 6½%, to rise to 7% on January 1, 1977.

This development has been the subject of criticism in the reports of two previous advisory committees and one Triennial Commission appointed by the Minister of Justice. In fact, the issue of judicial contributions toward the cost of annuities has been studied by every committee and commission appointed subsequent to the 1975 amendments to the *Judges Act*. The Dorfman Committee (1978), the de Grandpré Committee (1981) and the Lang Commission (1983) recommended either reducing (Dorfman and Lang) or eliminating (de Grandpré) contributions. The Guthrie Commission (1986) recommended that judicial contributions remain at their present levels.

We agree with the recommendation of the de Grandpré Committee that judicial contributions toward the cost of annuities, survivors' benefits and the indexing of annuities be eliminated, and in doing so we subcribe to the reasons given by that Committee.

We note that the effect of the 1975 change was to engender a disruption in the morale of the judges and disharmony between what was perceived by many as two categories of judges. Judges who carried the same workload and often occupied adjoining offices suddenly found

[9] S.C. 1974-75-76, c.81, s.100, amending the *Judges Act* by adding thereto the new section 29.1 (now section 50).

that the net salaries which they received were no longer the same. This malaise continues today, only now the difference in annual contributions is over $7300. As the Dorfman Committee stated at page 31 of its report:

> "The Committee is troubled by the effects of the amendments to the Judges Act in 1975, which required contributions to the Consolidated Revenue Fund from those appointed after the 16th day of February, 1975, of six per cent of total salary, and from those appointed prior to the 17th day of February, 1975, of one and one-half per cent of total salary. The amendment had the effect of reducing the salaries granted to judges and did so unevenly. The disparities thus created in the net income of judges presiding in the same courts has had a disquieting effect on a number of judges...".

In a letter dated December 20, 1979 (see Appendix "C"), the Minister of Justice at the time, Senator Jacques Flynn, advised the judges that the Government had earlier taken the decision to introduce on December 17, 1979, amendments to the *Judges Act* which would have implemented the recommendations of the Dorfman Committee. He expressed regret, however, that the dissolution of Parliament had intervened to prevent the implementation of that decision.

The de Grandpré Committee, at pages 14 and 15 of its report, stated that:

> "... it has resulted in two classes of judges, but for remuneration purposes alone. It is clear that these judges will frequently be doing not only the same *kind* of work, but indeed, the *same* work, hearing the same case. Their powers, prerogatives and status are identical. Until 1975, the compensation conditions of judges at the same level of court were identical. Now it is clear that on an appeal heard by a panel of three judges, one or two may be receiving 5.5% less in net compensation because they were more recently appointed and therefore contribute 7%, rather than 1.5%. Surely, judicial compensation should be on a footing of equal pay for equal work. Furthermore, this resulting differential has been destructive of morale."

The Lang Commission also referred to the disruptive nature of the uneven contributions required from judges based on the date of appointment to the bench. At page 9 of its report, the Lang Commission stated:

> "The Commission views judges' annuities as an important part of their total compensation. We do not consider the issue of contribu-

tions to annuities as in any way affecting the independence of the judiciary. As has been the conclusion of previous advisory committees, however, we consider a long-standing differential between judges doing the same work to be inappropriate, and as leading to the creation of two classes of judges."

We agree with the above noted comments from the Dorfman, de Grandpré and Lang reports. We would also emphasize that even the Guthrie Commission, which recommended maintenance of the *status quo* in so far as judicial contributions are concerned, predicated that recommendation on the totality of its recommendations being adopted, which they were not.

We believe that a further effect of the introduction in 1975 of judicial contributions toward the cost of annuities was that it detracted from the non-contributory annuity conditions which, before 1975, had served as an attractive inducement to accomplished and experienced lawyers to forego the most lucrative years of private practice and accept appointment to the bench.

In providing life-long security, the non-contributory annuity was a reasonable trade-off for a lawyer whose income from practice was virtually always higher than the salary of a judge. The value of the annuity as an inducement to judicial office was substantially reduced by the imposition of contributions.

The judges were never compensated for the loss of the contribution-free annuity benefit. It should not be thought that the increases in judicial salaries which took effect in 1975 had the effect of offsetting in part the requirement of deductions for the cost of annuities. The salary level for judges had been seriously eroded by inflation during the period from 1971 to 1975, and the salary increase to $53,000 in 1975 merely coincided almost exactly with that which would have resulted from adjusting the 1971 salary by the change in the Consumer Price Index. The result of the deduction for the cost of annuities, therefore, was to build into the salary structure a reduction of 1½% for the pre-1975 judges and 7% for those appointed after February 16, 1975, thereby reducing salaries below the level (as adjusted by the annual percentage change in the Industrial Aggregate Index) that had been accepted in 1975 as fair in order to allow for inflation since 1971.

There are further compelling reasons why judges' annuities should be non-contributory. These reasons lie in the nature of judicial annuities, which do not derive from a funded pension plan.

Judges in Canada, like their counterparts in other jurisdictions with the traditions of the English commmon law, are generally appointed from about the mid-point and beyond in their legal careers from those lawyers who have established reputations for professional ability (see Appendix "D"). They are not career judges, unlike the case in many civil law jurisdictions, and they do not serve in the office for a period long enough to provide, by their contributions, for a funded pension. Essentially, the size of annuities for judges and their surviving spouses does not depend upon length of service or the total contributions made by a judge. These contributions do not vest, and they are not and cannot be directed into a funded pool designed to pay for judicial annuities.

It is clear that the attributes of the payments made to retired judges or surviving spouses are more in the nature of annuities than pensions. As such, treating or even conceiving of these payments as pensions merely clouds the issue of responsibility for contributing to them. It follows that judicial annuities cannot and should not be equated with the pension plans of employees in the public and private sectors, and these differences would remove any valid reason for delaying the improvements in judges' annuities recommended by this report on the basis of the need to consider broader reforms of public service pension arrangements.

It might be noted that historically, federal Public Service pension plans have been contributory from at least as early as 1870 whereas judges, as we have seen, enjoyed non-contributory annuities until 1975. This historical difference is eminently reasonable and justifiable on the basis of the unique status of judges in our society and their position of independence from the other branches of government.

The Commission has also considered, within the context of contributions to judges' and survivors' annuities, the matter of contributions toward the cost of supplementary retirement benefits, commonly referred to as the indexing feature of annuities. Like the de Grandpré Committee, this Commission believes that the full package of retirement security benefits should be non-contributory and that as a matter of consistency, judges should not contribute towards the supplementary retirement benefits. We note that judges and the Governor General, alone out of all the groups whose pensions were indexed under the *Supplementary Retirement Benefits Act*, were not required to contribute towards indexing of annuities when the new benefit was introduced in 1970. Judges appointed prior to February 17, 1975, still do not contribute towards the cost of indexing yet they continue to be entitled to the indexing benefit. So the distinction between judges and other groups who have the indexing benefit under the *Supplementary Retirement Benefits Act* already exists.

A further reason why the Commission feels it is reasonable at this time to remove the requirement that judges contribute toward the cost of annuities is that upon the enactment and coming into force of Bill C-52, which comprises amendments to the *Income Tax Act* introduced in the House of Commons on December 13, 1989, judges would lose all but $600 of their tax deductible "contribution room" toward a Registered Retirement Savings Plan (R.R.S.P.). Judges are currently entitled to contribute toward an R.R.S.P., and deduct for income tax purposes, up to the limit applicable to self-employed taxpayers (currently $7,500, and expected to increase to $15,500 by 1995) and they have had this right since 1978. Pursuant to the proposed subsection 8308(9) of the Regulations under the new *Income Tax Act* amendments, the deductibility of their R.R.S.P. contribution would be limited to $600 a year.

There are a number of reasons why an R.R.S.P. has been attractive to a judge. The most important reason is to supplement the annuity of a surviving spouse of a judge who dies in office (where the annuity is one-third of the judge's salary) or to supplement the annuity of a surviving spouse on the death of a retired judge (where the annuity is reduced by 50%). The deductibility and flexibility in amount of the R.R.S.P. contribution is also a positive factor in attracting qualified lawyers to the bench.

For the individual judge who is now contributing to an R.R.S.P., the implementation of the Bill C-52 tax proposals would mean the virtual elimination of a benefit heretofore available to judges — the right to accumulate tax deferred benefits to supplement their annuities and the reduced annuities of their surviving spouses. We feel that the elimination of judicial contributions toward annuities would help to compensate judges for the imminent loss of almost all of their long-standing entitlement to tax deductible R.R.S.P. contributions.

The imposition of judicial contributions in 1975, which was contrary to the traditions of the common law judiciary, also sets our federally appointed judges apart from their counterparts in the United Kingdom, the United States and Australia, whose annuities are contribution free.

For all of these reasons, the Commission is of the view that the restoration of non-contributory annuities is correct from the point of view of pensions policy; as a matter of history and tradition; and from the unique perspective of judicial compensation, recruitment and retention, with respect to which it would serve as an inducement for lawyers to accept appointment to the bench and for serving judges to delay their retirement and continue to provide public service.

With regard to this latter point, delaying judicial retirement, we would point out that some judges who are entitled to resign with a full annuity of two-thirds of salary, but have not yet reached the mandatory retirement age of 75, continue to serve for a number of years, often until they reach age 75. (This service beyond initial pension entitlement is frequently undertaken as a supernumerary judge.) There is currently no provision in the *Judges Act* removing the obligation of these judges to continue to contribute toward the cost of their annuities, at the rate of either 7% or 1½% of salary, notwithstanding that they have reached the age and completed the service required to qualify for a full annuity. These judges receive no additional pension benefit for their continuing contributions, apart from the marginally higher annuities they will eventually receive when they do retire on two-thirds of their indexed salary.

The Commission **recommends that judicial contributions toward the cost of annuities, survivors' benefits and the indexing of annuities be eliminated**. We do not recommend the reimbursement to judges of the pension contributions heretofore paid.

B. "Rule of Eighty"

The "Rule of Eighty" is a measure that balances age and years of service in determining retirement eligibility. The *Judges Act* presently adopts the "Rule of Eighty" to a limited extent. A judge who has attained the age of 65 years and has continued in judicial office for at least fifteen years is eligible to retire, or elect supernumerary status. A judge who has attained the age of 70 years and has held office for at least ten years is entitled to elect supernumerary status (but not to retire).

The Guthrie Commission recommended that the "Rule of Eighty" be extended to permit retirement at full pension, but not the election of supernumerary status, at the following combinations of age and years of service on the bench: 60 years of age and 20 years of service; 61 and 19; 62 and 18; 63 and 17; and 64 and 16. The Joint Committee on Judicial Benefits and the Standing Committee of the Canadian Bar Association both suggested that this Committee extend the recommendation of the Guthrie Commission to include the election of supernumerary status.

We do not agree with the recommendation of the Guthrie Commission or with the submissions made to us with respect to the "Rule of Eighty". We accept that the present law was premised on the expectation of the appointment of the more senior members of the bar

and does not readily take into account those who accept an appointment to the bench in the early forties or younger. However, we view that expectation to be eminently reasonable and well-founded.

Furthermore, the young lawyer who applies for an appointment to the bench is mindful of the expectation, and the requirement, to serve until age 65 in order to be eligible for an annuity or election of supernumerary status. We feel that 65 years should remain as the age threshold for these benefits, and with the minimum service requirement of fifteen years, together reflect the important premise that a lawyer who accepts judicial appointment does so with the expectation that he or she is accepting a lifetime commitment. In addition, we would be opposed to a judge serving more than ten years on supernumerary status.

We therefore **recommend that the combination of 65 years of age and 15 years of service on the bench remain as the eligibility criteria for a judge's annuity or election to serve as a supernumerary judge, and that election of supernumerary status continue to be permitted at 70 years of age following 10 years of service.**

C. Annuities Granted to Surviving Spouses

Subsection 44(1) of the *Judges Act* provides an annuity to the surviving spouse of a judge who dies, equal to one-third of the judge's salary, and subsection 44(2) of the Act provides an annuity to the surviving spouse of a retired judge who was in receipt of an annuity at the time of death, equal to half of the amount of the retired judge's annuity. Both these types of survivor's annuities are indexed pursuant to the provisions of the *Supplementary Retirement Benefits Act*.

We feel, as did the Guthrie Commission, that survivors' benefits under the *Judges Act* should better reflect current values of survivors' benefits provided by many private pension plans and by federal and provincial pension benefits and standards legislation. We therefore **recommend that the surviving spouse of a judge who dies in office be entitled to an annuity equal to 40% (instead of one-third) of the judge's salary at the time of death.** We further **recommend that the surviving spouse of a retired judge who dies while in receipt of an annuity, be entitled to an annuity equal to 60% (instead of one-half) of the amount of the retired judge's annuity at the time of death.** The benefits of eligible children should be adjusted accordingly. These increases in survivors' benefits should apply only with respect to survivors not in receipt of annuities upon the coming into force of the necessary amendments to the *Judges Act*.

D. Return of Contributions toward Annuities

The *Judges Act* (at subsections 51(1), (2) and (3)) and the *Supplementary Retirement Benefits Act* (at section 6) provide for the return of a judge's contributions toward annuities in specified circumstances. Pursuant to subsection 51(4) of the *Judges Act*, interest is payable upon the return of contributions made under that Act, at the rate of 4% compounded annually.

Like the Guthrie Commission, we believe this rate is unfair and quite often unrealistic. Therefore, we **recommend that compound interest be payable upon the return of all contributions at a rate to be varied as and when necessary to reflect the "prescribed rates".**[10] If no prescribed rate was in effect, then a rate comparable to the average equivalent yield obtainable during each year on 90-day Government of Canada Treasury Bills should be used.

E. Judges of the Supreme Court of Canada

Judges of the Supreme Court of Canada cannot elect to hold office as supernumerary judges. We appreciate that extending the existing supernumerary scheme to members of the Supreme Court would create very real problems and would undoubtedly prove to be inappropriate. While to do so would make additional judges available to the Court, the finality of its decisions might be undermined to the extent they were made by supernumerary rather than "full" members of the Court. In addition, supernumerary status might upset the collegiality of the nine-member Court.

In view of the immense workload and heavy responsibility which are inherent in membership on the Supreme Court of Canada, a number of options have been advanced over the years which would inject additional flexibility into the retirement provisions of the *Judges Act* as they apply to members of the Supreme Court. The Guthrie Commission recommended a special provision for Supreme Court judges, given their ineligibility for supernumerary status. That Commission recommended that a Supreme Court judge who reached age 70, with at least ten years on the Court, be entitled to retire at 90% of salary until age 75, at which time the annuity would reduce to the standard two-thirds of salary.

We are not persuaded that the Guthrie Commission recommendation is necessarily the preferred means of dealing with the fact that Supreme Court judges cannot elect supernumerary status; accordingly, we do not recommend it at this time.

[10] See Part XLIII (sections 4300-4301) of the *Income Tax Regulations*.

F. Guaranteed Annuity Option

The Guthrie Commission recommended that a retiring judge be given the one-time option of receiving an actuarially reduced annuity for a ten-year guaranteed period. The recommendation was designed to mitigate the harshness of the consequences resulting from the death, shortly after commencing retirement, of a former judge. As matters now stand, the retirement annuity to which the deceased retiree would have been entitled would be halved (or reduced by 40% if our recommendation in Item C above is implemented) in the hands of the surviving spouse, with the former judge having received very little of what otherwise would have been payable over the years.

We agree with the Guthrie Commission that it would be desirable to proceed with a guaranteed annuity option for retired judges. We therefore **recommend that a retiring judge be given the one-time option of receiving an actuarially reduced annuity for a ten-year guaranteed period.** Following the expiry of the ten-year guaranteed period, the surviving spouse's annuity would be reduced to 50% (or 60% pursuant to our recommendation in Item C above) of the amount of the initial (actuarially reduced) annuity. The initial annuity amount would continue for a ten-year period in favour of the surviving spouse, eligible children or the estate, as the case may be. We note that there would be no additional cost for an option of this kind.

G. Indexation of Annuities

Judicial annuities, including those of surviving spouses and eligible children, are indexed pursuant to, and in accordance with a complex formula set out in, the *Supplementary Retirement Benefits Act*. That Act also applies to pensioners from many branches and groups of the public service, as well as to retired Members of Parliament, Lieutenant Governors and Governors General. The Act is administered by the President of the Treasury Board.

The Guthrie Commission recommended that the provisions for indexing judicial annuities should be transferred to the *Judges Act* from the *Supplementary Retirement Benefits Act*. We do not agree. We feel that the constitutional requirement for Parliament to fix and provide the "pensions" of judges, in so far as that obligation bears upon the indexation of annuities, is met regardless of whether indexing of judicial annuities is provided for by the *Supplementary Retirement Benefits Act* or by the *Judges Act*. The principle of indexing as it applies to judicial annuities is no more secure, or vulnerable to modification for that matter, in the one Act as in the other. We also note that the Standing

Committee on Justice and Solicitor General, which examined the report of the Guthrie Commission after its tabling in Parliament in 1987, did not accept the recommendation to transfer the judicial annuity indexing provisions to the *Judges Act*.

XI. FORMER CHIEF JUSTICES SERVING AS SUPERNUMERARY OR PUISNE JUDGES

The *Judges Act* provides at subsections 29(4) and 30(4) that a chief justice or chief judge, or an associate chief, who elects supernumerary status is entitled to receive the salary of a puisne judge during his or her supernumerary service. Subsections 31(4) and 32(4) provide that a chief justice or chief judge, or an associate chief, who has served in that position for at least five years and who reverts to the status of a puisne judge is also entitled to receive the salary of a puisne judge following the reversion. It has been suggested to this Commission that a former chief justice or chief judge who has elected to serve as a supernumerary judge or as a puisne judge should continue to receive the salary of a chief justice or chief judge. We do not agree. We feel that the salary should match the office, and the duties, then being performed.

We note that when these former chief justices or chief judges retire, pursuant to subsections 43(1) and (2) their annuities are based on the salaries then in effect of a chief justice or chief judge. This makes eminent sense because, by virtue of their having served as chiefs, they have earned the higher annuities.

XII. TAXATION OF NEW JUDGES

When a lawyer in the private practice of law is appointed to the bench, he or she is likely to be faced with an unusually large income tax burden in the year of appointment. This considerable tax burden results from the combination of professional income earned during the fiscal year prior to the appointment, taxable capital gains and recaptured capital cost allowance on assets deemed disposed of and taxable capital gains on the disposition of the partnership interest. In addition, earnings from the last fiscal year-end to the date of appointment ("stub period earnings"), unbilled work in progress and the 1971 accounts receivable reserve (if any) would also have to be included in taxable income.

It might be noted that lawyers appointed to the bench are, generally speaking, professionals of some standing in the legal community who are at or near the peak of their earning powers. As such, the aforementioned amounts are likely to represent substantial taxable items which must be added to the judicial salary itself. This results in an unusually high taxable income for that individual in the year of appointment and places the great proportion of that taxable income within the highest marginal tax bracket.

The tax situation confronting judges upon appointment used to be even more onerous. Section 24.1 of the *Income Tax Act*, enacted in 1984 following the Lang Commission report, provides some relief by way of permitting a newly appointed judge to defer the reporting of a portion of his or her income from the final year of practice until the year following the appointment to the bench. In other words, section 24.1 permits the tax burden arising in the year of appointment to the bench to be spread over that and the following taxation year.

Notwithstanding section 24.1, the lawyer considering an appointment may still be hesitant due to an unavoidable and extensive tax indebtedness in the first year or two on the bench if the offer of an appointment is accepted. In our view, an essential element in recruiting the best qualified lawyers to the bench is a comprehensive financial package which not only includes attractive salaries and benefits, but also avoids imposing financial or tax disincentives to accepting judicial appointment. We therefore **recommend that discussions between the Department of Justice and the Department of Finance continue with a view to alleviating the tax burden on newly appointed judges.**

XIII. CONCLUSION

The Triennial Commission review process was instituted by Parliament to reduce the factor of partisan politics in the determination and adjustment of judicial compensation and to reinforce the principle of judicial independence. Delay in implementing or substantial disregard of the recommendations of a Triennial Commission threatens the integrity of the review process and considerably reduces its effectiveness. For that to happen would be contrary to both the intentions of Parliament and the public interest.

XIV. SUMMARY OF RECOMMENDATIONS

1. That the Minister of the day promptly inform Parliament, following the tabling of the reports of this and subsequent Triennial Commissions, as to what action the Government proposes to take with regard to their individual recommendations or, if necessary, indicate promptly the Government's disagreement with any of such recommendations (Chapter III).

2. That whenever legislation to implement Triennial Commission recommendations is introduced in Parliament, the Government should proceed to ensure its quick passage (Chapter III).

3. The recommended levels of salary as of April 1, 1989, are as follows (Chapter IV):

   - **Judges, Tax Court of Canada, Federal Court of Canada and Superior Courts— $142,000**
   - **Chief Justices (Judge) and Associate Chief Justices (Judge), Tax Court of Canada, Federal Court of Canada and Superior Courts— $155,300**
   - **Judges, Supreme Court of Canada— $168,600**
   - **Chief Justice of Canada— $182,100**

4. That the salaries of judges and chief judges of the county and district courts be increased to the salary levels of judges and chief justices of the superior courts. The result, effective April 1, 1989, should be (Chapter V):

   - **Judges, county and district courts— $142,000**
   - **Chief Judges and Associate Chief Judges, county and district courts— $155,300**

5. That the annual representational allowance be increased to $15,000 for the Chief Justice of Canada, to $10,000 for the Chief Justice of the Federal Court of Canada and the Chief Justice of each province, and to $8,000 for each other chief justice, chief judge, senior judge or judge presently entitled to receive it (Chapter VIII).

6. That the *Judges Act* be amended to authorize the Minister of Justice of Canada to approve the payment of additional amounts as representational allowance in any given year (Chapter VIII).

7. That the annual conference allowance for the Supreme Court of Canada be increased to $1,500 per judge and the annual allowance for all other courts be increased to $750 per judge with a minimum of $7,500 per court (Chapter IX).

8. That judicial contributions toward the cost of annuities, survivors' benefits and the indexing of annuities be eliminated (Chapter X, Item A).

9. That the combination of 65 years of age and 15 years of service on the bench remain as the eligibility criteria for a judge's annuity or election to serve as a supernumerary judge, and that election of supernumerary status continue to be permitted at 70 years of age following 10 years of service (Chapter X, Item B).

10. That the surviving spouse of a judge who dies in office be entitled to an annuity equal to 40% (instead of one-third) of the judge's salary at the time of death (Chapter X, Item C).

11. That the surviving spouse of a retired judge who dies while in receipt of an annuity, be entitled to an annuity equal to 60% (instead of one-half) of the amount of the retired judge's annuity at the time of death (Chapter X, Item C).

12. That compound interest be payable upon the return of all contributions at a rate to be varied as and when necessary to reflect the "prescribed rates" (Chapter X, Item D).

13. That a retiring judge be given the one-time option of receiving an actuarially reduced annuity for a ten-year guaranteed period (Chapter X, Item F).

14. That discussions between the Department of Justice and the Department of Finance continue with a view to alleviating the tax burden on newly appointed judges (Chapter XII).

All of which is respectfully submitted this 5th day of March, 1990.

E. Jacques Courtois, Q.C., Chairman

Laura Legge, Q.C.

David B. Orsborn

APPENDIX "A"

Commission on Judges' Salaries and Benefits

OTTAWA, K1A 1E3

Commission sur le traitement et les avantages des juges

1989 COMMISSION ON JUDGES' SALARIES AND BENEFITS

NOTICE

This Commission was appointed on September 30, 1989 by the Minister of Justice and Attorney General of Canada, pursuant to section 26 of the *Judges Act*, to inquire into the adequacy of the salaries and other amounts payable under the Act to federally-appointed judges and into the adequacy of federally-appointed judges' benefits generally, including the granting of annuities provided to judges and to their surviving spouses and children.

The Commission invites written submissions in either official language concerning the matters within the Commission's terms of reference. Written submissions must reach the Commission by December 31, 1989, in eight copies. A party intending to file a written submission with the Commission may also request an opportunity to make a presentation at an oral hearing. The Commission must be notified by December 31, 1989 of the party's desire to appear at an oral hearing. A party filing a written submission need not request to appear at an oral hearing.

Copies of the Commission's terms of reference are available upon request.

1989 Commission on Judges'
Salaries and Benefits,
110 O'Connor Street
Room 1114
Ottawa, Ontario
K1A 1E3

E. Jacques Courtois, Q.C.
Chairman

Commission on Judges' Salaries and Benefits

Commission sur le traitement et les avantages des juges

OTTAWA, K1A 1E3

COMMISSION DE 1989 SUR LE TRAITEMENT ET LES AVANTAGES DES JUGES

AVIS

La Commission de 1989 sur le traitement et les avantages des juges a été instituée le 30 septembre 1989 par le ministre de la Justice et procureur général du Canada, en application de l'article 26 de la *Loi sur les juges*. Elle a pour mandat de déterminer si le traitement et les avantages des juges nommés par le gouvernement fédéral ainsi que les pensions auxquelles ceux-ci, leur conjoint et leurs enfants ont droit, sont satisfaisants.

La Commission invite toute personne intéressée à lui soumettre par écrit ses vues sur les sujets qu'elle a reçu pour mission d'examiner. Ces interventions doivent prendre la forme d'un document écrit, établi dans l'une ou l'autre des deux langues officielles, et être déposées auprès de la Commission en huit exemplaires au plus tard le 31 décembre 1989. Quiconque dépose un tel document écrit peut en outre demander à la Commission d'être entendu par celle-ci. En pareil cas, il convient d'aviser la Commission au plus tard le 31 décembre 1989 du souhait de présenter des observations orales. Il convient de noter que le dépôt de documents écrits n'oblige nullement à présenter les observations orales.

Il est possible d'obtenir le texte définissant le mandat de la Commission sur simple demande.

Commission de 1989 sur le
traitement et les avantages
des juges
110, rue O'Connor
Bureau 1114
Ottawa (Ontario)
K1A 1E3

Le président de la
Commission

E. Jacques Courtois, c.r.

APPENDIX "B"

LIST OF WRITTEN SUBMISSIONS

1. The Joint Committee on Judicial Benefits of the Conference of Chief Justices and Chief Judges and the Canadian Judges Conference.
2. The Honourable Judge Stephen Borins (District Court of Ontario).
3. The Honourable Judge Marie Corbett (District Court of Ontario).
4. The Canadian Bar Association Standing Committee on Pensions for Judges' Spouses and Judges' Salaries.
5. The Law Society of Alberta (Peter Freeman, Q.C., Secretary).
6. The Law Society of British Columbia (R. Paul Beckmann, Q.C., Treasurer).
7. The Nova Scotia Barristers' Society (Bruce T. MacIntosh, President).
8. Le Barreau du Québec (André Gauthier, Bâtonnier).
9. The Honourable Margaret Joe, Minister of Justice of the Yukon Territory.
10. Terry Billings, Hartland, New Brunswick.
11. James Thachuk, Barrhead, Alberta.

APPENDIX "C"

Minister of Justice and Attorney General of Canada

Ministre de la Justice et procureur général du Canada

December 20, 1979.

I am writing to inform you of the decision that the Government had reached on amendments to the *Judges Act* that were planned to be introduced in Parliament on Monday, December 17th. However, as you know, the dissolution of Parliament prevented this from being done. Nevertheless, I wanted you to be aware of the recommendations that the Government was about to make to Parliament for salary increases for all judges and to improve the overall compensation package provided for them and their dependants.

The Government had agreed on salary increases that would have been in line with those recommended in the *Dorfman Report on Judicial Compensation and Other Related Matters*, to be effective April 1, 1979 and again on April 1, 1980. It was also decided to rationalize the salary structure by removing the additional salary for "extra-judicial services" in subsection 20(1) of the Act and adding that amount to the basic judicial salary. I think you will agree that this would be a much more straightforward way of recording judicial salaries.

A further decision was to provide for each judge a new accountable allowance of up to $1,000 a year for expenses required for the fit and proper execution of the office of judge. This would be to ensure that the necessary expenditures for robes, books and the like are not borne by judges personally, but would be met out of specific funds provided by Parliament for this purpose. The recommendations made by the Dorfman Committee regarding conference expenses, representational allowances and an increase in the allowance for the judges in the Northwest Territories and the Yukon Territory were also adopted by the Government.

On the matter of a salary review mechanism for judicial salaries, the Government directed a comprehensive study of this issue, with the aim of legislation before April, 1981, to implement an effective method of reviewing judicial salaries, in keeping with the provisions of the *BNA*

Act and the independence of the judiciary, without having continually to resort to the legislative process.

The Government also directed the Minister of Finance to study the transitional income-tax problems frequently experienced by new appointees to the bench and others who leave self-employment or a profession for salaried office or employment, in order to develop a comprehensive approach to a rational and equitable solution to the problem so clearly outlined in the Dorfman Report.

The final issue of real significance in the Government's decisions related to annuities. The Government wished to ensure that the minimum annuity to be received by the spouse of a deceased judge would not be less than $13,900. This base figure would have been "indexed", and was adopted as being the group average received by all such spouses as of October 1, 1979.

There is finally the matter of contributions towards annuities. The Government decided to seek the abolition of the requirement that some judges contribute towards the cost of their basic annuities, while others contribute only towards annuities for their dependants. The Government's decision was that the abolition of basic contributions would be retroactive to the date of introduction in 1975 and the present system of contributions would be replaced by a uniform contribution, to be paid by all federally-appointed judges, for the "indexed" aspect of annuities, that is, the Supplementary Retirement Benefit. That contribution would be at the standard rate, now 1%, although it is expected that an increase in the contribution would be required before too long. The result of this decision would have been a refund of the excess contributions paid heretofore, with interest.

It is my view that this proposed overall package of improvements in judicial compensation would be most adequate, having regard to the need for financial restraint, and I am truly sorry that we have been unable to secure its enactment at this time.

Yours sincerely,

Jacques Flynn

Ministre de la Justice et
procureur général du Canada

Minister of Justice and
Attorney General of Canada

Le 20 décembre 1979

Monsieur le juge,

La présente a pour but de vous faire part des décisions prises par le gouvernement ayant trait aux amendements à la *Loi sur les juges* qui devaient être introduits au Parlement, lundi le 17 décembre. Toutefois, comme vous le savez, la dissolution du Parlement a empêché ceci d'être fait. Néanmoins, je voulais que vous preniez connaissance des recommandations que le gouvernement était sur le point de faire au Parlement pour augmenter le traitement de tous les juges et améliorer les avantages prévus pour eux et les personnes à leur charge.

Le gouvernement avait approuvé des augmentations de traitement qui auraient été conformes aux recommandations du *Rapport Dorfman sur la rémunération des juges et autres questions connexes*. Celles-ci seraient entrées en vigueur en deux étapes, soit le 1er avril 1979 et le 1er avril 1980. Il avait aussi été décidé de rationaliser la structure du traitement des juges en retranchant le traitement supplémentaire pour «services extrajudiciaires» visé au paragraphe 20(1) de la *Loi sur les juges* et en ajoutant ce montant au traitement de base. Je crois que vous conviendrez que ceci serait une façon plus juste de comptabiliser le traitement des juges.

En plus, la décision avait été prise d'accorder à chaque juge une nouvelle indemnité annuelle d'au plus 1 000 $, dont il serait tenu de rendre compte, en contrepartie des frais accessoires à la bonne exécution de ses fonctions. Cette mesure aurait visé à assurer que les juges n'auraient pas à payer eux-mêmes certaines dépenses entraînées par leur charge, comme par exemple l'achat de toges et de livres, ces dépenses devant être acquittées à même les fonds fournis par le Parlement. Les recommandations du Comité Dorfman sur les frais de représentation, les frais de déplacement pour assister à des conférences et l'indemnité de vie chère pour les juges des Territoires du Nord-Ouest et du Territoire du Yukon avaient aussi été adoptées par le gouvernement.

Le gouvernement a demandé qu'une étude en profondeur soit faite sur la possibilité de mettre en place un mécanisme de révision du traitement des juges en vue d'une législation qui serait prête avant avril 1981. Notre but était de mettre au point une loi efficace portant sur la révision du traitement des juges, qui aurait été conforme aux dispositions de l'A.A.N.B. et au principe de l'indépendance de la magistrature, sans avoir à faire continuellement appel au processus législatif.

Le gouvernement avait en outre donné instruction au ministre des Finances d'étudier les problèmes d'ordre fiscal auxquels font souvent face les nouveaux juges aussi bien que les personnes quittant la pratique privée ou leur profession pour accepter une charge ou un emploi rémunéré. Cette étude aurait permis d'apporter au problème si clairement exposé dans le rapport Dorfman une solution rationnelle et équitable.

La dernière question importante qui fut l'objet des décisions du gouvernement fut celle qui a trait à la pension. Le gouvernement tenait à s'assurer que la pension minimale versée au conjoint d'un juge décédé ne serait pas inférieure à 13 900 $. Ce chiffre de base aurait été «indexé». Ce montant fut adopté comme étant la moyenne des pensions reçues par les veuves, en date du 1er octobre 1979.

Pour terminer, j'en viens à la question des contributions des juges à leur pension. Le gouvernement avait décidé d'abroger la disposition portant que certains juges doivent participer à leur pension de base alors que d'autres ne contribuent qu'à la pension payable aux personnes dont ils ont la charge. Ainsi, il avait été décidé que l'abolition des contributions de base serait rétroactive à la date de leur entrée en vigueur en 1975, et que le présent système de participation serait remplacé par une contribution uniforme qu'auraient versé tous les juges nommés par le gouvernement fédéral relativement à l'«indexation» de leur pension, c'est-à-dire en ce qui concerne la prestation de retraite supplémentaire. Cette contribution aurait été au même taux de un pour cent qui est présentement versé par les autres personnes quoiqu'une augmentation du tarif de contribution est à prévoir.

En conséquence, les juges auraient reçu un remboursement des cotisations qu'ils ont versées en trop jusqu'à maintenant, avec intérêt.

J'estime que dans l'ensemble ces améliorations proposées pour la rémunération des juges auraient été très satisfaisantes, compte tenu des restrictions budgétaires auxquelles nous sommes tous soumis. Je suis navré que nous n'ayions pu obtenir l'adoption des ces propositions en ce moment.

Veuillez agréer l'expression de mes sentiments les meilleurs,

Jacques Flynn

APPENDIX "D"

AVERAGE AGE OF JUDICIAL APPOINTEES ON ASSUMING OFFICE

1970	—	47	**1980**	—	50
1971	—	48	**1981**	—	50
1972	—	47	**1982**	—	51
1973	—	49	**1983**	—	49
1974	—	50	**1984**	—	51
1975	—	48	**1985**	—	52
1976	—	50	**1986**	—	49
1977	—	47	**1987**	—	50
1978	—	49	**1988**	—	52
1979	—	50	**1989**	—	48

Source: Commissioner for Federal Judicial Affairs.

Department of Justice
Canada

Ministère de la Justice
Canada

REPORT AND RECOMMENDATIONS OF THE 1992 COMMISSION ON JUDGES' SALARIES AND BENEFITS

March 31, 1993

**Submitted to the
Minister of Justice of Canada**

Canada

Pursuant to Section 26 of the *Judges Act*, I am now tabling the Report and Recommendations of the 1992 Commission on Judges' Salaries and Benefits, appointed on September 30, 1992, to inquire into the adequacy of the salaries and other amounts payable under the Act and into the adequacy of judges' benefits generally. In accordance with Standing Order 32(5) of the House of Commons, this document shall be deemed to be referred to the Standing Committee on Justice and Solicitor General.

The Minister of Justice and
Attorney General of Canada

Pierre Blais

REPORT AND RECOMMENDATIONS OF THE 1992 COMMISSION ON JUDGES' SALARIES AND BENEFITS

Table of Contents

1992 COMMISSION ON JUDGES' SALARIES AND BENEFITS

I. BACKGROUND

Members: Purdy Crawford (Chairperson)
Jalynn H. Bennett
John G. Goodwin
Yves Guérard
Kitty Heller

Executive Secretary: Harold Sandell

Terms of Reference

The 1992 Commission on Judges' Salaries and Benefits was appointed on September 30, 1992, by the Honourable Kim Campbell, then Minister of Justice and Attorney General of Canada, pursuant to subsection 26(1) of the *Judges Act*, and was given the following terms of reference:

> "The Commission shall, pursuant to section 26 of the *Judges Act*, inquire into the adequacy of the salaries and other amounts payable under the Act and into the adequacy of judges' benefits generally.
>
> Without restricting the generality of the foregoing, the Commission shall inquire into and report on the following matters:
>
> 1. the adequacy of judges' salaries, allowances and benefits, taking into account the principle of judicial independence, comparative factors, the general Canadian economic situation and the ability to attract qualified candidates for judicial office;
>
> 2. how judicial annuities can be harmonized with the *Income Tax Act* with respect to the establishment of a registered pension plan and retirement compensation arrangement;

3. how judicial annuities can be harmonized with federal pension benefit standards;

4. how the current provisions respecting supernumerary judges might be modified to better ensure achievement of the benefits that supernumerary judges can provide;

5. the adequacy of existing provisions in the *Judges Act* regarding resignation on the basis of permanent infirmity; and

6. the projected costs of the Commission's recommendations.

The Commission shall report to the Minister of Justice by March 31, 1993."

Meetings and Conference Calls

The Commission held meetings and/or telephone conference calls as follows:

October 25, 1992 - Toronto
November 11, 1992 - Montreal
December 11, 1992 - Telephone conference
December 17, 1992 - Ottawa
December 18, 1992 - Ottawa
January 16, 1993 - Ottawa
February 6, 1993 - Montreal
February 21, 1993 - Toronto
March 12, 1993 - Toronto
March 18, 1993 - Telephone conference

Notice to the Public, Submissions and Hearings

The Commission published a Notice in newspapers across Canada, inviting written submissions and presentations at oral hearings, in either official language, concerning matters within the Commission's terms of reference. Specific notice was also sent to a number of interested organizations and individuals, including all of the provincial and territorial Ministers of Justice and Attorneys General.

Copies of the Notice in English and French are reproduced as Appendix A. The Notice was published in the following newspapers:

St. John's Evening Telegram
Charlottetown Guardian
La Voix Acadienne
Halifax Chronicle-Herald
Le Courrier
Saint John Telegraph Journal
L'Acadie Nouvelle
Le Soleil
La Presse
Montreal Gazette
Le Droit
Ottawa Citizen
The Globe and Mail
The Toronto Star
The Lawyers Weekly
Winnipeg Free Press
La Liberté
Regina Leader Post
Saskatoon Star-Phoenix
Journal L'Eau vive
Calgary Herald
Edmonton Journal
Le Franco-Albertain
Vancouver Province
Le Soleil de Colombie
The Yellowknifer
Whitehorse Star

Written submissions were received from the organizations, groups and individuals listed in Appendix B.

A public hearing took place on December 17, 1992, in the Centennial Room of the Government Conference Centre, 2 Rideau Street, Ottawa. The following groups and organizations, with the counsel indicated, made oral presentations to the Commission:

1. The Joint Committee on Judicial Benefits of the Canadian Judicial Council and the Canadian Judges' Conference.

Counsel Appearing: L. Yves Fortier, C.C., Q.C., Montreal
Wilfrid Lefebvre, Q.C., Montreal

2. The Ontario Superior Court Judges' Association.

Counsel Appearing: Brian P. Bellmore, Toronto

3. The Canadian Bar Association Standing Committee on Pensions for Judges' Spouses and Judges' Salaries.

Counsel Appearing: The Honourable Paule Gauthier, P.C., O.C., Q.C., Québec City
(President of the Association)
Donald R. Cranston, Edmonton
(Chairman of the Standing Committee)

Previous Committees and Commissions

The 1992 Commission on Judges' Salaries and Benefits is the seventh federal committee or commission established in recent years to inquire into and make recommendations to the Minister of Justice with respect to judicial salaries, allowances and benefits. It is the fourth Triennial Commission appointed pursuant to subsection 26(1) of the *Judges Act*.

In September 1974, a Special Advisory Committee, chaired by the Honourable Mr. Justice Emmett Hall, a retired member of the Supreme Court of Canada, reported to the Minister. The Dorfman Committee on Judicial Compensation and Related Matters was chaired by Irwin Dorfman, Q.C., and reported to the Minister in November 1978. The de Grandpré Committee on Judicial Annuities, chaired by Jean de Grandpré, Q.C., reported in December 1981. The 1983 Commission on Judges' Salaries and Benefits, which was the first of the Triennial Commissions established pursuant to subsection 26(1) of the *Judges Act*, was chaired by the Honourable Otto Lang, P.C., Q.C., and it reported to the Minister in October 1983. The 1986 Commission on Judges' Salaries and Benefits, which was the second Triennial Commission, was chaired by H. Donald Guthrie, Q.C., and reported to the Minister in February 1987. The 1989 Commission on Judges' Salaries and Benefits, which was the third Triennial Commission, was chaired by E. Jacques Courtois, Q.C., and reported to the Minister in March 1990.

Acknowledgements

The Commission wishes to thank Pierre Garceau, Q.C., Commissioner for Federal Judicial Affairs (Ottawa), and the members of his staff, in particular Ginette Beauparlant and Wayne Osborne, for their support throughout the Commission's mandate.

We also thank Bernard Dussault, F.S.A., F.C.I.A., Acting Chief Actuary; Claude Gagné, F.S.A., F.C.I.A., Director, Government Services Division; and L.M. Cornelis, F.S.A., F.C.I.A., Chief, Government Services Division, all of the Office of the Superintendent of Financial Institutions (Ottawa), as well as Marc-André Paradis, F.S.A., F.C.I.A., and Luc St.-Pierre, M.Sc.I.R., both of Sobeco Ernst & Young (Montreal), for their valuable actuarial and costing assistance.

The Commission was extremely fortunate to have had Harold Sandell of the Department of Justice in Ottawa assigned to it as Executive Secretary. Mr. Sandell's enthusiastic and dedicated service, together with his comprehensive knowledge of the Canadian legal and judicial systems, made it possible for us to complete our report within the legislated time limit. We are indeed grateful to Mr. Sandell for his able assistance.

II. INTRODUCTION

The Triennial Commission is a contributor to a process by which the remuneration of federally appointed judges is determined and implemented. The role of the Triennial Commission in that process is to examine the state of judicial salaries, pensions, allowances and benefits and then make recommendations to the Minister of Justice of Canada regarding the need or the desirability of changes in the judicial remuneration package. In order for the Commission's recommendations or any other changes in judicial remuneration to come into effect, Parliament must enact the necessary legislative amendments, usually to the *Judges Act*. Once this is done, the Office of the Commissioner for Federal Judicial Affairs can then administer the new benefits to the judges, retired judges and survivors entitled to them.

This complex process is designed to preclude arbitrary interference by the executive branch of government in the determination and granting of the judicial compensation package, thereby upholding the principle and strengthening the practical manifestations of judicial independence.

It is perhaps advisable for the Commission to state at the outset that it views its task as one of major importance. We have enormous respect for the judiciary and for the fundamental role which it plays in the functioning of our society. Canadians have been well served by our judges. We are pleased to make this contribution in support of such a worthy institution.

III. THE REVIEW PROCESS

The *Judges Act*, at section 26, imposes strict time limits on the Triennial Commission process. The Minister of Justice is required to appoint from three to five commissioners every third year "to inquire into the adequacy of the salaries and other amounts payable under [the *Judges Act*] and into the adequacy of judges' benefits generally". The commissioners are required within six months of their appointment to submit a report to the Minister of Justice "containing such recommendations as they consider appropriate", and the Minister must "cause the report to be laid before Parliament" within ten Parliamentary sitting days after he or she receives it.

Parliament had a clear purpose in legislating these obligatory time limits into every stage of the Triennial Commission process. Parliament recognized that the integrity of this full and independent review of judicial compensation matters would be seriously compromised without also compelling both the commissioners and the Minister to treat the review with the utmost resolve.

It stands to reason, therefore, that the Government of the day and Parliament must treat the Triennial Commission's report with similar deference. The exigencies of an independent judiciary, which is fundamental to our democratic society, demand nothing less. Long delays in the introduction of legislation in response to recommendations of the Commission and further long delays in the enactment of any such legislation — as have occurred in the past — can be very discouraging to the judiciary, and over time can negatively impact on the judges' independence, particularly if they have to become advocates for their own cause.

The respect shown for the concept of judicial independence in the design of the Triennial Commission process has been tainted by the business-as-usual attitude of successive Governments once the Commission reports have been presented to Ministers of Justice and tabled in Parliament. This failure to act with reasonable promptness cannot but lead to the entire review process losing credibility. This Commission notes, for example, that the legislation (Bill C-50) comprising the Government's response to the 1989 Commission on Judges' Salaries and Benefits (the Courtois Commission), was not introduced in Parliament until December 1991, and that by the end of the mandate of the current Commission, this relatively uncomplicated legislation had not yet been enacted.

We therefore **recommend that the Government of the day state its response to the recommendations of a Triennial Commission, and introduce its resultant legislation, as soon as feasible but in any event within 20 sitting days after the expiry of a nine-month period**

immediately following the submission of the Triennial Commission report to the Minister of Justice.

The Commission believes that it is neither desirable nor (in view of the requirement of section 100 of the *Constitution Act, 1867*) constitutional, for Triennial Commission recommendations to be binding on the Government. However, the process of independent review mandated by Parliament over a decade ago loses much of its effectiveness, and might even be rendered meaningless, if the Government's, or Parliament's, response to a Commission's recommendations is allowed to become part of the political agenda or the subject of partisan debate.

We believe that Triennial Commission members should be prepared to become advocates for their recommendations. To this end, we **recommend that Triennial Commission members be called as witnesses by parliamentary standing and legislative committees to elaborate on and support their recommendations**, both in proceedings where their report is being considered and in proceedings which are considering the Government's legislative response to the recommendations.

IV. THE COMMISSION'S HEARING PROCESS

Triennial Commission members, during the period of their mandate, should have access to the best information available concerning matters of relevance to the Commission's terms of reference. This Commission has benefited from having received very helpful documentation and background material provided by a number of federal government departments. This information was also provided to all the judicial organizations that made presentations at the oral hearing.

We feel that receiving information of this nature would prove equally useful to future Triennial Commissions as well as to the judges' organizations. We therefore **recommend that this briefing process, including the possibility of Department of Justice and other federal government officials appearing at Commission hearings to present departmental positions on relevant issues, be encouraged and even formalized.** We also **recommend that the practice of holding open hearings be continued by future Triennial Commissions.**

V. JUDICIAL SALARIES

Recognition of financial security as a fundamental component of the independence of the judiciary dates back almost three centuries, to the *Act of Settlement* of 1701. The *Constitution Act, 1867*, at section 100, acknowledges the essentiality of judges' financial security by conferring on Parliament the duty to fix and provide judicial salaries, allowances and pensions. Other legislated manifestations of the importance of financial security within the context of judicial independence are the Triennial Commission review process, the annual salary adjustment (section 25 of the *Judges Act*) and the administration of Part I of the *Judges Act* by the Commissioner for Federal Judicial Affairs, instead of by the Deputy Minister of Justice, who in his or her capacity of Deputy Attorney General of Canada is a frequent litigator before the judges. The Commissioner for Federal Judicial Affairs reports directly to the Minister of Justice.

The Supreme Court of Canada has twice underscored the necessity and importance of financial security within the context of judicial independence (*The Queen* v. *Beauregard*, [1986] 2 S.C.R. 56, at 74- 75; *Valente* v. *The Queen*, [1985] 2 S.C.R. 673, at 704). The Supreme Court understood financial security to include both the determinative source of judicial compensation — that is to say, the legislative authority for payment of judges' remuneration — and the level of compensation. The Court did not suggest at what level of salary financial security is achieved, but it is evident that the Court considered financial security to include a salary level that was not merely adequate, but commensurate with the status, dignity and responsibility of judicial office (*Beauregard*, p. 75). In addition to these criteria, one must consider the necessity, unique to the requirements of the bench, to attract recruits from among the best qualified and experienced individuals in the generally well-paid legal profession. Furthermore, the judicial salary must be sufficient to preserve and reflect the role and esteem which the office of judge deserves. The judge and his or her family must not only be, but be regarded by society to be financially secure, particularly in view of the statutory requirement (at section 55 and subsection 57(1) of the *Judges Act*) that a judge devote himself or herself exclusively to judicial duties and not engage in any occupation or business.

The 1983 (Lang), 1986 (Guthrie) and 1989 (Courtois) Triennial Commissions all recommended that the salary level established by amendments to the *Judges Act* in 1975 be restored in relative terms by increasing salaries in accordance with the "Industrial Composite [now Industrial Aggregate] Index formula", as per section 25 of the Act, for each year since 1975 to allow for inflation, with a cap of 6% and 5% in 1983 and 1984 respectively, to reflect the limit on salary adjustments for members of the public sector under the *Public Sector Compensation Restraint Act* (S.C. 1980-81-82-83, c. 122). The resultant salary level is commonly referred to as "1975 equivalence."

We are of the view that the concept of "1975 equivalence" is not particularly helpful as a determinant of judges' salaries today. The concept of "1975 equivalence" was developed under circumstances that existed 18 years ago in conjunction with the introduction of mandatory pension contributions and prior to the introduction of automatic annual indexing of judicial salaries. Much has changed since 1975, not the least of which has been the Canadian economy. The concept of "1975 equivalence" no longer relates to empirical realities, and is in serious danger of acquiring the status of arbitrariness.

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.

There are presently only 20 DM-3s in the entire federal public service, and they hold positions which generally carry very onerous operational, policy, management and budgetary responsibilities. They are a group whose services are immensely valuable to the country as a whole, and to the extent that the value of their services might be quantified with accuracy on any objective scale, it would appear that the same scale could quite fairly apply to superior court judges as well. We say this without any intention of comparing or equating judges to public servants for any purpose whatsoever except the stated purpose of determining an appropriate salary benchmark for judges that would reflect the role and esteem which judicial office deserves and, most important, ensure financial security and thereby contribute to judicial independence. Rough parity of this nature between judges and top-level public servants finds support in the comparative salary figures from a number of other common law industrial democracies.

Disregarding other elements of total compensation, we note that superior court judges' salaries have been below the mid-point of the DM-3 salary range for all but 2 of the 18 years since 1975. Those judicial salaries ($155,800) are currently $500 above the DM-3 mid-point ($155,300), which is well within the scope of rough equivalence. Having determined what we feel is currently an appropriate benchmark for judicial salaries, subsequent Triennial Commissions might re-examine the judges/DM-3 relationship in light of the future salary levels of both groups, without prejudicing the judges' entitlement to receive, in intervening years, annual salary adjustments, to a maximum of 7%, calculated in accordance with section 25 of the *Judges Act*.

When the salary freeze announced by the Minister of Finance on December 2, 1992, ends on March 31, 1995 (which assumes clause 10 of Bill C-113, the freeze legislation, will be enacted as tabled), the Commission sees no reason for judicial salaries to "bounce back" to where they would have been without the freeze unless the same salary "catch-up" is given to the DM-3s.

We therefore **recommend that rough equivalence with the mid-point of the DM-3 salary range be the appropriate benchmark by which to gauge puisne judges' salaries.**

We have examined judges' salaries in conjunction with the many other elements of the entire judicial compensation package, and although we are recommending that rough equivalence with DM-3s serve as the benchmark only for judges' salaries, we note that judges' pensions, allowances and other benefits, when considered in the aggregate, are certainly no less generous than those of the DM-3s.

We have also examined the salaries of chief justices and of judges on the Supreme Court of Canada, and their relationship to the salaries of puisne judges. We do not favour fixed dollar differentials between the salaries of the puisne judges and these other groups of judges who are paid at a higher rate, but instead we are of the view that all judges should receive the same percentage increase whenever salaries are raised.

VI. CONTINUING THE SALARIES OF RETIRED JUDGES OF THE SUPREME COURT OF CANADA

Bill C-50, introduced on December 12, 1991, is the Government's response to the 1989 (Courtois) Triennial Commission. The Bill, which at the time of the submission of this report to the Minister of Justice had not gone beyond First Reading in the House of Commons, contains a provision which would entitle a judge of the Supreme Court of Canada to receive the incidental and representational allowances during the six-month period immediately following retirement while completing his or her judgments. The Commission fully endorses Bill C-50, including the above-mentioned provision.

However, we do not recommend acceptance of the proposal that a retired judge of the Supreme Court of Canada receive his or her salary during the six-month judgment-writing period immediately following retirement. Supreme Court judges in that position should receive whatever support facilities and staff are necessary to assist them in their judgment-writing, as well as the incidental and representational allowances which Bill C-50 would provide.

The significance of membership on the Supreme Court of Canada is recognized by the higher salary, and consequently the higher annuity, received by its judges. Furthermore, our recommendation, in Item F of Chapter X, for a 65/10 retirement option for the judges of the Supreme Court, recognizes the added responsibilities and workload inherent to the position. It seems to us that these responsibilities would normally include completing and/or contributing to the decisions in matters in which the judge sat in appeal.

VII. ANNOUNCEMENT OF THE SALARY FREEZE ON DECEMBER 2, 1992

On December 2, 1992, the Minister of Finance, the Honourable Don Mazankowski, delivered an economic and fiscal statement in the House of Commons which, among other things, announced the Government's intention to impose a two-year freeze on judicial salaries. The salary freeze also applied to the Governor General, the Lieutenant Governors, the Prime Minister, Ministers, Members of Parliament, Senators, public servants and the employees of non-commercial Crown corporations. Assuming the freeze legislation as it applies to judges (clause 10 of Bill C-113, introduced on February 17, 1993) is enacted as tabled, it would override the annual salary adjustment provision, section 25 of the *Judges Act*, in 1993 and 1994.

The Commission has no comments to make with respect to the appropriateness of the two-year salary freeze itself, since to do so would not be within our mandate. However, we believe that the manner in which the Government announced the imposition of the freeze on judges could have been more consistent with the procedures provided for in the *Judges Act* for maintaining the independence of the judiciary.

This Commission had been appointed and was in the midst of its six-month mandate at the time of the announcement of the freeze. Furthermore, the next statutory salary adjustment following the announcement would not have been payable until April 1, 1993. That being the case, the Government had the option of supporting the process for maintaining judicial independence by presenting its proposal to freeze judges' salaries to the Commission for consideration and comment instead of presenting the judges, and this Commission, with a fait accompli.

VIII. REGISTERED RETIREMENT SAVINGS PLAN CONTRIBUTION LIMITS

Since 1978, pension contributions made under the *Judges Act* have not been treated as reducing the amount which judges may contribute to a Registered Retirement Savings Plan (R.R.S.P.). Up to and including the 1991 taxation year, judges have been permitted to deduct from income for tax purposes not only their statutory pension contributions but also contributions toward an R.R.S.P. up to the self-employed limit ($11,500 for 1991).

As a result of the coming-into-force in 1990 of the amendments to the *Income Tax Act* contained in Bill C-52 (S.C. 1990, c. 35), and in 1991 of the new section 8309 of the *Income Tax Regulations*, as of the 1992 taxation year judges lost the benefit of the higher deduction which had been available to them since 1978. Judges will now have the same tax-deductible R.R.S.P. contribution room, $1,000, that is available to taxpayers who are members of a Registered Pension Plan providing the maximum permissible benefits. We note that a number of other taxpayers in similar situations have also had their tax-deductible R.R.S.P. contribution room reduced to $1,000.

The Commission is of the view that as a matter of general tax policy, all taxpayers should be placed on the same footing. Consequently, the unique and distinct status of judges should not extend to their standing as taxpayers, and their loss of the higher deduction for the 1992 and subsequent taxation years should be allowed to stand. We cannot say it better than Chief Justice Dickson did in *Beauregard*, at page 76:

> Canadian judges are Canadian citizens and must bear their fair share of the financial burden of administering the country.

Chief Justice Dickson recognized that Parliament can construct new, and change established, judicial remuneration schemes and provisions, but at page 77 he qualified Parliament's power in this way:

> I want to qualify what I have just said. The power of Parliament to fix the salaries and pensions of superior court judges is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges vis-a-vis other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be ultra vires s. 100 of the *Constitution Act, 1867*.

There is absolutely no reason to suggest that subjecting judges to the same R.R.S.P. contribution room and tax deduction rules as other taxpayers constitutes discriminatory treatment. The Commission finds no reason to make an exception for judges by continuing the higher deduction anomaly. Nor do we feel that judicial salaries should be adjusted to compensate judges for the changes in the deductibility rules.

We recommend that no exception be made for judges with respect to the changes in the R.R.S.P. deductibility rules implemented by the amendments to the *Income Tax Act* contained in S.C. 1990, c. 35 and the regulations thereunder.

IX. FORMER CHIEF JUSTICES SERVING AS SUPERNUMERARY OR PUISNE JUDGES

The *Judges Act*, at subsections 29(4) and 30(4), provides that a chief justice or chief judge, or an associate chief justice or associate chief judge, who elects supernumerary status receives the salary of a puisne judge during his or her supernumerary service. Pursuant to subsections 31(4) and 32(4), a chief justice who reverts to puisne status after serving as a chief justice then receives the salary of a puisne judge following the reversion.

During the public hearings, the Commission was asked to examine the feasibility of amending the *Judges Act* so that a former chief justice who has elected to serve as a supernumerary judge or has reverted to puisne status can continue to receive the salary of a chief justice.

In our view, the additional responsibilities which attach to the office of a chief justice justify the entitlement to the higher salary level. Should a chief justice relinquish that office by electing to serve as a supernumerary judge or by reverting to puisne judge status, we do not see why his or her salary should continue at the higher level. We therefore concur with the conclusion reached on this point by the 1989 (Courtois) Commission. We also concur with that Commission to the effect that former chief justices or chief judges who retire are justified in receiving, pursuant to subsections 43(1) and (2) of the *Judges Act*, pensions that are based on the salaries then in effect of a chief justice or chief judge, since they have earned the higher pensions by virtue of their having served as chief justices for at least 5 years.

X. JUDICIAL ANNUITIES

Section 42 of the *Judges Act* provides for the granting of an annuity equal to two-thirds of the salary annexed to the office of a judge at the time of his or her resignation, removal or ceasing to hold office, to a judge who

(a) has continued in office for 15 years and has attained the age of 65, if he or she resigns his or her office:

(b) has continued in office for 15 years but has not attained the age of 65, if his or her resignation is conducive to the better administration of justice or is in the national interest;

(c) resigns or is removed as a result of becoming afflicted with a permanent disability preventing him or her from executing his or her office; or

(d) has reached the mandatory retirement age of 75, if he or she has held office for at least 10 years.

If a judge reaches the mandatory retirement age without having served for 10 years, he or she is entitled to an annuity pro-rated on the basis of years of completed service (to the nearest one-tenth of a year) as a proportion of 10 years.

Like the 1986 (Guthrie) Triennial Commission, we are using the terms "annuity" and "pension" interchangeably, since as they apply to judges' benefits they mean essentially the same thing. We note that the *Judges Act* uses the term "annuity", while section 100 of the *Constitution Act, 1867* refers to "Pensions". We might also point out that in the French version of both the *Judges Act* and the Constitution, the single term "pension" is used exclusively, even though the French word "annuité" exists and means virtually the same as the English word "annuity". We also refer to the very à propos comment by Chief Justice Dickson in the footnote on page 62 of the *Beauregard* decision:

> In this judgment I have used the word "pension" because I think it corresponds more closely to the ordinary understanding of the benefits being considered.

A. Judges' Contributions toward Annuities

Prior to 1975, federally appointed judges did not contribute toward the cost of their statutory annuities. The 1975 amendments to the *Judges Act* (now section 50) require judges who were appointed before February 17, 1975 (the date of First Reading of the amendments), to contribute at a rate of 1.5% of their annual salary to help defray the cost of improved annuities for their surviving spouses and eligible children. These judges are not required to contribute in respect of their own annuities or for indexing the pensions to the cost of living. Judges appointed on or after February 17, 1975, must contribute at a rate of 6% of annual salary toward the cost of their own annuities as well as those of their surviving spouses and children. They also contribute a further 1% of salary to help pay for indexing the pensions to the cost of living. Pension indexing is provided for by the *Supplementary Retirement Benefits Act* (R.S.C. 1985, c. S-24).

The constitutional authority of Parliament to legislate reasonable contributions by judges toward their annuities, as well as the legality of the differential in contribution rates which is based on date of appointment to the bench, were settled by the Supreme Court of Canada in the *Beauregard* decision.

The Commission recognizes that annuities represent an important element in the overall judicial compensation scheme. Judicial compensation, as the Supreme Court of Canada affirmed in the *Valente* and *Beauregard* decisions, in turn constitutes an essential component in guaranteeing judicial independence. We are firmly of the view, however, and are supported in this contention by the *Beauregard* decision, that reasonable pension contributions do not affect judicial independence.

The "two classes of judges," each contributing at different rates, which resulted from the "grandfathering" of judges appointed before February 17, 1975, is inexorably losing practical significance with each passing year. We note in this regard that at the time of the writing of this report, only 155 judges, or less than 17% of all judges, are paying 1.5% of salary as pension contributions. Of those paying 1.5%, 95 judges, more than 61%, are supernumerary. That leaves 60 judges, less than 7% of all judges, who are full-time and paying pension contributions at the rate of 1.5%. In terms of the overall membership of the bench, therefore, the proportion paying contributions at the rate of 7% is overwhelming and growing, and those judges accepted appointment with the knowledge that pension contributions of that amount were mandatory.

We support the continuation of judges' contributions toward the cost of their pensions, including supernumerary judges and judges who are entitled to retire but who have not done so. In this connection, we note that even at the current rates of contribution, the judges are actually paying for about one-fifth of the overall cost of their pensions. About 80% of the cost is borne by Canadian taxpayers. (See Appendix D.)

B. Reporting and Accounting

At present, judges' contributions toward the costs of their pensions are paid into the Consolidated Revenue Fund. To better serve fiscal accountability, we **recommend that contributions, benefits, interest and liabilities for the judges' pension scheme be accounted for distinctly in the Pension Accounts**, as is already done, for example, for the public service superannuation plan.

C. Indexation of Annuities

Judicial annuities, including those of surviving spouses and eligible children, are indexed pursuant to the *Supplementary Retirement Benefits Act*. That Act applies to the pension plans of virtually all of the branches of the public service and to Members of Parliament, as well as to judges, and it is administered by the President of the Treasury Board.

The unique status of the judiciary, the principle of judicial independence, and the fact that the judicial compensation package (of which pension indexing is a part) is an essential element in the financial security of the judges, all suggest that the indexation of judicial annuities should be provided for in the *Judges Act*. The indexation of annuities is, for judges alone, a factor that should be regarded as coming within the constitutional guarantee of security of salary and pension. Consequently, we believe that the indexation of judges' pensions should be distinct from the indexation of public service pensions. We note that the provisions regarding the indexation of judges' salaries are already in the *Judges Act*. This is consistent with our view that all of the elements of the judges' remuneration package should be governed by the Minister of Justice and administered by the Commissioner for Federal Judicial Affairs pursuant to provisions contained in the *Judges Act*.

We therefore **recommend that the provisions for indexing judicial annuities, including those of surviving spouses and eligible children, should be transferred to the *Judges Act* from the *Supplementary Retirement Benefits Act*.**

D. "Rule of Eighty"

Traditionally, appointments to the superior courts (and when they existed, the county and district courts as well) were made from among the more senior members of the bar, that is, in the age range of 50 years and older. Commencing about a generation ago, a practice began of appointing on occasion younger men and women to the bench: for example, lawyers in their late 30s and early 40s.

This trend, almost imperceptible when it began but now evident, was welcomed. It produced a group of younger judges who are able to dedicate longer periods of service to the judiciary and help meet the increasing demands of the busy court systems. The practice of

appointing male and female judges at a younger age has undoubtedly been a successful one, but over the years it has affected the overall age profile of the judges. (Appendix C contains an outline of the average ages of male and female judges appointed to the bench during the years 1981 to 1992 inclusive.)

In view of this changing judicial age profile, we believe that the administration of justice would be better served by providing more flexible rules of retirement. Therefore, the Commission is of the view that 60 years should be the minimum age at which a judge qualifies for a full pension of two-thirds of salary. We are also of the view that 15 years' service on the bench should continue as the minimum required to be eligible for a full pension unless the provisions of subsection 42(2) of the *Judges Act*, regarding mandatory retirement, apply.

We therefore **recommend that retirement at full pension be permitted when a judge has reached at least 60 years of age and has served on the bench for a minimum of 15 years, provided the sum of age and years of service equals at least 80.**

The Commission considers a "Rule of 80" retirement option as particularly appropriate in view of the changing age profile of judges. By permitting retirement with a full pension at earlier ages, in a flexible and fair manner which recognizes the unique service conditions and requirements of the judiciary, the Rule of 80 would not be inconsistent with pension reform standards. We note, however, that certain pension reform standards are not relevant, due to the special characteristics of the judges' plan.

E. Disability

The *Judges Act*, at paragraph 42(1)(c), provides for the granting of a full pension of two-thirds of salary to a judge who resigns or is removed from the bench as a result of becoming afflicted with a permanent disability preventing him or her from executing his or her office.

The Commission has considered whether it is appropriate that a judge can resign pursuant to this provision after very short service and receive a full pension. This led the Commission to consider a number of options, such as the implementation of a pro-rated disability pension in circumstances where a full pension may appear to be overly generous.

The disability provision serves as the judges' long-term disability insurance plan.[1] Since 1982, an average of 3.5 judges per year have retired from the bench, and received a full pension, under the authority of paragraph 42(1)(c). We do not consider this number of disability retirements and the resulting additional years of pension payments to be unusual, given the age profile of judges. In other words, the statistics do not indicate significant problems with the disability provision. We note, in passing, that there are administrative measures that can be taken to resolve any problems that may be identified from time to time.

We consider the paragraph 42(1)(c) disability provision, with its certainty of financial security for the judge and his or her family in the event of the judge's permanent disability, to be an important aspect of his or her overall independence. We do not recommend that any changes be made to the disability provision at paragraph 42(1)(c) of the Act.

F. Retirement for Judges of the Supreme Court of Canada

It is universally recognized that acceptance of an appointment as a Justice of the Supreme Court of Canada brings with it an immense workload and heavy responsibility. In addition, judges of the Supreme Court cannot elect to hold office as supernumerary judges. Like the earlier Triennial Commissions, we appreciate that supernumerary status is inappropriate for the judges of our highest court, and inconsistent with the Court's unique role as the final arbiter of the country's legal values. The finality of the Supreme Court's decisions requires that they be handed down only by full-time members of the Court rather than by supernumerary judges. Furthermore, supernumerary status might impair the collegiality of the nine-member Court, and detract from the sense of permanence and the regional balance which add to its credibility and legitimacy.

In view of the unusually heavy burden inherent in membership on the Supreme Court of Canada, and the unavailability of supernumerary service, the Commission is of the view that an additional retirement option should be provided exclusively to the judges of that court. Therefore, in addition to the existing retirement entitlements and the recommended new Rule of 80 retirement option in Item D above, we **recommend that judges be permitted to retire with a full pension after serving for a minimum of 10 years on the Supreme Court of Canada and reaching the age of 65 years.**

---

[1] Short-term illness requiring absence from judicial duties for a period in excess of 30 days can be accommodated by the judge obtaining a leave of absence from the Governor in Council under subsection 54(1) of the *Judges Act*. An average of 8 illness-related leaves of absence per year have been granted in each of the last six years under subsection 54(1). In any event, whenever a judge will be absent from his or her judicial duties for more than 30 days, the judge must report the absence and the reasons therefor to the Minister pursuant to subsection 54(3).

G. Credit Splitting on Marriage Breakdown

When the recently enacted *Pension Benefits Division Act* (S.C. 1992, c. 46) is brought into force, it will provide a scheme applicable to certain statutory pension plans which recognizes the right of a spouse to a share of the plan member's pension credits on the breakdown of a marriage or common-law relationship. The Act will enable the divorced or separated spouse of a plan member to apply for a division of the member's pension credits which have accrued during the period of cohabitation, as long as there is a court order or a spousal agreement which provides for the division of the credits. The *Pension Benefits Division Act* will apply to the pension plans of the federal public service, the Canadian Forces, the R.C.M.P., Members of Parliament, lieutenant governors, the Governor General and others. It will not apply to judges' pensions under the *Judges Act*. Consequently, there is currently no authority to split a judge's pension credits upon the breakdown of his or her marriage.

Credit splitting is another area of pension reform where harmonization of judicial pensions is a worthwhile objective. It is an accepted pension reform standard under both federal and provincial legislation. We believe as a matter of fairness and equity that credit splitting ought to be made applicable to the judiciary. Therefore, we **recommend that the *Judges Act* be amended to incorporate therein the relevant provisions of the *Pension Benefits Division Act*, with such changes as the circumstances require.** The regulations made thereunder to permit the valuation of judicial pensions for credit splitting purposes should be made by the Governor in Council on the recommendation of the Minister of Justice after consultation with the Commissioner for Federal Judicial Affairs.

It is important that the *Judges Act* actually contain the relevant provisions of the *Pension Benefits Division Act*, rather than merely being listed as one more statute to which the *Pension Benefits Division Act* applies, since as a compensation matter it impacts on the independence of the judiciary and, as we stated earlier with respect to the indexation of judges' pensions, it should be governed by the Minister of Justice and administered by the Commissioner for Federal Judicial Affairs.

This amendment would permit the payment of part of a judge's pension credits to his or her non-judge spouse or on the spouse's behalf. This transfer would be made directly out of the Consolidated Revenue Fund and would have the effect of reducing the amount of the pension that the judge would eventually receive. We are informed that a judge's pension credits may be actuarially valuated and quantified for these purposes at any time following appointment, notwithstanding that judges' pensions are the non-accrual type. (We note that the lieutenant governors', Governor General's and non-career diplomats' pensions are also the non-accrual type.) We do not regard the concept of credit splitting as interfering with the principle of judicial independence.

XI. SUPERNUMERARY STATUS

Rather than leave the bench after attaining the minimum qualification for retirement, a judge has the option pursuant to sections 28 and 29 of the *Judges Act* to elect to serve as a supernumerary judge. Under this arrangement, a puisne judge who is at least 65 years of age and has served as a federally appointed judge for a minimum of 15 years, or has reached the age of 70 years and has held office for at least 10 years, may opt to continue in office until age 75 as a supernumerary judge by so electing. A supernumerary judge holds himself or herself available to perform whatever judicial duties his or her chief justice requests of him or her.

A supernumerary judge remains entitled to a full judicial salary until the judge reaches mandatory retirement age or otherwise leaves the bench, at which time he or she would receive a full annuity. A chief justice or associate chief justice who elects supernumerary status is entitled to receive the salary of a puisne judge during his or her supernumerary service, although the subsequent annuity is based on the salary then in effect of a chief justice.

All federally appointed judges except the members of the Supreme Court of Canada are entitled to opt for supernumerary status. Approximately 18% of the federally appointed bench are currently supernumerary judges, and that proportion is anticipated to increase in the years ahead.

When a judge becomes a supernumerary judge, the judicial position held by that judge becomes vacant and a replacement might then be appointed (although not necessarily so). Consequently, the supernumerary programme lengthens judicial careers and promotes continuity on the bench, while making available positions which could not otherwise be filled until the retirement of the incumbents. Supernumerary status allows a judge who might not be able to carry a full workload, but who is otherwise able to work on a part-time basis, to continue to do so for the benefit of his or her court.

The judges, in their submissions, informed us that the workload of a supernumerary judge is expected to average, on a cross-Canada basis, 50% of the workload of a regular, full-time judge. On that basis, combined with the fact that the large majority of supernumerary judges are entitled to retire with a full pension by virtue of having reached the 65/15 age and service thresholds, we accept the judges' representations that from an economic standpoint, a supernumerary judge represents an efficient use of human resources, and that supernumerary service is quite conducive to the effective administration of the courts, including the reduction of court backlogs and delays.

The Commission regards supernumerary status for judges to be consistent with currently evolving views regarding gradual retirement. On the basis of the information given to us by the judges in their submissions before us, we support the supernumerary concept. The cost analysis in this report is predicated on the 50% workload factor.

We would encourage chief justices to continue to carefully monitor the implementation of the supernumerary programme in their respective courts. We would invite the Canadian Judicial Council to consider documenting court management of the supernumerary programme so that it might confirm for future Triennial Commissions whether the basic assumptions surrounding supernumerary service, such as the 50% workload factor, remain valid in the years ahead as the number of supernumerary judges increases.

A. The Rule of Eighty and Supernumerary Service

Predicated on the judges' representations, we consider the supernumerary programme to be providing a valuable contribution toward the effective and efficient administration of the courts. With that in mind, along with the changing age profile of judges referred to earlier, we consider it appropriate for judges to elect supernumerary status under a Rule of 80 formula, provided the judge has served a minimum of 15 years in office and is at least 60 years of age. We would, however, maintain the existing 70/10 supernumerary option.

We therefore **recommend that the election of supernumerary status be permitted when a judge has reached at least 60 years of age and has served on the bench for a minimum of 15 years, provided the sum of age and years of service equals at least 80.** This Rule of 80 recommendation is identical to our Rule of 80 recommendation regarding retirement which we made in Item D of Chapter X.

B. Ten-year Maximum Supernumerary Service

Concomitant with our recommendation for an extended eligibility to elect to serve as a supernumerary judge, we also **recommend that a judge not be permitted to serve for more than 10 years as a supernumerary judge.** Consequently, an eligible judge who would elect to serve as a supernumerary judge at younger than 65 years of age would forfeit his or her right to retire at age 75. Should this recommendation be considered to be unconstitutional or, once enacted, be so found, as a result of the 75 years mandatory retirement age in subsection 99(2) of the *Constitution Act, 1867*, then we would recommend that the minimum age for the election of supernumerary status remain, or be increased (as the case may be), to age 65. However, since we recognize the value of supernumerary service, and have concerns only with respect to the workload capacity of supernumerary judges who are approaching the mandatory retirement age of 75, we suggest that future Triennial Commissions may want to re-examine the 10-year supernumerary limit on the basis of information which might then be available regarding the 50% average workload of supernumerary judges.

XII. INCOME TAX HARMONIZATION

The income tax rules relating to retirement savings have been extensively revised over the past few years. The stated objectives of these income tax reforms were to ensure that all taxpayers are provided with a similar opportunity to save for retirement on a tax-assisted basis and to ensure that the costs of pension plans and benefits are measurable according to common standards.

The new pension rules are extremely complex. Simply put, the rules now restrict the benefits that may be provided under a defined benefit Registered Pension Plan (R.P.P.), and in this way limit the amount of tax assistance provided to such plans. (A defined benefit pension plan is a plan that provides a specified level of benefits, regardless of the cost of providing those benefits.) An employer who wants to provide pension benefits in excess of those permissible under an R.P.P. must establish a separate Retirement Compensation Arrangement (R.C.A.) for this purpose, which then becomes subject to rules of its own.

The Department of Finance assured the Commission that the restructuring of the judicial pension plan into a combination of an R.P.P. (that is to say, a base pension plan that is to be registered for income tax purposes) and an R.C.A. or supplementary plan, can take place without any change to the benefits payable to judges and their survivors. The Commission accepts this assurance, and recognizes that the R.P.P./R.C.A. regime would have no practical effect on the amount or administration of judges' pensions.

Judges' pensions are rooted in the constitution. This constitutional foundation, arising from the exigencies of judicial independence, marks the judicial pension plan as unique. The entire scheme, with the sole exception of pension indexing, is provided for and administered in accordance with the *Judges Act*. In view of the Department of Finance's assertion that the R.P.P./R.C.A. regime would have no practical impact on judges' pensions, we see no compelling reason to restructure or transform the *Judges Act* to embrace the entire R.P.P./R.C.A. regime.

We note that the *Judges Act*, at subsection 50(3), currently contains a clause which deems a judge's statutory pension contributions to be made to or under a registered pension plan or fund. The clear purpose of that deeming provision is to enable the judge to deduct those contributions from income for tax purposes; the provision essentially creates a legal fiction. The Commission believes that the R.P.P./R.C.A. restructuring should also be made applicable to judges by means of a deeming provision. We therefore **recommend that the *Judges Act* be amended to provide that the judges' pension scheme is deemed to be a Registered Pension**

Plan up to the limits provided therefor under the *Income Tax Act* and regulations, and is deemed to be a Retirement Compensation Arrangement for the excess.

In our view, a deeming provision of that nature would be entirely consistent with our belief, referred to at Chapter VIII with regard to judges' R.R.S.P. contribution limits, that as a matter of general tax policy all taxpayers should be placed on the same footing. The deeming clause would also conform to our belief, mentioned in Items C and G of Chapter X, and rooted in the understanding that judges' pensions are an essential component of their financial security and judicial independence, that all aspects of their pensions should be governed by the Minister of Justice and administered by the Commissioner for Federal Judicial Affairs pursuant to provisions contained in the *Judges Act*.

XIII. JUDICIAL ALLOWANCES

The Commission has examined the status of a number of the statutory allowances under the *Judges Act*. In particular, we have looked at the amount and adequacy of the incidental allowance (subsection 27(1)); the northern allowance (subsection 27(2)); the representational allowance (subsection 27(7)); the removal allowance (section 40); and the conference allowance (subsection 41(3)).

We note that in the case of every one of these allowances, statutory improvements have either been implemented following the recommendations of the 1986 (Guthrie) Triennial Commission or introduced (but not yet enacted) through Bill C-50 as a result of the recommendations of the 1989 (Courtois) Triennial Commission. We believe that once Bill C-50, or its successor legislation in the current or a new parliamentary session, is enacted, those allowances will be adequate and in any event may be examined again by the next Triennial Commission.

We also want to mention the submission made to this Commission on behalf of the superior court judges serving in the two territories. We appreciate the higher cost of living that comes with service in the north, and recognize that the current $6,000 northern allowance might not fully compensate for those increased costs. However, we do not believe that varying the northern allowance annually by tying it to increases in judicial salaries is the appropriate method of dealing with the higher cost of living. The judges' annual salary adjustment based on a statutory indexing formula serves a special purpose relating to judicial independence, and we do not believe it should be used for calculating the northern allowance as well.

The Commission is not persuaded that there is a sufficient basis to increase the northern allowance by any amount. The existing $6,000 allowance is already unique in that the *Judges Act* does not recognize other regional cost disparities that exist across Canada.

XIV. NON-STATUTORY BENEFITS

The Commission considers the judges to have, in the aggregate, very good basic insurance and medical coverage. If a judge dies in office, his or her surviving spouse is entitled to an annuity equal to one-third of the judge's salary (to be increased to 40% under Bill C-50) and a lump-sum statutory payment of one-sixth of salary. The surviving spouse of a retired judge who dies is entitled to receive an annuity equal to half of the judge's annuity (to be increased to 60% under Bill C-50). Surviving minor children or those in full-time attendance at a school or university are also entitled to annuities. Under the *Judges Act*, a judge who is unable to continue on the bench due to a permanent infirmity is entitled to retire with a full pension of two-thirds of salary. A judge with a lesser disability, but lasting longer than 30 days, may apply for a leave of absence and continues to receive full salary while on leave. Of course, each judge is also covered by the public health insurance plan of his or her province or territory of residence. Bill C-50 would make judges eligible under the *Government Employees Compensation Act* (R.S.C. 1985, c. G-5) for the purposes of compensation for injuries.

In addition to their statutory allowances and entitlements, judges also receive a number of non-statutory benefits related to life, health and dental group insurance and accident insurance. For instance, judges can participate in both the Public Service Management Insurance Plan (P.S.M.I.P.) and the Public Service Health Care Plan (P.S.H.C.P.), taking advantage in both plans of the federal public service's highly competitive group rates. The judges also participate in the Public Service Dental Care Plan (P.S.D.C.P.) at no charge to either themselves or their dependents. We see no need to specifically augment these broad and comprehensive coverages for the judges alone.

The P.S.M.I.P coverage, which is optional, includes life insurance, accidental death and dismemberment insurance, and dependents' insurance. As an example, maximum life insurance coverage available under this plan could provide a lump sum benefit upon the judge's death of twice his or her salary, which is in addition to the survivor benefits under the judges' pension plan. Premiums vary with age, sex and coverage chosen; due to a partial premium holiday in effect at the time of writing our report, a 50-year-old male judge would pay less than $22 per month for the maximum coverage available.

The P.S.H.C.P. includes coverage for both the judge and his or her dependents, and consists of drug benefits (80% of costs paid); vision care benefits (including 80% of the costs of eyeglasses and contact lenses, to maximum annual limits); health practitioners benefits (including costs of private-care nurses, physiotherapists, psychologists, speech and language pathologists, and the like, to maximum annual limits); out-of-province benefits (including travel and emergency travel assistance benefits, to maximum limits); miscellaneous expense benefits

(including 80% of the costs of medically prescribed hearing aids, air and ground ambulance service, orthopaedic shoes, and so on, to maximum annual limits); benefits relating to hospital expenses incurred outside of Canada (subject to per-trip limits); and benefits relating to hospital care within Canada (including semi-private or private room accommodation, to maximum daily limits).

Judges, retired judges and surviving spouses in receipt of annuities under the *Judges Act* are all entitled to participate in the P.S.H.C.P. Family coverage to the highest level currently costs a judge less than $10 per month.

In addition to participating in the P.S.M.I.P., the P.S.H.C.P. and the P.S.D.C.P., judges are also eligible to participate in an optional supplementary catastrophic health insurance plan which has been arranged between the Canadian Judges' Conference and a private carrier. This optional plan is not subsidized, although the monthly premium of $105 (for family coverage) is deducted at source by the Office of the Commissioner for Federal Judicial Affairs.

XV. MATERNITY/PARENTAL LEAVE

Under section 54 of the *Judges Act*, a judge who is absent from his or her judicial duties for a period in excess of 30 days requires Governor in Council approval of the absence. The approval for this paid leave of absence is granted by order-in-council. The Commission notes that this leave of absence provision is sufficiently flexible, and has been so used in the past, to authorize maternity leave for a female judge during pregnancy or following the birth or adoption of a child.

Notwithstanding the availability of a section 54 leave of absence for maternity and possibly parental leave purposes, we believe that the social benefits attributable to allowing a parent to be with her or his newborn or newly adopted child are sufficiently evident to justify reducing the decision-making authority for judicial maternity/parental leave to the chief justice level from the Governor in Council. We therefore **recommend that the *Judges Act* be amended to permit a chief justice to authorize up to 6 months of maternity/parental leave: (i) for a female judge on his or her court who is pregnant, has recently given birth or has recently adopted a child; and (ii) for a male judge following the birth or adoption of his child.** This period of maternity/parental leave should have no effect on the judge's salary. An aggregate of 6 months of maternity/parental leave seems appropriate and is in accordance with federal unemployment insurance legislation. We would invite chief justices to take into account the amount of maternity/parental leave being taken by the other parent when considering how much maternity/parental leave to grant to the judge.

Whenever a judge is absent from his or her judicial duties for a period in excess of 30 days, the requirement in subsection 54(3) that he or she report the absence and the reasons therefor to the Minister of Justice should continue.

XVI. COSTING METHODOLOGY

The terms of reference of this Commission, unlike those of previous Triennial Commissions, specifically request that we cost our recommendations. We were therefore required to consider how best to discharge our duty in that regard within the limited time available.

We considered it advisable to develop a costing methodology that was sufficiently general yet comprehensive enough to apply to our recommendations as well as to the recommendations of future Triennial Commissions. We believe that the credibility and comparability of costings would be enhanced if this and subsequent Commissions use a consistent cost methodology.

We came to the conclusion that the best way to measure the costs of our recommendations was by determining the difference between the cost of the total compensation package enjoyed by judges before and after implementing our recommendations. This total compensation cost approach automatically accounts for the interactions between the various components of the judges' salary, allowance and benefits package. In addition, by providing a global value of judicial salaries and benefits, a standard of comparison is available between the judges' compensation package and that of public servants and the private sector.

The Commission considered the advisability of developing an independent set of assumptions for the purpose of the costing process. We noted that the cost of our recommendations is the difference between the cost of the total compensation package for judges before and after implementing our recommendations; therefore, the estimated costs are not too sensitive to variations in the assumptions used, if those variations are held within a reasonable range.

We concluded that it would be prudent to use the same assumptions that are used by the federal government in reporting its liabilities in the Public Accounts. These assumptions are not very different from those used by the Chief Actuary in the triennial actuarial reviews prescribed under the *Public Pensions Reporting Act* (R.S.C. 1985, c. P-31.4). The Public Account assumptions are deemed to represent best estimates from the point of view of the Government, which is the payor of judicial compensation. Furthermore, in our view these assumptions should be regarded by the judges as providing a reasonable estimate of the value of their salary and benefits package.

As the assumptions used for the Public Accounts will be updated from time to time to reflect current conditions, future Triennial Commissions could follow the same approach and

thereby avoid possible criticism for making what might appear to be arbitrary changes in the assumptions.

Appendix D describes more fully the Total Compensation concept and cost methodology, including the assumptions used. The Commission is satisfied that this total compensation cost approach is most appropriate for measuring and comparing total compensation costs for judges. As a matter of ease of reference, the Appendix terminology refers to "employer" and "employee", but these terms should be understood in the generic sense that judges are "employed" by the people of Canada. We recognize that judges hold an "office" which is based on the constitution and enshrined in the *Judges Act*. The independence of the judiciary requires this to be the case.

We have used the Level of Benefit Method, as described in Appendix D, because it allows for the comparison of hypothetical compensation packages while eliminating the distortions which would arise from a variation in the number of judges from year to year or from variations in the distribution by age, sex or years of service on the bench. This Method accommodates the prospective nature of our recommendations and enables us to measure their cost implications with an accuracy limited only by the availability of experience data and the necessity of relying on assumptions.

Of the actuarial cost methods that were considered, we have used the Level Entry Age Cost Method, described in Appendix D, to produce estimates of the pension costs because it automatically averages total compensation over the career of the judges. It avoids the necessity of making a number of assumptions as to the apportionment of benefits over successive periods and about blending costs while supernumerary with costs while fully active. This actuarial cost method is particularly suitable with respect to the judges' pension scheme where benefits are granted globally and not explicitly apportioned on a year-by-year basis.

One particular difficulty has been the determination of a rate of total compensation per period, since the work period for a judge can extend far beyond his or her sitting times. This is an important consideration because a change in working conditions which reduces the work period for a given amount of compensation results in a cost increase and vice versa. For the purpose of doing this costing, some workload assumptions had to be made, which are not meant to imply actual circumstances. After consideration of various alternatives, we have chosen to use as an estimate a work period of 1.5 times the work period that a judge is available for sitting on the bench. On the basis of judges being available for sitting 32 weeks per year, each is deemed to work approximately 48 weeks per year. This approximation can be extended to supernumerary judges, where wide variations in the work period can be expected, but where we have assumed a 50% workload. Assuming the availability of supernumerary status results in a higher average retirement age for judges, costs are affected in two opposite ways:

- pension costs are reduced by postponing the retirement age, and the cost per period is further reduced by an increase in the average period worked (since judges' pensions are not the accrual-type); and

- salary costs are increased because the full salary is paid for a shorter annual work period.

Similarly, some reduction in the average period effectively worked had to be made to take into account leaves of absence, maternity/parental leaves and short-term disabilities. In the absence of suitable data, an arbitrary estimate of one week per year has been used, which could be revised as experience data is accumulated. Although there are obviously some costs associated with our recommendations in Chapter XV, given this arbitrary approximation it is not captured by the calculations. However, we believe these costs to be quite marginal.

We strongly suggest that work be undertaken in advance of the next Triennial Commission to facilitate the full application of the Total Compensation Cost Method to all components of judicial compensation and to accumulate the experience data necessary to confirm or modify the assumptions which have been used.

Section 6 of Appendix D summarizes the cost of the components of Total Compensation for the general case of puisne judges. The various allowances provided for in the *Judges Act* have been treated as amounts paid in exchange for expenses assumed by the judges, not for work done, and have thus not been deemed a compensation component. Section 5 of Appendix D summarizes the calculations made to take into account the differentials for judges of the Supreme Court of Canada and for chief justices.

Assuming the salary freeze for the 2 years beginning April 1, 1993, proceeds in accordance with clause 10 of Bill C-113, it might be noted that the cost of our recommendations for that period is limited to the impact of the Rule of 80. However, for the third year, beginning April 1, 1995, our recommendations infer a judicial salary increase equal to the percentage increase in the Industrial Aggregate, as stipulated in section 25 of the *Judges Act*, and this increase has been reflected in the estimated costs.

The average compensation per week worked and the increase over the base year are estimated as follows:

	Average per week worked	Increase per week worked
Base year	$ 4,947	—
First year	$ 5,069	$ 122
Second year	$ 5,069	$ 122
Third year	$ 5,196	$ 249

In order to compare the cost of a constant amount of services, the calculation of the aggregate costs needs to be adjusted to take into account the reduction in the average number of weeks worked per year resulting from the introduction of the Rule of 80. As the expected average number of weeks worked before the change is 0.986% higher, the calculation reflects

the fact that to maintain the same level of services an increase of 0.986% in the number of judges would be required.

The increase in the accrued pension liabilities due to the introduction of the Rule of 80 is a non-recurring cost that could be deemed allocated to the first year. Since the change benefits the judges currently in office, we have considered it reasonable to allocate it over the Expected Average Remaining Service Life of these judges, estimated at 12.0 years. This results in an increase of $1,626,000 per year for the next 12 years rather than $12 million in the first year.

The aggregate costs of our recommendations are therefore estimated as follows, expressed as an increase over the base year:

	$ millions
01/04/93 - 31/03/94	6.1
01/04/94 - 31/03/95	6.1
01/04/95 - 31/03/96	10.8
Total	23.0

These estimates assume that our recommendations apply as of April 1, 1993.

More details are available in Appendix D.

XVII. CONCLUSION

Judges are not in a position to negotiate with the Government with respect to their salaries, pensions and benefits. According to constitutional law, doctrine and jurisprudence, the independence of the judiciary rests to a significant degree on the nature of their compensation package. Parliament has legislated the Triennial Commission process in recognition of this unique role and standing of the judiciary. The purpose of the Triennial Commission is to examine judges' remuneration in a non-partisan and objective manner, in the context of prevailing economic conditions, and to make recommendations to the Minister of Justice which would serve to reinforce the fundamental principle of judicial independence.

The worthy objectives of this process require the timely response of the Minister, the Government and Parliament to the recommendations contained in this report.

XVIII. SUMMARY OF RECOMMENDATIONS

1. That the Government of the day state its response to the recommendations of a Triennial Commission, and introduce its resultant legislation, as soon as feasible but in any event within 20 sitting days after the expiry of a nine-month period immediately following the submission of the Triennial Commission report to the Minister of Justice (Chapter III).

2. That Triennial Commission members be called as witnesses by parliamentary standing and legislative committees to elaborate on and support their recommendations (Chapter III).

3. That the process whereby federal government departments provide documentation and background materials to Triennial Commissions, including the possibility of Department of Justice and other federal government officials appearing at Commission hearings to present departmental positions on relevant issues, be encouraged and even formalized (Chapter IV).

4. That the practice of holding open hearings be continued by future Triennial Commissions (Chapter IV).

5. That rough equivalence with the mid-point of the DM-3 salary range be the appropriate benchmark by which to gauge puisne judges' salaries (Chapter V).

6. That no exception be made for judges with respect to the changes in the R.R.S.P. deductibility rules implemented by the amendments to the *Income Tax Act* contained in S.C. 1990, c. 35 and the regulations thereunder (Chapter VIII).

7. That contributions, benefits, interest and liabilities for the judges' pension scheme be accounted for distinctly in the Pension Accounts (Chapter X, Item B).

8. That the provisions for indexing judicial annuities, including those of surviving spouses and eligible children, should be transferred to the *Judges Act* from the *Supplementary Retirement Benefits Act* (Chapter X, Item C).

9. That retirement at full pension be permitted when a judge has reached at least 60 years of age and has served on the bench for a minimum of 15 years, provided the sum of age and years of service equals at least 80 (Chapter X, Item D).

10. That judges be permitted to retire with a full pension after serving for a minimum of 10 years on the Supreme Court of Canada and reaching the age of 65 years (Chapter X, Item F).

11. That the *Judges Act* be amended to incorporate therein the relevant credit splitting provisions of the *Pension Benefits Division Act*, with such changes as the circumstances require (Chapter X, Item G).

12. That the election of supernumerary status be permitted when a judge has reached at least 60 years of age and has served on the bench for a minimum of 15 years, provided the sum of age and years of service equals at least 80 (Chapter XI, Item A).

13. That a judge not be permitted to serve for more than 10 years as a supernumerary judge (Chapter XI, Item B).

14. That the *Judges Act* be amended to provide that the judges' pension scheme is deemed to be a Registered Pension Plan up to the limits provided therefor under the *Income Tax Act* and regulations, and is deemed to be a Retirement Compensation Arrangement for the excess (Chapter XII).

15. That the *Judges Act* be amended to permit a chief justice to authorize up to 6 months of maternity/parental leave: (i) for a female judge on his or her court who is pregnant, has recently given birth or has recently adopted a child; and (ii) for a male judge following the birth or adoption of his child (Chapter XV).

All of which is respectfully submitted this 31st day of March, 1993.

Purdy Crawford (Chairperson)
Jalynn H. Bennett
John G. Goodwin
Yves Guérard
Kitty Heller

Commission on Judges' Salaries and Benefits

CANADA

OTTAWA, K1A 1E3

APPENDIX A

Commission sur le traitement et les avantages des juges

1992 COMMISSION ON JUDGES' SALARIES AND BENEFITS

NOTICE

This Commission was appointed on September 30, 1992 by the Minister of Justice and Attorney General of Canada, pursuant to section 26 of the Judges Act, to inquire into the adequacy of the salaries and other amounts payable under the Act to federally appointed judges and into the adequacy of federally appointed judges' benefits generally, including the granting of annuities provided to judges and to their surviving spouses and children.

The Commission invites written submissions in either official language concerning the matters within the Commission's terms of reference. Written submissions must reach the Commission by November 30, 1992, in ten copies. A party intending to file a written submission with the Commission may also request an opportunity to make a presentation at an oral hearing. The Commission must be notified by November 20, 1992 of the party's desire to appear at an oral hearing. A party filing a written submission need not request to appear at an oral hearing.

Copies of the Commission's terms of reference are available upon request.

1992 Commission on Judges'
Salaries and Benefits
Room 1114
110 O'Connor Street
Ottawa, Ontario
K1A 1E3

Purdy Crawford, Q.C.
Chairman

Commission on Judges' Salaries and Benefits

CANADA

OTTAWA, K1A 1E3

Commission sur le traitement et les avantages des juges

COMMISSION DE 1992 SUR LE TRAITEMENT ET LES AVANTAGES DES JUGES

AVIS

La Commission de 1992 sur le traitement et les avantages des juges a été instituée le 30 septembre 1992 par la ministre de la Justice et procureure générale du Canada, en application de l'article 26 de la Loi sur les juges. Elle a pour mandat de déterminer si le traitement et les avantages des juges nommés par le gouvernement fédéral ainsi que les pensions auxquelles ceux-ci, leur conjoint et leurs enfants ont droit, sont satisfaisants.

La Commission invite toute personne intéressée à lui soumettre par écrit ses vues sur les sujets qu'elle a reçu pour mission d'examiner. Ces interventions doivent prendre la forme d'un document écrit, établi dans l'une ou l'autre des deux langues officielles, et être déposées auprès de la Commission en dix exemplaires au plus tard le 30 novembre 1992. Quiconque dépose un tel document écrit peut en outre demander à la Commission d'être entendu par celle-ci. En pareil cas, il convient d'aviser la Commission au plus tard le 20 novembre 1992 du souhait de présenter des observations orales. Il convient de noter que le dépôt de documents écrits n'oblige nullement à présenter les observations orales.

Il est possible d'obtenir le texte définissant le mandat de la Commission sur simple demande.

Commission de 1992 sur le
traitement et les avantages
des juges
110, rue O'Connor
Bureau 1114
Ottawa (Ontario)
K1A 1E3

Le président de la
Commission

Purdy Crawford, c.r.

APPENDIX B

LIST OF WRITTEN SUBMISSIONS

1. The Joint Committee on Judicial Benefits of the Canadian Judicial Council and the Canadian Judges' Conference
2. The Ontario Superior Court Judges' Association
3. The Northern Federally Appointed Judges
4. The Honourable Mr. Justice John deP. Wright (Ontario Court of Justice (General Division))
5. The Canadian Bar Association Standing Committee on Pensions for Judges' Spouses and Judges' Salaries
6. The Law Society of Alberta (J. Patrick Peacock, Q.C., Counsel)
7. The Law Society of British Columbia (Peter Leask, Q.C., Treasurer)
8. Le Barreau du Québec (Paul P. Carrière, Bâtonnier)
9. The Federation of Law Societies of Canada (Claude Séguin, Executive Director)
10. Kirsten F. Connor, Charlottetown, Prince Edward Island
11. Frans F. Slatter, Edmonton, Alberta

APPENDIX C

AVERAGE AGES OF MALE AND FEMALE JUDGES ON ASSUMING OFFICE

Year	Male	Female	Combined
1981	50.99	43.95	50.17
1982	50.38	54.12	50.54
1983	50.09	44.31	49.39
1984	51.35	42.78	50.59
1985	53.58	42.68	52.26
1986	50.10	43.29	49.22
1987	52.16	44.46	50.12
1988	52.92	43.48	51.74
1989	50.74	40.30	48.31
1990	51.80	42.66	49.08
1991	52.46	43.00	50.40
1992	50.22	43.95	48.66

Source: Office of the Commissioner for Federal Judicial Affairs

APPENDIX D

TOTAL COMPENSATION COST METHODOLOGY

MARCH 1993

TOTAL COMPENSATION

INTRODUCTION

This document presents the concepts underlying a methodology for measuring and comparing total compensation costs.

First, the concept of total compensation is defined. This definition is then used as a framework to identify the various elements composing total compensation.

A specific method to assess and compare total compensation costs in an objective, valid and reliable manner is then presented.

The concept of total compensation has been developed and refined gradually over the years and there are variations both as to the definition of what should be part of compensation and how the cost on the value should be calculated. Essentially the differences arise from the benefit components, since the basic salary itself is unambiguous.

Studies have been published regularly in Canada and in the United States that report on Employee Benefit Costs (1). This concept is underlying studies published by the Pay Research Bureau of Canada (2) and the "Centre de recherche et de statistiques sur le marché du travail" of the Ministry of Labour of Quebec (3).

A more complete description of a Total Compensation Model as well as a discussion of the analytical issues appear in the Proceedings of the Conference on Public Sector Compensation - 1985 under the aegis of the Ontario Economic Council (4). It indicates in the introduction *"This model of total compensation was developed to assist the Federal Government (as employer) in understanding the compensation relativities between its employees and those performing comparable work in other sectors of the economy."*

The 8th Report of the IRIR(5) contains a description of two costs methodologies : the Cost of Benefit Method also known as Disbursement Method and the Level of Benefit Method also known as Simulated Cost Method. Variations of these methods are used by parties to the negotiations of labour agreements, to support representations made to arbitrators or to establish the cost of labour as part of production costs.

---

(1) Employee Benefit Costs in Canada, Peat Marwick Stevenson & Kellogg
Employee Benefits, U.S. Chamber Research Center

(2) Benefits and Working Conditions, Public Service Staff Relations Board; Re. 118-90

(3) Fréquence et caractéristiques des avantages sociaux et des conditions de travail, Études et recherches du Ministère du Travail, ISBN 2-251-14598-8

(4) Total Compensation and Comparability, C.R. Horne, P. Mercier and G.J. Bourdeau, Treasury Board Secretariat

(5) Huitième rapport sur les constatations de l'IRIR (Institut de Recherche et d'Information sur la Rémunération), May 1992, ISBN 2-551-12864-1

1. OBJECTIVES IN ASSESSING AND COMPARING TOTAL COMPENSATION COSTS

The measurement of total compensation costs can be undertaken to serve a variety of objectives:

- Quantify total compensation costs in an objective, valid and reliable manner.
- Identify differences in total compensation that are related to conditions of employment only, avoiding artificial value differences resulting from factors such as work force characteristics or financing strategy.
- Determine the cost impact of compensation changes.
- Compare different total compensation packages.

The use of the term "costs" implies that the measurement is done from the point of view of the employer, i.e. the payor. However, it can equally be seen as a quantification of the value of the Total Compensation package from the point of view of an employee. The objectives can be similar and help an employee choose between different offers or between working and not working. It should be stressed however that, to the extent the measurement rests on assumptions, including probabilities, it measures an average value for an individual as a member of a group or what could be called a fair market value. Effective values or perceived values would depend on individual characteristics, preferences and other subjective factors.

The words "costs" and "value" implicitly exclude elements of compensation that, for practical purposes, do not have a calculable monetary value. It would therefore exclude intangibles such as the prestige of a function, the intellectual reward resulting from personal achievement or development, the quality of the environment including the human elements, etc. Although it could be debated, we exclude elements such as training which are less intangible but could be seen also as an investment by the employer.

We are also excluding the overhead costs of providing the elements of compensation, as it would confuse the relation between costs and value.

2. THE CONCEPT OF TOTAL COMPENSATION

Total compensation includes all the conditions, contractual or statutory which usually result in a financial commitment by the employer, in respect of employees or for their benefit which the employer meets in exchange for the work performed for a given period.

- Using the neutral term "conditions" rather than "benefits" indicates that it is not necessary for an employee to actually benefit from a provision for it to be considered as compensation. The employer's contributions to a provincial medical plan such as OHIP, for example, would be deemed compensation, even if the employee does not derive any particular benefit from them. This concept assumes that all the financial costs to the employer must be included.

- "Contractual or statutory": compensation conditions are "contractual" when they are agreed to between the employee and the employer and "statutory" when they arise from legislation or government programs (CQPP, unemployment insurance, workers compensation). It is not necessary for a condition to be the subject of a collective or written agreement for it to be considered as contractual. "Company" management practices may enter into this price (e.g. employee assistance programs).

- "Which result in a financial commitment": this statement restricts the definition of compensation to items which can be quantified in monetary terms. The definition is more conventional and operational than one which would include non-monetary benefits. There are no definite limits for compensation and, consequently, for its measurement if one looks beyond the financial framework. This does not mean that non-monetary items are not significant but that they are considered, not as items making up compensation, but as variables which must be taken into account in the analysis and that may explain the variances observed due to qualitative differences.

- The use of the term "commitment" rather than "payment" indicates that it is not necessary for the employer to make disbursements although the employer is committed to do so if the case arises. An indemnity to be paid related to a termination under specific conditions is an example of a case where a commitment is made which might never require disbursements, but it would nevertheless be considered as compensation.

- "By the employer" indicates that the benefits that the employee derives from his/her employment but which the employee pays for himself/herself (contributions to benefits, social club) are not considered to be compensation.

- "Usually" means that a benefit offered by an employer (e.g. job security) which usually incurs costs is considered as compensation even if, for a particular employer, no disbursements or contractual commitments are required if the employees are still entitled to the benefit because of the company's management policies. Conversely, a benefit which does not usually cost anything, and which for particular reasons would be costly for the employer, would not constitute a form of compensation (e.g. special transportation to bring the employees to work in an isolated area).

- "Respecting the employees or for their benefit" refers to direct compensation regarding all amounts paid to the employee as well as to indirect compensation paid to third parties in the employee's name. The amounts paid to third parties may be in the form of the purchase of services (e.g. insurance premiums) or operating expenditures (e.g. subsidized meals).

- "Which the employer meets" means that the employer who meets a condition in actual fact is considered to be paying compensation, even when there is no obligation to continue to do so.

- "In exchange for work performed" means that not all payments are included. The reimbursement of expenses incurred (use of equipment, automobile, traveling expenses) is done in exchange for the expenses assumed by the employee and not for the work done.

- "For a given period" means that compensation always applies to a period of time. The absolute value of the compensation is meaningless if we do not know whether it corresponds to a given annual, monthly, weekly, daily or hourly amount. The unit of measure must also be dated and thus define the period of reference.

3. COMPENSATION ELEMENTS

In assessing total compensation, the elements to be considered vary according to the situation reviewed and existing conditions of employment (as well as with data availability). Such elements may comprise:

1. Direct compensation

- 1.1 Base salary
- 1.2 Incentives (bonus, commissions, lump sums) linked to job content or performance
- 1.3 Premium pay
- 1.4 Overtime
- 1.5 Reimbursement of sick leave days
- 1.6 Allowances

2. Indirect compensation

- 2.1 Income protection
  - 2.1.1 Disability insurance premiums (short term and long term)
  - 2.1.2 Job security (including severance pay and supplemental unemployment benefit insurance)
  - 2.1.3 Pension plan contributions
- 2.2 Health, accident, liability protection
  - 2.2.1 Life insurance
  - 2.2.2 Supplementary health insurance
  - 2.2.3 Dental plan
  - 2.2.4 Additional protection (liability insurance, car insurance, etc.)
- 2.3 Legally required payments
  - 2.3.1 Unemployment insurance
  - 2.3.2 Basic health insurance
  - 2.3.3 Workers compensation
  - 2.3.4 Quebec / Canada pension plan
  - 2.3.5 Labour standards

2.4 Services and gratuities

- 2.4.1 Educational fees
- 2.4.2 Company car
- 2.4.3 Transportation and parking
- 2.4.4 Employer sponsored meals
- 2.4.5 Employee assistance program
- 2.4.6 Retirement counseling
- 2.4.7 Professional membership fees
- 2.4.8 Nursery
- 2.4.9 Others

3. Working days

- 3.1 Standard number of working days
- 3.2 Overtime hours (if applicable)

4. Pay for time not worked

- 4.1 Holidays
- 4.2 Vacations
- 4.3 Parental leave (paternity and maternity)
- 4.4 Funeral leave, jury duty, etc.
- 4.5 Education leave with pay
- 4.6 Sick days

When using a total compensation approach to compare the cost of a **different compensation package**, we also have to determine to what extent the jobs for which the compensation comparisons are made are comparable in terms of content. In this case, because of the types of comparison involved, this determination is not relevant.

4. METHODOLOGY

4.1 Total Compensation Valuation Method

Different approaches are available to assess total compensation costs.

One approach consists in assigning subjective values to each element of the compensation package. These values are then compared to values assigned to similar compensation elements offered to other employees. The result is more a qualitative assessment of the value of total compensation comparisons.

Under this approach, called the **Gross Comparison Method**, the cost of implementing new or modified compensation elements cannot be calculated. Hence this method only ranks benefits and distinguishes between the best, next to best or less acceptable ones. It only resolves that benefits are above, below or at par when compared with others.

At best, this method has the merit of simplicity but produces only a superficial comparison.

Another approach, the **Cost of Benefit Method**, compares actual disbursements made by different employers for employees in comparable job classifications. It has the advantage of being applicable on the basis of information available from financial statements. It is also promoted as more factual than calculations based on assumptions. This method compares only expenditures without determining the amount or quality of compensation being provided to employees. An equal dollar amount spent by two different employers does not necessarily amount to similar quality and quantity of compensation to employees because it may reflect a different financing method or a different work force distribution.

Hence we can question the effectiveness of this method as a means of comparing total compensation packages. Furthermore because it only uses information on expenditures, this method is not suitable to assess the cost impact of changing or modifying compensation elements in the current compensation package for a given group of employees until after the facts.

A third approach, the **Level of Benefit Method**, can be used to assess total compensation costs. This method involves calculating the costs incurred by the employer to provide its employees with a compensation package, current or simulated.

The level of benefits method allows for calculating the value of compensation in comparison to compensation offered to different employee groups working for the same employer or for similar employee groups working for other employers. This method allows for a calculation of the costs that would be incurred by an employer if it were to provide its employees with a modified compensation package.

This method avoids the artificial value differences resulting from such factors as funding, utilization experience, or work force characteristics. Further, this method requires only descriptive information on provisions and characteristics of compensation elements applicable to the employees for whom the assessment is to be made. No information is necessary on the actual expenditures being incurred.

Under this approach, the value of each element of compensation is first assessed individually and then all elements values are integrated into a composite measure of total compensation. For some elements, the valuation process is relatively straightforward (for example, number of paid holidays) but for others, like pension and insurance-type elements, the valuation process can be complex, involving actuarial methods.

Under this model, the term "value" (of compensation) is used to ensure that there is no confusion with actual expenditures. Since the analyses are based on models of benefits and their usage, it is important to make clear that figures used are not exactly the same as expenditures.

We recommend using this Level of Benefit Method for total compensation comparison purposes.

4.2 Total Compensation Formula

After the various compensation elements have been identified, and their value established under the level of benefits method, the issue of days of work and time off with pay arise.

Hence, the sum of the estimated or actual expenses from the various compensation elements only represents an incomplete measure of total compensation, since it does not take into consideration days of work and time off with pay.

The method presented incorporates these issues by presenting total compensation in the form of the monetary value of all compensation elements involving an expense in relation to weeks actually worked.

This measure best reconciles the net average value of compensation to a group of employees under a level-of-benefits approach with the cost of compensation to the employer. As a formula, the value of total compensation is expressed as:

$$\text{Total compensation per week worked} = \frac{\text{Direct compensation (annual)} + \text{Indirect compensation (annual)}}{\text{Regular weeks paid (annual)} - \text{Weeks paid but not worked (annual)}}$$

For some occupations, we may deal with days or hours: the denominator is then calculated in terms of net days or hours worked, producing the measure dollars-per-day or dollars-per-hour rather than dollars-per-week as the standard of comparison. In either case, the equation provides a common basis for comparing the value of compensation packages that might be quite different both in terms of benefits or work requirements.

By subtracting the paid time-off period rather than adding an equivalent monetary value, there is no systematic overstatement of the aggregate monetary value.

In the case of Federally Appointed Judges, we are not dealing with a conventional employer-employee relationship. The determination of the regular work period, for example, must reflect the special characteristics of judicial duties. The regular weeks worked have been estimated as 150 % of the number of weeks spent in the courtroom to allow for decision-writing weeks. On the basis of 32 weeks spent in the courtroom, the number of regular weeks worked is 48, leaving 4 weeks as an estimate for the vacation period paid but not worked.

For Supernumerary Judges, it is necessary to adjust the denominator to reflect the change in the weeks worked. As a first approximation, we have increased the weeks not worked by 50 % of the weeks worked to reflect a 50 % reduction in the regular workload. Hence the number of regular weeks worked is reduced to 24 weeks.

To take into account the reduced number of weeks, we have calculated the average number of regular weeks worked during the career of a judge using the Expected Average Service Life as an active Judge and the Expected Average Service Life as a Supernumerary Judge.

In either case, we also needed an estimate of the average number of days not worked pursuant to a leave of absence, maternity or parental leave or short-term disability. In the absence of more suitable data, an arbitrary estimate of one week has been used both before and after Recommendations. Therefore our calculations do not quantify the cost of this change which we consider marginal.

4.3 Reference Situation

When assessing the cost of total compensation packages, a reference situation is always used and should include the following elements:

- Reference period: compensation packages are in force at a given date for a given period; in the case of the present calculation, we refer to the compensation package in force as at April 1, 1992, and the reference period is April 1992 to March 1993.

- Reference population: to estimate costs resulting from the application of a set of conditions of employment and of associated working days, we need to define and use a reference population and experience that will be used to isolate changes in conditions of employment. The actual population of judges as at the beginning of the reference period is used as the standard for the purpose of the study.

4.4 Actuarial Valuation

An actuarial methodology is used to determine the cost of some of the elements of the compensation package being assessed.

These valuations forecast future expenditures related to the plans in effect, and then convert these future costs into a present value. This methodology requires the use of demographic and economic assumptions.

ASSUMPTIONS

Generally, when a pension plan is offered, it is considered convenient to use the same demographic and economic assumptions as the ones used in the valuation process for the pension plan because this plan represents a large proportion of the costs. In the present situation, the assumptions used in the actuarial valuations, as prepared by the Office of the Superintendent of Financial Institutions of Canada for reporting in the Public Accounts, have been selected. These assumptions are summarized in the Appendix.

METHODS

Different actuarial methods can be used.

Entry Age Method

This method calculates the present value of the projected benefits up to the date of termination, at the age the employees are hired or start participating in the plan.

This present value of benefits is then divided by the present value of salary for the period starting at the age of entry until the age at the date of termination. The cost of the benefit is then presented as a uniform percentage of salary during the career of the employee.

The cost, thus determined, does not vary with attained age or service but is stable over the career of the employees.

Unit Credit Method

Under this method, we calculate the present value at the present age of the projected benefits in respect of service in the following year. The cost of benefit can then be expressed as a percentage of the salary projected for that following year.

The cost is less stable because it varies according to age. But when applied to a group of employees, the average age is more stable and that method can be used to evaluate certain benefits (for reasons of simplicity) when we can assess that its use is not going to bring distortion in the valuation. For example, taking into account existing commercial practices to cover insurance, that approach could be suitable to evaluate health insurance costs even though it is known that the underlying costs vary by age.

To illustrate the difference between the two methods, let us take the following vacation schedule:

- 2 weeks after 1 year of service
- 3 weeks after 3 years of service
- 4 weeks after 10 years of service

Under the Entry Age Method, taking into consideration the overall career, we could determine, under the proper set of assumptions, that the schedule is equivalent in cost to a uniform 3.25 weeks per year.

Under the Unit Credit Method, the results would be 2 weeks between 1 and 3 years, 3 weeks between 3 and 10 years, and 4 weeks after.

The Unit Credit Method would be the average results taking into account the number of employees in each service group. In the case of an employer having currently no employees with more than 10 years of service, the advantage of the 4 weeks after 10 years would not be reflected in the calculation.

The Entry Age Method captures more faithfully all the features of a compensation package notwithstanding the current age and service distribution of the group under study. This method is thus more suitable to measure the value of Total Compensation averaged over a full career.

However, in the circumstances, given that the benefits other than pension are not modified and that the vacation period is deemed equal at all ages, we have deemed the one-year cost to be a satisfactory substitute for costs established under the Entry Age Method.

5. TOTAL COMPENSATION COSTS ESTIMATES

The number of judges is as at March 31, 1992, and the salary rate for the two years beginning April 1, 1993, is the rate applicable on April 1, 1992, while the salary rate for the third year incorporates the automatic indexing provided under Section 25 of the *Judges Act* projected at 2.5% on the basis of the actuarial assumptions used for the valuation of the Pension Plan. It is further assumed that the costs of the other components, on the average, remain constant as a percentage of salary.

In order to estimate the Total Compensation Costs we have first calculated the Total Compensation Costs on the basis of the estimates of Section 6 applicable to a Puisne Judge. This first total is then adjusted to take into account the salary differential for Supreme Court Judges and Chief Justices. Pension costs for the differential over the Puisne rate have been estimated on the basis of the same percentage as calculated for the all the Judges. For compensation components other than Pension, no adjustment to the differential over the Puisne rate is necessary because the total cost has been allocated already as a percentage of the Puisne rate.

These calculations are as follows :

	Prior to recommendations	First and second year	Third year
A. Total compensation at Puisne rate			
Total compensation	$ 201,559	$ 204,519	$ 209,632
Total number of judges	898	898	898
Total compensation at Puisne rate	$ 180,999,982	$ 183,658,062	$ 188,249,514
B. Differentials			
Chief Justices			
Base salary differential	$ 14,200	$ 14,200	$ 14,555
Number of Chief Justices	36	36	36
Subtotal for Chief Justices	$ 511,200	$ 511,200	$ 523,980
Supreme Court Judges			
Base salary differential			
Judges	$ 29,400	$ 29,400	$ 30,135
Chief Justice	$ 44,100	$ 44,100	$ 45,202
Number of Judges	8	8	8
Number of Chief Justices	1	1	1
Subtotal for Supreme Court	$ 279,300	$ 279,300	$ 286,282
TOTAL SALARY DIFFERENTIALS	$ 790,500	$ 790,500	$ 810,262
C. Pension differentials as per line 2.1.3 Section 6	$ 207,900	$ 222,921	$ 228,494
D. Total compensation costs	$ 181,998,382	$ 184,671,483	$ 189,288,270

The average compensation cost per week worked is obtained by dividing Total Compensation Costs by the number of weeks worked, taking into account the assumed duration of leaves of absence and the reduced regular workload during the Supernumerary period. With the introduction of the Rule of 80, the average number of weeks in the regular work year is reduced by the increased proportion of the period served as Supernumerary over the career of a judge. The weighted average is calculated by applying the expected number of years in each status to 24 weeks and 48 weeks respectively. The reduction is as follows:

	Current conditions	After Rule of 80
Expected average service life (years)		
As Supernumerary Judge	5.43	5.47
Other than as Supernumerary	16.17	14.96
Total number of years	21.60	20.43
Weighted expected average regular work load	41.97	41.57
Reduction from regular 48 weeks	6.03	6.43
Expected number of weeks worked	40.97	40.57

The average Total Compensation Cost per week worked is thus as follows:

Prior to recommendations	$ 4,947
First and second year	$ 5,069
Third year	$ 5,196

The average number of weeks worked by a judge is 0.986% higher before the change, that is 40.97 versus 40.57. Therefore, to produce the same number of weeks worked, the number of judges would need to be increased by 0.986%. The aggregate cost increases resulting from the recommendations can be obtained by multiplying the cost increase per week worked by the aggregate number of weeks worked as at 4/1/92 before change, that is 36,791 weeks (898 x 40.97) versus 36,432 weeks (898 x 40.57) after change.

The effect of the introduction of the Rule of 80 on the cost of the Pension Plan has been estimated on the basis of Entry Age Normal Cost. The entry ages assumed have been based on the 1989-91 experience. The retirement rates have been adjusted to take into account the shift in the age at which judges become eligible to retire and hence become eligible to Supernumerary status. The adjustment has been deemed sufficient, in aggregate, to cover the change in the retirement age for Supreme Court Judges.

The increase in the Normal Cost measures the effect on the cost as if the new rule had applied over the whole career of the judges, thus measuring the long term effect. In addition, the introduction of the Rule of 80 results in a non-recurring cost equal to the increase of the liabilities accrued with respect to prior service as the rule becomes applicable to all judges on the basis of their total service. The increase in the actuarial liability on the Unit Credit basis is estimated to $11.4 million on the basis of the 1991 year-end population. This estimate has been deemed an acceptable approximation for the increase on the Entry Age basis which could not be available within the required time period. The December 31, 1991, estimate covered 902 judges. It has been projected to April 1, 1992, in proportion to the increase in aggregate salaries for the population of 898 judges at that date.

This increase in liabilities can be amortized by equal annual installments over the Expected Average Remaining Service Lifetime of the judges, estimated at 12.0 years which result in a declining percentage cost over the 12-year period. The projected increase in liabilities is $ 12.0 millions and the annual installment is $ 1,626,000.

The cost increases are estimated as follows by comparison to total compensation costs as at 4/1/92 before change :

	Increase in accrued liability allocated to first year	Increase in accrued liability amortized over 12 years
4/1/93 - 3/31/94	16,488,502	6,114,502
4/1/94 - 3/31/95	4,488,502	6,114,502
4/1/95 - 3/31/96	9,160,959	10,786,959
Total	$ 30,137,963	$ 23,015,963

6. PUISNE JUDGES COMPENSATION ELEMENTS

Cost estimates for the Pension Plan (2.1.3) have been provided by the Office of the Superintendant of Financial Institutions (Ottawa). Other cost estimates are based on information provided by the Office of the Commissioner for Federal Judicial Affairs.

	1992	Recommendations
1. DIRECT COMPENSATION		
1.1 Base salary (*Judges Act*, Art. 9 to 23)	**$ 155,800**	**$ 155,800**
1.2 Allowances (*Judges Act*)	**Not included**	**Not included**
The allowances have been deemed a reimbursement of expenses.		

2. INDIRECT COMPENSATION

2.1 Income protection

	1992	Recommendations
	Included in Pension Costs (2.1.3) or leave of absence (4.2)	Included in Pension Costs (2.1.3) or leave of absence (4.2)
2.1.1 Disability, long term and short term:		
– Income protection with full salary	Not estimated	Not estimated
2.1.2 Job security		
2.1.3 Pension		
– Judicial annuities (*Judges Act*, Art. 42) (Employer share)	26.3 %	28.2 %
2.1.4 Insurance benefits available at retirement:		
– Health: - Provincial health insurance *	Not included	Not included
- Public Service Health Care Plan (Employer share)	0.13 %	0.13 %
- Health Plan (Canadian Judges Conference) *(optional)* (Employee paid)	0	0
– Life: - Public Service Management Insurance Plan *(optional)* (Employee paid)	0	0
- Canadian Judges Conference *(optional)* (Employee paid)	0	0

* **Applicable to B.C. only**

	1992	Recommendations
2.2 Health, accident, protection		
2.2.1 Life - dismemberment - dependents:		
— Public Service Management Insurance Plan (*optional*) (Employee paid)		
– Life insurance	0	0
– Accidental death and dismemberment insurance	0	0
– Dependent's insurance	0	0
2.2.2 Health:		
— Public Service Health Care Plan (Employer share):	0.26 %	0.26 %
– Drug benefit		
– Vision care benefit		
– Health practitioners benefit		
– Out of province benefit		
– Hospital expenses (outside Canada) benefit		
– Hospital benefit		
— Blue Cross (*optional*) (Employee paid)	0	0
— Health Plan (Canadian Judges Conference) (*optional*) (Employee paid)	0	0
— Dental (Public Service Dental Care Plan) (Employer paid)	0.29 %	0.29 %

3. LEGALLY REQUIRED PAYMENTS	1992	Recommendations
3.1 Unemployment insurance	Not eligible	Not eligible
3.2 Basic health insurance	1.94 %	1.94 %
3.3 Workers compensation	Not eligible	Not eligible
3.4 Quebec/Canada Pension Plan	0.45 %	0.45 %
• Total direct, indirect and legally required payments	$ 201,559	$ 204,519

	1992	Recommendations
4. TIME WORKED		
4.0 Average number of weeks	**52.00**	**52.00**
LESS		
4.1 Statutory holidays and vacation periods	**4.00**	**4.00**
4.2 Leave of absence (*Judges Act*, Art. 54)	**1.00**	**1.00**
4.3 Maternity leave (Treasury Board Manual)	**Included in 4.2**	**Included in 4.2**
4.4 Others (Funeral leave, sick days)	**Included in 4.2**	**Included in 4.2**
4.5 Reduction in number of weeks for average duration as a Supernumerary Judge	**6.03**	**6.43**
• **Average number of weeks worked**	**40.97**	**40.57**
5. TOTAL COMPENSATION PER WEEK	**$ 4,920**	**$ 5,041 ***

* **$ 5,167 for the third year after including projected indexation at 2.5 %**

ACTUARIAL ASSUMPTIONS

This section describes the actuarial assumptions used by the Chief Actuary of the Office of the Superintendant of Financial Institutions for valuing the liabilities of the Pension Plan for Federally Appointed Judges in the 1992 Public Accounts.

A. Economic Assumptions as for 1992 Public Accounts

The valuations assumptions are set at the Yield minus 1%, but no less than the New Money rate. The Fund Yield is derived through an iterative process based on investments in notional 20-year bonds.

	Rates of Interest				
Year	New Money %	Projected Fund Yield %	Valuation Assumption %	January 1 Pension Indexing %	Salary Increases %
1992	8.5	10.8	9.8	5.8	5.4
1993	8.3	10.7	9.7	2.1	0.0
1994	8.0	10.5	9.5	2.2	0.0
1995	7.6	10.4	9.4	2.1	2.5
1996	7.3	10.2	9.2	2.0	2.4
1997	6.9	10.0	9.0	1.9	2.3
1998	6.0	9.7	8.7	1.8	2.5
1999	5.0	9.4	8.4	2.0	2.5
2000	5.0	9.1	8.1	2.0	2.5
2001	5.0	8.7	7.7	2.0	2.5
2002	5.0	8.3	7.3	2.0	2.5
2003	5.0	7.9	6.9	2.0	2.5
2004	5.0	7.7	6.7	2.0	2.5
2005	5.0	7.8	6.4	2.0	2.5
2006	5.0	7.1	6.1	2.0	2.5
2007	5.0	6.9	5.9	2.0	2.5
2008	5.0	6.7	5.7	2.0	2.5
2009	5.0	6.5	5.5	2.0	2.5
2010	5.0	6.2	5.2	2.0	2.5
2015	5.0	5.2	5.0	2.0	2.5
Ultimate	5.0	5.0	5.0	2.0	2.5

B. Main Demographic Assumptions

The demographic assumptions are those expected to be used for the forthcoming statutory valuation as at December 31, 1991. In aggregate they are not materially different from the demographic assumptions used in the 1988 statutory valuation described more fully in the Actuarial Report signed by the Chief Actuary on June 20, 1990.

RETIREMENT RATES

Retirement rates are based on the smoothed experience of the plan. These unisex rates are applied only to active judges who qualify for pensionable retirement or must retire at age 75.

For those eligible under the Rule of 80, the statutory rates of retirement were extended down to age 60 and rates of retirement at ages 70 to 74 have been adjusted to reflect the 10-year limit on Supernumerary status as follows:

Age	Rate	Age	Rate
60	.0141	70	.9229
61	.0155	71	.5199
62	.0170	72	1.0000
63	.0187		
64	.0206		

NEW ENTRANTS FOR ENTRY AGE NORMAL COST

	Male	Female
Below 46	16%	82%
46 - 50	28%	10%
51 - 55	26%	8%
56 - 60	23%	0%
Over 60	7%	0%
Average Age	51.9	42.2

OTHER ASSUMPTIONS

Mortality rates for the year 1992 are based on the 1983 Group Annuity Mortality Table, adjusted to recognize the recent experience of the plan. Rates for 1993 and subsequent years are obtained by decreasing the 1992 rates by mortality improvement factors on the order of 1% per annum. For disability pensioners, levels of mortality are more than doubled. There are separate rates for males and females.

Disability rates are based on the smoothed experience of the plan. These unisex rates are applied only to active judges not yet eligible for pensionable retirement.

The *sex-distinct proportion-married, age of surviving spouse,* and *surviving offspring assumptions* are based largely on the plan's own experience and are applied to both active and retired plan members.

GLOSSARY

Actuarial Cost Method

A recognized technique for establishing the amount and incidence of the actuarial cost of pension or benefits programs, and the related actuarial liabilities.

Actuarial Present Value

The value of an amount or series of amounts payable or receivable at various times, determined as of a given date by the application of a particular set of actuarial assumptions.

Cost of Benefit Method

Total compensation valuation method that consists in comparing actual disbursements made by employers for employees, without any reference on the amount or quality of compensation being provided.

Entry Age Actuarial Cost Method

Also called *entry age normal actuarial cost method*. A method under which the actuarial present value of the projected benefits of each individual included in an actuarial valuation is allocated on a level basis over the earnings or service of the individual between entry age and assumed exit age(s). The portion of this actuarial present value allocated to a valuation year is called the *normal cost*. The portion of this actuarial present value not provided for at a valuation date by the actuarial present value of future normal costs is called the *actuarial accrued liability*. Under this method, the actuarial gains (losses) are reflected as they occur in a decrease (increase) in the unfunded actuarial accrued liability.

Expected Average Remaining Service Life (of an employee group)

Total number of years of future service expected to be rendered by that group divided by the number of employees in the group. The calculation of expected future service takes into account decrements based on actuarial assumptions but is not weighted by benefits or compensation.

Experience

Usually expressed as a ratio or percentage, it is the relationship of claims, or benefits of a plan over the expected amounts.

Funding Method

Any of the several techniques actuaries use in determining the amounts of contributions to provide for pension costs.

Gross Comparison Method

Total compensation valuation method that consists in assigning subjective values to each element of a compensation package and then comparing these values to values assigned to similar compensation elements offered to other employees.

Level of Benefit Method

Total compensation valuation method that involves calculating the costs incurred by the employer to provide its employees with a compensation package, current or simulated.

Simulated Cost Method

Different term used to refer to the level of benefit method.

Total Compensation

Includes all the conditions, contractual or statutory, which usually result in a financial commitment by the employer, in respect of employees or for their benefit, which the employer meets in exchange for the work performed for a given period.

Unit Credit Actuarial Cost Method

An actuarial cost method under which the plan's normal cost for a year is the present value of the benefit credited to all participants for service in that year and the accrued liability is the present value at the plan's inception of the units of benefits credited to participants for service before the plan's inception.

Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits

Submitted to the Minister of Justice Canada

September 30, 1996

Pursuant to Section 26 of the *Judges Act*, I am now tabling the Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits, appointed on September 30, 1995, to inquire into the adequacy of the salaries and other amounts payable under the Act and into the adequacy of judges' benefits generally. In accordance with Standing Order 32(5) of the House of Commons, this document shall be deemed to be referred to the Standing Committee on Justice and Legal Affairs.

The Minister of Justice and
Attorney General of Canada

Allan Rock

Table of Contents

I. Introduction

The undersigned were appointed pursuant to section 26 of the *Judges Act*, the Triennial Review Commission, to enquire into the salaries and benefits of Her Majesty's judges and to make recommendations to the Minister of Justice to be laid before Parliament in accordance with the statutory arrangement. We were appointed on the 6th day of October, 1995, and are the fifth such Commission since the institution was created in 1981.

Subsequent to our appointment, Bill C2 was introduced in Parliament extending the mandate of this and succeeding Commissions from 6 to 12 months. We were specifically invited at the time of our appointment to give particular consideration to problems associated with the process by which Triennial Commission Reports are received and ultimately tabled in Parliament and the extent to which the Constitutional responsibility of Parliament to fix and provide judicial salaries, allowances, and pensions is facilitated by the process. Our inquiry has confirmed that there is much legitimate cause for concern about the Triennial Review process and a very serious question as to whether it is, in practice, serving the system.

To the extent that the Triennial Commission's inquiry is intended to facilitate the discharge of Parliament's obligation pursuant to section 100 of the *Constitution Act, 1867*, there are germane and serious questions as to whether the process is functioning as intended. By the delivery of this Report, we invite the Government to address this aspect of the question as a matter of first priority in the interest of maintaining the integrity of the system for the future.

During the process of discharging our mandate and in the course of gathering the requisite information we have, not unexpectedly, been most impressed with the dignity and dedication of the members of the various courts who addressed us on their own behalf and on behalf of their colleagues. We are of the view that Canadians are well served by a committed, independent and impartial judiciary. In this respect, we enjoy the benefits of

an extraordinary resource which must be nurtured and supported in our own collective interest and the interest of those who follow.

II. Summary of Recommendations

1. That section 26(3) of the *Judges Act* be amended to require that the Minister, after a fixed period of time (three months), shall cause the Report of the Triennial Commission to be tabled in the House of Commons, together with the Government's response to the Report and a Government Bill incorporating those matters requiring legislative change as part of the process of implementing the same; both the Response and the Bill to be filed within a fixed number of sitting days (30 days) after the expiry of the initial period noted above.

2. That commencing April 1, 1997, the Government introduce an appropriately phased upward adjustment in judicial salaries such as to ensure that the erosion of the salary base caused by the elimination of statutory indexing is effectively corrected.

3. That retirement at full pension be permitted when a judge has served on the Bench for a minimum of 15 years and the sum of age and years of service equals at least 80.

4. That, in addition to the existing retirement provisions and our recommendation concerning the Rule of 80, judges of the Supreme Court of Canada be permitted to retire with a full pension after serving a minimum of ten years on the Court.

5. That provision be made in the *Judges Act* for a surviving spouse's annuity to be paid, in legally appropriate circumstances, to a common-law spouse.

6. That provision be made in the *Judges Act* to enable a retired judge who marries after retirement to provide for joint and survivor benefits.

7. That section 51(4)(b) of the *Judges Act* be amended to provide that interest be

payable upon the return of all pension contributions in respect of the 1996 contribution year, and each contribution year that is subsequent to 1996, calculated at the rates prescribed by the Income Tax Regulations, and compounded annually.

8. That the government paid life insurance coverage for judges be brought more closely into line with that provided to Deputy Ministers.

9. That section 54(1) of the *Judges Act* be amended to authorize Chief Justices to approve leaves of absence of up to six months, including maternity/parental leave and study leave.

III. The Review Process

A. INTRODUCTION

Section 26 of the *Judges Act* requires the Minister of Justice of Canada to appoint a Commission every third year "to inquire into the adequacy of the salaries and other amounts payable under the *Judges Act* and into the adequacy of judges' benefits generally." The Commissioners are required within twelve months of their appointment to submit a report to the Minister of Justice "containing such recommendations as they consider appropriate." The Minister is required by the Act to "cause the report to be laid before Parliament not later than the tenth sitting day of Parliament after the Minister receives it."

A reader of the past four Triennial Review Commission reports will note that the issue of process is the first item dealt with in every case. Successive Commissions have stressed that the process is flawed by reason of the failure of governments to act with reasonable dispatch to introduce and enact legislation in response to the recommendations of Triennial Commissions. Bill C-50, which died on the Order Paper, is the sole piece of legislation introduced in Parliament since the third Commission was held in 1989.

The Minister of Justice has recognized that there are serious problems with the present system. In an address to the Canadian Judicial Council in March 1994, he noted:

> **"...I regard it as unacceptable that two triennial commission reports have been received and not yet acted upon, that Bill C-50 died on the Order Paper, and that a third triennial commission exercise will soon be upon us. I know, I can sense strongly, that things are reaching the point where the very legitimacy of the system itself is in question, where confidence of judges is being seriously undermined. But there are implications for the morale of judges, for frayed relations with Government, and it is made all the worse and all the more damaging because of the very few ways that judges have for speaking out. There is a perception that I know is growing that the system which was designed to be non-political and above the fray is not working. This is where I come in."**

The Minister has specifically mandated this Commission through our terms of reference to include:

> **"...recommendations for improvements to the process by which judicial compensation is established."**

In his letter of August 1995 appointing each of us as Commissioners, he drew our attention to this specific responsibility:

> **"As the attached terms of reference indicate, I would like the Commission to deal with the issue of the process for establishing judicial compensation and to recommend any changes that could improve the process."**

What follows is our response to this aspect of our mandate.

B. THE PROCESS AND ITS REFORM

It has been repeatedly noted by past Triennial Review Commissions, and by students of the subject, that the matter of establishing judicial remuneration in a parliamentary democracy has much to do with the separation of powers in general, and the independence of the judiciary, in particular. Western democracies rooted in English constitutional tradition have been at pains to ensure that judicial independence, which ensures accountability on the part of the executive branch of Government, is uncontaminated by uncertainty (and thus preoccupation) on the part of the judges with their economic security. Under our Constitution the obligation is upon Parliament to "fix and provide" the salaries and benefits of judges. It is implicit in this constitutional imperative that the process be undertaken in an environment in which judicial independence is enhanced and the consequences of dependency eliminated.

Each parliamentary democracy has its own method of achieving these goals. In Canada, prior to the establishment of the Triennial Review Commission, the process was both

unstructured and unsatisfactory. It was characterized by the judiciary, in a supplicant's role, petitioning the Government through the responsible minister, usually with the support of related institutions in the judicial process, including the Bar, urging the Government to petition Parliament to do what was necessary to fulfil its constitutional obligation with respect to economic security for the judges. The imperfections in the system, largely dictated by dependence upon the commitment and goodwill of the Minister gave rise, in 1981, to the passage of section 26 of the *Judges Act* establishing the institution of the Triennial Review Commission.

The purpose of the Commission was to ensure that, through the creation of a body which would be independent both of the judiciary and Government, Parliament would be presented with an objective and fair set of recommendations dictated by the public interest, having the effect of maintaining the independence of the judiciary while at the same time attracting those preeminently suited for judicial office. The theory was that, by way of such recommendations, emanating from regularly convened independent commissions, the process would be de-politicized and judicial independence would be thus maintained.

While the idea was sound, the underlying assumptions appear to have been naïve. The result has been a failure in practice to meet the desired objectives. Since the first Triennial, there have been four Commissions (Lang (1983), Guthrie (1986), Courtois (1989) and Crawford (1992)). In spite of extensive inquiries and exhaustive research in each case, recommendations as to the establishment of judicial salaries and other benefits have fallen almost totally upon deaf ears. The reasons for this state of affairs have been largely political.

Prior to the establishment of the present process, the dictates of section 100 of the *Constitution Act* have required successive Ministers, on a regular basis, to ensure that Governments discharge their constitutional responsibilities. Success has frequently been mixed. An unanticipated and unintended result of the establishment of the present Triennial process has been the insulation of Ministers from the otherwise pressing requirements of the Constitution with respect to salaries and benefits. Upon delivery of successive reports,

political debate in Committee has followed with governments behaving as though, "having caused the Report to be laid before Parliament," they were thereby absolved from their constitutional responsibilities. This situation represents not only an unexpected, but a highly undesirable, result of the establishment of the Triennial Review Commission model. What was seen as a positive step has in many ways proved to have been negative. In spite of thorough recommendations by successive Commissions, Parliament has failed, in a proactive sense, to fix judicial salaries and benefits for many years. Furthermore, successive reports have failed to generate any meaningful response from Government. The whole subject of judicial salaries and benefits has, in spite of the best intentions, been politicized. The present Commission has detected in its hearings and consultations a very definite impact on judicial morale caused almost entirely by the fruitlessness of the present process.

When the *Act* was amended to establish Triennial Review Commissions in 1981, judicial expectations were elevated, in large measure, by prognostications on the part of Government as to improvements in judicial affairs which would flow from the creation of an independent Commission. The then-Minister of Justice noted:

> **"But there comes a time when the inaction on the salaries of judges in inflationary period begins to have profound effects, not only on the morale of those sitting on the Bench *but also on the attractiveness of judicial appointment to the more highly qualified lawyers who we would like to see appointed to the Bench.* At some stage, subtly and slowly, no doubt, a failure to maintain judicial compensation in line to some degree with inflationary tendencies must come to affect the quality of our judiciary. I have no doubt about the correctness of that proposition and I venture to suggest that there is a real concern about judicial compensation that underlies section 100 of the *British North America Act.***
>
> **That section, which deals with the provision of salaries, allowances and pensions of the federally appointed judiciary, is unique. It is the sole section of the B.N.A. Act which casts an affirmative obligation on Parliament to enact legislation. In recent economic circumstances, this obligation serves to secure not only the independence of the judiciary, *but also requires Parliament to take action to mitigate the debilitating effects on the judiciary that flow from undue delay or default in securing legislation on judicial compensation.* Bill C-34 seeks to fulfil that constitutional responsibility and to improve the structure of compensation for the**

> **federally appointed judiciary.**
>
> **...The Bill provides for the appointment of a commission made up of no more than five members which will be asked to examine every three years the adequacy of judicial compensation." [emphasis added]**

In effect, what judicial appointees since 1981 were promised by the establishment of the Triennial Commission was an independent, rational, depoliticized procedure for the determination of their compensation. The perception abounds that what they got was an abdication by the Government of its constitutional responsibilities. Furthermore, the ramifications of the failure to fulfil this promise will be significant and detrimental if the shortcomings in the process are not soon rectified.

The problem is not simply that the report of the Triennial Review Commission is laid before Parliament as the *Judges Act* requires but that the Government has, by the process of referral, excused itself from responding to its recommendations in the clear and nonpartisan way that was promised. One could argue that the establishment of the Commission has created an imperative obligation on the Government to consider Commission reports and make recommendations to Parliament thereupon, apart altogether from the adoption of any of the specific recommendations contained in the report. Continued indifference on the part of Governments (and through such Governments successive Parliaments) to recommendations made by Review Commissions has undermined the system and the expectations which accompanied its creation in 1981. Not only has inaction on the part of the Government disheartened the judges, but of greater concern is the fact that it will undoubtedly have a negative effect, over the course of time, upon candidates for the judiciary best suited for judicial appointment, candidates who are required almost inevitably to make significant economic sacrifice in order to accept appointment. Judicial despondency, interestingly, is not attributable so much to Parliament's failure to accept the recommendations of successive Commissions as it is to the Government's failure to react to such recommendations in advance of general debate or, indeed, at all. Regrettably, it would appear, the appointment of successive Commissions has simply served to distance the

Government from the performance of its obligations when it was thought that it would ensure a prompt and practical response to Parliament's constitutional obligations.

If evidence of the failure of the present system were required, it would come directly from the history of the work of successive Commissions. In each case, Triennial Review Commissions have made recommendations for change in the process to overcome the same obstacles identified in this report. In every case, the recommendations for change have equally fallen upon deaf ears. The utterances of successive Commissions have become like trees falling in the forest. The Lang Commission (1983) recommended a negative resolution solution such as exists in several Australian states. The Guthrie Commission (1986) recommended mechanisms to ensure prompt adoption of acceptable recommendations by the Government. The Courtois Commission (1989) proposed setting a time limit within which Government ought to respond. The Crawford Commission (1992) recommended obliging the Government to introduce legislation within a specific time frame as a reaction to the Commission's recommendations. The fact that none of these were accepted, nor even commented upon by Government, is compelling evidence of institutional indifference to the statutory process and its shortcomings.

Your Commissioners make their own recommendations hereunder with respect to procedural and structural changes designed to convert the Triennial Review process from a peculiar anomaly to a practical instrument for change as was originally intended. Failing change, this section of the Report is intended to forewarn our successors that by their appointment they will become instruments in a process which, far from ensuring an independent and positive response to constitutional obligations, will, in all probability, have the opposite effect.

Presently, after the report is laid before Parliament by the Minister of Justice, it is referred to the Standing Committee on Justice and Legal Affairs which conducts its own review of Commission recommendations prior to the Government formulating its position. The consequences of this are that a process that was designed to be "depoliticized" is not. The Government, upon receipt of the Standing Committee's report on judicial salaries and

benefits, is left in an awkward situation when inclined to take a different view. This in turn has a negative impact on the prospect of the introduction of any constructive legislation. In order to overcome this situation, we have concluded that the *Judges Act* should be amended to require that within a fixed time frame, consideration by Parliament of the Commission's report should coincide with the introduction of a government bill incorporating desired changes to the salaries and benefits of the judges. We are advised that this proposal can be accommodated within the existing standing orders of the House of Commons (ref. Standing Order 32(5)). If a regime along these lines were created, the public in general, and the judiciary in particular, could be confident that Commission recommendations would be responded to by Government and those recommendations considered desirable, of which there are surely many examples in the past, would thereby, and promptly, be the subject of legislative change.

Your Commission has also considered the possibility of recommending even more substantive change. Several suggestions emerged during the Commission's inquiry process. That most frequently repeated was the adoption of the so-called "negative resolution regime" which has been adopted in certain jurisdictions, notably by the Government of New South Wales. Under this regime, the Commission's recommendations would be by statute considered binding upon Government and, through Government, Parliament unless Parliament adopted a form of "negative resolution" within a specified period of time. This approach has substantial appeal in that it appears to resolve the irksome issue of failure on the part of Governments and Parliaments to act on the recommendations of successive Commissions. On the other hand, there is a down side in the form of a risk that if a negative resolution process were adopted, reports of future Triennial Commissions might well, by the passage of a negative resolution, be discarded in their entirety. In the final analysis, and while the negative resolution approach has much to recommend it, it is the impression of your Commission that it is not likely that this model would be considered seriously by the Government. Accordingly, we confine ourselves to the more modest proposal outlined above.

If these or similar corrective measures are not introduced, the statutory scheme will collapse of its own weight with the attendant damage to the institution of the judiciary which can be expected to occur.

It is therefore recommended that: section 26(3) of the *Judges Act* be amended to require that the Minister, after a fixed period of time (three months), shall cause the Report of the Triennial Commission to be tabled in the House of Commons, together with the Government's response to the Report and a Government Bill incorporating those matters requiring legislative change as part of the process of implementing the same; both the Response and the Bill to be filed within a fixed number of sitting days (30 days) after the expiry of the initial period noted above.

IV. Judicial Salaries

The independence of the judiciary, the attractions of the Bench for highly qualified and experienced men and women, financial security and the preservation of the enviable standards of our Courts are all important features of the judicial component of our system of administration of justice in Canada. The *Constitution Act, 1867*, confers on Parliament the duty to fix and provide judicial salaries, allowances and pensions. The *Judges Act* prescribes the Triennial Commission review process, the statutory annual salary adjustment plans and, pursuant to Part I, the administration of the *Act* by the Commissioner for Federal Judicial Affairs. A properly functioning system requires a high level of synergy between these inter-dependent elements.

As a result of amendments to the *Judges Act* in 1975, the salary level of superior court puisne judges was brought to within 2% of the mid-point of the salary range of the most senior level (DM-3) of federal deputy ministers. As the Guthrie (Commission 1986) reported:

> **"In 1975, judicial salary equivalence to senior deputy ministers was generally regarded, however, as satisfying all of the criteria to be considered in determining judicial salaries. At that level, a sufficient degree of financial security was assured and there were few financial impediments to recruiting well-qualified lawyers for appointment to the bench."**

At the present time the salaries of superior court puisne judges are $155,800 while the mid-point of the DM-3 salary range is $155,300 (there are currently nine deputy ministers at the DM-3 level which is the most senior level of federal public servant).

Triennial Commissions subsequent to the 1975 amendments to the *Judges Act* have endorsed this measure of equivalence, not as a precise measure of "value," but as one that appeared to them to:

> **"...reflect(s) what the market place expects to pay individuals of outstanding character and ability, which are attributes shared by**

deputy ministers and judges."

The Courtois Commission Report (1989)

Or, as stated in the Crawford Commission Report (1992):

> **"Rough parity of this nature between judges and top-level public servants finds support in the comparative salary figures from a number of other common law industrial democracies."**
>
> **The Crawford Commission Report** (1992)

A strong case can be made for the proposition that the comparison between DM-3's and judges' compensation is both imprecise and inappropriate. The Canadian Judicial Council and the Canadian Judges' Conference made extensive submissions in this connection. Your Commissioners choose not to focus on this aspect of the matter, but rather to address a far more significant aspect of judicial compensation, specifically the relationship between judicial income and income at the private Bar from which candidates for judicial office are largely drawn.

Section 25 of the *Judges Act* provides a statutory mechanism for the annual adjustment of judges salaries whereby they may be increased in accordance with the "Industrial Aggregate Index formula" to a maximum of 7%. However, salaries have been frozen since December 1992 and will remain so until March 31, 1997 as reflected in the *Public Sector Compensation Restraint Act.*

The provisions of s.25 of the *Judges Act* are reflective of much more than a mere indexing of judges' salaries. They are, more specifically, a statutory mechanism for ensuring that there will be, to the extent possible, a constant relationship, in terms of degree, between judges' salaries and the incomes of those members of the Bar most suited in experience and ability for appointment to the Bench. The importance of the maintenance of this constant cannot be overstated. It represents, in effect, a social contract between the state and the judiciary. By its statutory terms, the judges, who by acceptance of judicial office close the door, on a permanent basis, to any real prospect of a return to their previous lives at the

Bar, can at least be certain that their commitment in accepting a judicial appointment will not result over the years in a less favourable financial situation as between judicial service and practice at the Bar than that which prevailed at the moment of their appointment.

Seen in this light, the freezing of salaries, which has had the effect of neutralizing the operation of s.25 of the *Judges Act*, has, in the absence of corrective action, permanently altered the relationship described above. When the freeze is lifted, the section will have been inoperative for five years.

The judges in the Joint Brief noted, at page 39:

> **"It is accepted that as an aspect of judicial independence, judges must be financially secure. This can only be achieved if both the executive and legislative branches of Government respect the integrity of the provision of the *Judges Act*. It is indeed to be remembered that those provisions dealing with statutory indexation constituted an important part of the terms and conditions of appointment. It may be said that many judges would have refused an appointment to the Bench, had it not been for the security provided by the statutory indexation."**

Your Commission agrees with this submission.

What are the effects of the salary freeze? Over the four year period to April 1996, one year prior to the end of the freeze, judicial salaries, absent indexation, have been reduced by approximately 8%[1]. Furthermore, by reason of the failure of governments to introduce 1975 equivalency, notwithstanding recommendations of successive Triennial Commissions, judicial salaries have been further eroded. In terms of the clear intent to establish a

---

[1] The percentage change for the Industrial Aggregate Index for the years 1993–1996 has been as follows:

to April 1, 1993	3.4%
to April 1, 1994	1.7%
to April 1, 1995	1.9%
to April 1, 1996	0.95%

Source: Office of the Commissioner for Federal Judicial Affairs

relationship between Bench and Bar, or even a relationship with DM-3's, the judiciary is in an accelerating backward slide. This has serious and troubling implications for the long term attraction of suitable candidates for office. Indeed, the removal of indexing has resulted in the anomalous situation in which judges retiring prior to the freeze in 1992 are enjoying a significantly higher annuity than that which can be expected for those who retire tomorrow.

Accordingly, your Commission, rather than engaging in an elaborate analysis of DM-3's and their comparability with judges, or indeed the available statistics with respect to earnings of candidates in the private sector at the Bar, chooses to focus on the most significant factor, the withdrawal of indexing. It is this government initiative which has been, and if not checked will continue to be, the most significant contributor to distancing judicial salaries from those of the practising Bar. Corrective action is clearly called for.

<u>It is recommended that</u>: commencing April 1, 1997, the Government introduce an appropriately phased upward adjustment in judicial salaries such as to ensure that the erosion of the salary base caused by the elimination of statutory indexing is effectively corrected.

V. Judicial Annuities

A. Rule of 80

There can be no doubt that the time has come for the Government to consider the need for some more contemporary form of retirement option for judges, such as the Rule of 80, the adoption of which is recommended in this report. This subject enjoys the highest priority in the view of the judiciary. Informed observers, including responsible members of the Bar, are unanimous in the view that the ability of ordinary mortals to function in the judicial mode is finite in terms of time. The judge's role is a unique one, as is the case with all fact-finders and dispute-resolvers. Their task, which is to sit, to listen and to decide, while sometimes appearing unremarkable, requires mental discipline of a kind which in most human beings has its limitations. Where the requisite mental discipline is lacking or exhausted, the result is, or can be, a tendency to undermine, in a serious way, public acceptance of judicial decision making in individual cases. Furthermore, 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 appointments process can no longer be seen as a mere matter of finding suitable candidates for office who are at the end of their careers.

There is also the important question of gender balance. Your Commissioners were offered very strong representations on this subject from women judges, many of whom have been appointed at much younger ages. Under the present system, by reason of their age at appointment, they are being required to continue in office for what may, in some cases, be unacceptably lengthy periods of time before retirement. The notion, implicit in the present *Act*, that a period of 15 years service represents an appropriate judicial lifespan may be inapplicable for many women judges who are appointed at younger ages. We were provided with statistics which would suggest that well over 80% of women judges presently

sitting were appointed before age 50 and almost 25% before age 40. It is a matter of real concern on the part of many women judges and, no doubt, candidates for judicial office, that unreasonably long periods of service may be required before retirement with any pension is possible. This concern may seriously affect the already difficult task of attracting qualified women candidates from a pool whose numbers have yet to grow to that of male lawyers. Gender and age ranges have already broadened but the terms of the annuity are focused largely at males appointed to the Bench at or after age 50.

The Crawford Commission (1992) described the Rule of 80 retirement option:

> **"...as particularly appropriate in view of the changing age profile of judges. By permitting retirement with a full pension at earlier ages, in a flexible and fair manner which recognizes the unique service conditions and requirements of the judiciary, the Rule of 80 would not be inconsistent with pension reform standards."**

Early retirement plans are increasingly common in society. In many ways they are even more defensible in the case of the judiciary. As noted above, such plans could contribute to the overall quality and efficiency of the Bench by affording long-serving judges, who may be suffering from "burn-out," the opportunity to retire at a time when their judicial energy may have been sapped, thereby opening the way for renewal with younger, more representative judges many of whom will, logically, be women.

It should also be noted that judicial responsibilities are not amenable to constructive change during a judge's tenure on the Bench. The institution affords no opportunity to assume an alternative role as a basis for maintaining one's usefulness such as is the case in almost all other institutional and business settings.

Furthermore, as pointed out elsewhere, a serious concern which was raised before the Crawford Commission was the impact of the changes in the RRSP arrangements disentitling the judiciary to plan for retirement by investments in RRSPs. In particular, women members of the Bench who are generally appointed at a younger age, make the point that during their

most productive years, and as young judges, they are no longer able to contribute to RRSPs even though they cannot be certain that they will be able to continue to occupy the Bench to age 65. The present regime deprives them of the opportunity to make arrangements to forestall disaster in the event of premature retirement. It is argued, with some force, that the decision on the part of the Government to withdraw the right to invest in RRSPs was, in all probability, made without consideration of the impact on younger, and in most cases, female appointees.

No data was presented in the Crawford Commission report (1992) to illustrate the magnitude of this "loss." In their submission to the present Commission, the judges presented a report from William M. Mercer Limited, a consulting actuarial firm (tabled with the Commission on May 15, 1996), which provided estimates of this loss. Prior to 1992, judges could contribute to a personal RRSP in the maximum allowable amount, but are now restricted to a $1,000 annual maximum. The differences in tax savings and investment accumulations taken together or separately over a 30 year period were obviously quite staggering whatever actuarial assumptions are utilized. Mercers estimated that the difference in accumulation over 30 years before tax was in the amount of $1.7 million but the loss due to the elimination of tax benefits on an after tax basis was in the neighbourhood of $437,000.

We have sympathy with these concerns, nonetheless, we are of the view that if the Government reacts rapidly and introduces the Rule of 80, much of the negative impact of the RRSP changes, particularly on younger judges, will be minimized.

These are some of the reasons why modified criteria for retirement, in general, and the Rule of 80 in particular, have been considered and offered broad support for a number of years. In assessing the Rule of 80 itself and how it might be implemented, it was noted that various formulae might be utilized to achieve the combination of years of service and age totalling 80. The judges, and the Canadian Bar Association, in their submissions argued that the Rule of 80 should not be encumbered by a minimum age or service requirement. Others argue that a judge should be required to serve a minimum of 15 years on the Bench in order to

qualify for retirement under the Rule of 80. This would be consistent with the prescribed minimum of 15 years of service for retirement at age 65 pursuant to section 42 of the *Judges Act*.

Interestingly, present incumbents who are somewhat older and largely male would argue that an unencumbered Rule of 80 is desirable in order to ensure that judges who are appointed after age 50 can retire at age 65. Women judges, on the other hand, and in particular younger women, have argued that shorter minimum periods than the traditional 15 years in the present legislation ought to be considered having in mind the situation confronted by women who are appointed in the early years of their careers. It has been argued on behalf of younger women judges that fairness is better served with more weighting for length of service and less for age.

There have been extensive discussions with successive Ministers and other interested groups with respect to the Rule of 80 and support for its adoption is virtually universal. In addition, studies have been conducted by the Superintendent of Financial Institutions Canada. It has been concluded that the cost associated with the introduction of this scheme would be negligible. More specifically, it was noted that:

> **"...the increase in the pension plan's accrued liability and normal cost caused by the Rule of 80 would in practice be almost entirely offset by the payroll decrease arising from the removal of partially-productive judges from the bench."**
>
> **Correspondence from L.M. Cornelis (OSFIC) to H. Sandell (Department of Justice) dated June 16, 1995**

We are of the view that on balance a Rule of 80 with a 15 year period of service best meets the requirements of the public interest in the present profile and state of maturity of the Bench. For most younger women, a 15 year minimum will still enable those who have reached their limit of useful service to retire at an appropriate age.

The adoption of this reform was eloquently defended and recommended in the Crawford

Report. We cannot but believe that the failure of the Government to implement this constructive recommendation was more likely due to process deficiencies referred to elsewhere in this report than to substantive reservations or objections.

<u>It is recommended that</u>: retirement at full pension be permitted when a judge has served on the Bench for a minimum of 15 years and the sum of age and years of service equals at least 80.

B. PENSION CONTRIBUTIONS BY JUDGES WHO ARE ELIGIBLE TO RETIRE ON FULL PENSION

Section 42 of the *Judges Act* provides for the granting of an annuity equal to two-thirds of the salary annexed to the office of a judge. Judges are eligible to proceed to pension at age 65 if they have accumulated 15 years service. The majority (about 75%) do not retire but opt to continue as supernumerary judges at full pay until they leave office either before or at the mandatory retirement age of 75. All judges are expected to make pension contributions at the rate of 7% of salary until they take their retirement.

The requirement to continue pension contributions after eligibility for retirement is the source of much disquiet on the part of the judiciary. The Conference and the Council consider this requirement a levy for which there is no corresponding benefit; inconsistent with other pension plans which provide for discontinuance of contributions when pensions are paid up and actuarially inappropriate in requiring continued contributions beyond the age of eligibility for retirement. Essentially it is argued that contributions beyond retirement entitlement provide no corresponding benefit.

It is important to remember in weighing these considerations that there is a marked difference between the pension scheme for public servants and the annuity for the judiciary. The pension of a judge is two-thirds of the final years' salary following 15 years service. On

the other hand, a career public servant must accumulate 35 years of pensionable service and reach the age of 55 in order to receive the maximum pension. Quantum is based on 70% of the individual's average salary for the best six consecutive years. A Deputy Minister who qualifies as a career public servant is entitled to an additional 2% pension income per year for each year served as a Deputy Minister to a maximum of ten years. Differences between pension and annuities are important.

Information derived from the Office of the Superintendent of Financial Institutions Canada in December 1995 demonstrates that the sum of the annual pension contributions of 7% made by judges to retirement are modest relative to the final costs borne by the Crown. For example, the cost to provide an annuity to a judge at age 75 with 20 years of service would require an annual contribution by the state of 36.9% of his or her salary. Based upon the judge's contributions of 7%, it follows that the Crown bears the remainder of the burden which, in this example, would be 29.9%. This is illustrative of the distinction between an annuity and a funded pension.

We therefore agree with the conclusions of the Crawford Commission (1992) which supported the continuation of judges' contributions toward the cost of their pensions until those who are entitled to retire, do so. Any perception of inequitable treatment is surely tempered by the benefits afforded the annuitant under the present arrangement.

C. Retirement for Judges of the Supreme Court of Canada

Successive Triennial Commissions have all recommended a special regime for the retirement of judges of the Supreme Court of Canada. Notwithstanding the retirement regime which we are recommending by the adoption of the Rule of 80, we are also persuaded that judges of the Supreme Court of Canada ought to be permitted to retire with full annuity after 10 years service.

Judicial service on the Supreme Court of Canada, is of course, unique, not so much in terms of the prestige associated with the office, as with the depth of responsibility and onerous workload which is peculiar to the Court of last resort in our system. Review of cases emanating from the highest appellate courts in the provinces and the Federal Court of Appeal is an enormous burden. The criteria for leave to appeal to the Court defines this responsibility. Only those cases involving issues of national importance reach the Court, thus each case that the members of the Court consider is a matter of special significance. There are no routine matters on the Court's calendar.

It is well to reflect on the capacity of individuals, other than the most extraordinary, to cope with the relentless intellectual self-discipline associated with the work of the Court. There are surely limits as to the capacity of the judges to maintain the requisite focus over many years. Furthermore, the responsibilities associated with the *Charter* militate in favour of an atmosphere of renewal on the Court. All of these circumstances lead to the conclusion that, insofar as the Supreme Court is concerned, in particular circumstances, 10 years of service may be all that can reasonably be expected. Thus, this period ought to represent the threshold for retirement. Flexibility at this level is clearly in the public interest.

It is recommended that: in addition to the existing retirement provisions and our recommendation concerning the Rule of 80, judges of the Supreme Court of Canada be permitted to retire with a full pension after serving a minimum of ten years on the Court.

D. SPOUSAL SURVIVOR BENEFITS

Pursuant to section 44 of the *Judges Act*, the surviving spouse of a deceased judge is provided with an annuity equal to one-third of the judge's salary and the surviving spouse of a retired judge, who was in receipt of an annuity at the time of death, is provided with an annuity equal to half of the amount of the retired judge's annuity. These annuities are

indexed pursuant to the provisions of the *Supplementary Retirement Benefits Act.*

There has been a long-standing effort on the part of the judiciary to have each of these annuities increased to 40% and 60% respectively. These higher values, it is argued, would better reflect present federal, provincial, and many private sector pension benefits. However, judges' annuities, unlike the provisions of other pension plans, are based on the salary for the last year in office and not on the average salary for the best six years of employment. There are many features of the benefits currently in place which are equal to, if not better than, those afforded most others.

We are advised that the cost to implement this reform would be in the neighbourhood of $2 million over five years escalating accordingly thereafter. Changes along these lines have been recommended by previous Triennial Commissions. We consider that while these increases may be warranted, the reestablishment of an appropriate salary base for the judiciary is of greater importance. If priorities are being set, we would locate the reestablishment of this salary base of the highest level of importance and, accordingly, for the present, would recommend that there be no change in spousal survivor benefits.

E. COMMON-LAW SPOUSES

Section 44 of the *Judges Act* does not currently contemplate that the surviving spouse's annuity will be paid to common-law spouses. This is no longer a reflection of contemporary values. Furthermore, this deficiency is inconsistent with most provincial family law regimes. In addition, we have been advised that it is inconsistent with public sector policy. Reform is clearly indicated. Presumably, statutory change would be no more elaborate than definitional amendment to include a common-law spouse in the definition of spouse in the *Act* with entitlement to be dictated by conventional family law principles.

<u>It is recommended that</u>: provision be made in the *Judges Act* for a surviving spouse's annuity to be paid, in legally appropriate circumstances, to a common-law spouse.

F. JOINT AND SURVIVOR PENSIONS

There is currently no provision in the *Judges Act* to allow a retired judge who marries after retirement to elect to have his or her annuity paid on a joint-and-survivor basis. Again, this is an issue about which there is no contention from any quarter. Statutory reform is clearly indicated.

<u>It is recommended that</u>: provision be made in the *Judges Act* to enable a retired judge who marries after retirement to provide for joint and survivor benefits.

G. INTEREST ON JUDGES' PENSION CONTRIBUTIONS

Pursuant to section 51 of the *Judges Act* and section 6 of the *Supplementary Retirement Benefits Act*, under certain conditions a judge's contributions toward his or her pension (annuity) may be returned to the judge upon retirement from the Bench where payment of the annuity is not otherwise triggered. In the event interest is payable, it is presently calculated at the rate of 4% compounded annually. This is the rate applicable under the circumstances for the return of pension contributions for all federal public servants.

Your Commissioners fail to appreciate the logic in utilizing a fixed rate of interest when calculating the amount of money to be returned to an individual who has made contributions to a pension plan and is about to withdraw those contributions. As the judges pointed out, this arrangement is "manifestly inequitable." Both the Guthrie Commission (1986) and the Courtois Commission (1989) recommended the adoption of "...a rate to be varied as and when necessary to reflect the 'prescribed rates'." The Government of the day

recognized the necessity for this reform by including in Bill C-50 a provision which would have amended section 51 of the *Judges Act* to allow for a rate "prescribed by the Income Tax Regulations." This method of dealing with the anomaly in question is fair and appropriate and we would recommend its adoption.

It is therefore recommended that: section 51(4)(b) of the *Judges Act* be amended to provide that interest be payable upon the return of all pension contributions in respect of the 1996 contribution year, and each contribution year that is subsequent to 1996, calculated at the rates prescribed by the Income Tax Regulations, and compounded annually.

VI. Insurance

This is a non-statutory benefit. Federally appointed judges are covered for life insurance under the Public Service Management Insurance Plan in contrast to Deputy Ministers who are covered by what is described as an "Executive" plan. Essentially, Deputy Ministers receive basic coverage at twice their salaries, while judges only qualify for insurance equal to one- times their salaries. Supplementary insurance coverage at the individual's cost and at one-times salary is available to both groups.

It is the position of the judiciary that they should have equivalent insurance coverage, particularly if the utilization of Deputy Ministers as the comparable group for judges is to continue. If the judges were afforded equivalency of coverage, they would have coverage at two times salary in the form of group term life insurance with coverage to continue until retirement without reduction. Furthermore, the judiciary argues that this enhanced coverage is of even greater importance bearing in mind the removal of the right to make full RRSP contributions, in addition to what are described as the "relatively low" survivor benefits under the *Judges Act*.

These suggestions have much to recommend them. Economics aside, there is no reason why judges should be treated less favourably than the comparator group in question. We are advised that government officials have recognized this disparity and that a great deal of work has been undertaken to ascertain what might be done to address this situation. One of the difficulties is that the age profile of the judges is so vastly different from that of the five thousand or so senior public servants who are covered by the "Executive" plan, that it is, in the first place, not possible to incorporate them into this group, and in the second, a very expensive proposition to create an independent plan to provide like coverage. For example, because of the age profile of senior public servants, insurance for Deputy Ministers costs approximately 25 cents per month per $1000 units of insurance coverage. By reason of their present age profile, comparable insurance for the judges is estimated to be about

four times as costly. However, implementation of the Rule of 80 and gender balancing will both serve to normalize the age of active judges over a relatively short time period.

Notwithstanding these cost considerations, it is clearly inequitable to continue in the present mode indefinitely. It is premature to make a detailed recommendation presently, but we are of the view that even if it must be a staged program based on manageable age criteria, efforts should be made to offer equivalent life insurance coverage for the judiciary.

It is recommended that: the government paid life insurance coverage for judges be brought more closely into line with that provided to Deputy Ministers.

VII. Leaves of Absence

Under section 54 of the *Judges Act*, leaves of absence in excess of 30 days require the approval of the Governor in Council. The Crawford Commission (1992) recommended that in every Superior or Appellate Court the Chief Justice be permitted to grant maternity or parental leave of up to six months. This is essentially a "management" issue and delegation of authority ought to have occurred long before this. There also appears to be an opportunity to broaden the scope of the study leave program and this we would encourage.

It is recommended that: section 54(1) of the *Judges Act* be amended to authorize Chief Justices to approve leaves of absence of up to six months, including maternity/parental leave and study leave.

VIII. Salary Differential Between Trial and Appellate Judges

As our report was in the final stages of preparation, a submission was received from the judges of the Court of Appeal of the Province of Quebec. In substance, the members of the Court urged the Commission to recommend that the existing system of remuneration for judges be fundamentally altered by striking salaries which would differentiate between those federally appointed judges who sit on Provincial Courts of Appeal and those who sit in the Trial Divisions. Higher pay for appellate judges, lower for trial judges. We are firmly of the view that the submission comes too late in the day for this Triennial Commission to address it. The notion of differential salaries requires very careful assessment. While some interesting points, in substance, in favour of the concept are advanced, a very persuasive case would have to be made to depart from the present regime which assumes that the burden of judicial office, while different in nature as between the trial and appellate levels of our courts, nonetheless requires an equivalent discipline and dedication on the part of the judges at both court levels. The cultural impact on the system in the event of such differentiation would have to be very carefully weighed. The submission, while welcome, simply came too late to be given the attention that this subject deserves.

IX. Conclusion

As has been noted by a succession of our predecessors, the Triennial Commission review process was instituted by Parliament to reduce the presence of political partisanship in the course of determining judicial salaries and benefits. To date, the process has been a failure. Your Commissioners are of the view that the principal reasons for this state of affairs are outlined in this Report. There is an opportunity, nonetheless, to rescue the statutory scheme and to restore it to the stature originally envisioned. The public interest in the effective administration of justice would be well served by modest, but meaningful, reform to achieve this objective.

All of which is respectfully submitted this 30th day of September 1996.

David W. Scott, Q.C.
Michel Vennat, Q.C.
Barbara Rae

Appendix A

Background

1. **Members:** Mr. David W. Scott, Q.C. (Chairperson)
Ms. Barbara Rae, Order of Canada
Maitre Michel Vennat, Q.C., c.r., Order of Canada

Executive Secretary: Charles G. Watt

2. **Terms of Reference**

The Commission shall, pursuant to s.26 of the *Judges Act*, inquire into the adequacy of the salaries and other amounts payable under the *Act* and into the adequacy of judges' benefits generally.

The Commission shall report to the Minister of Justice within six months of the Commission's appointment, with such recommendations as the commission considers appropriate, including recommendations for improvements to the process by which judicial compensation is established.

The same Commissioners will make a second report to the Minister by November 30, 1996, recommending specific changes that should be made when economic circumstances allow. The report would be given by the Minister to the Canadian Judicial Council and the Canadian Judges Conference, and made public.

In carrying out its mandate, the Commissioners should:

1. **Take into account:**
   - (a) **the principle of judicial independence, and in particular the constitutional requirement of financial security for judges**
   - (b) **the overall economic and fiscal situation, including the compensation freeze reflected in the *Public Sector Compensation Restraint Act***
   - (c) **comparative factors, including the relative compensation of judges in other jurisdictions, lawyers, persons paid out of public funds, and Canadians generally**
   - (d) **the need to attract strong candidates for judicial appointment.**

2. **Seek the views of judges and judicial organizations, the legal profession, and the Canadian public.**

NOTE: The mandate of the 1995 Commission was formally extended to September 30, 1996 with the enactment of Bill C-2 in March 1996. Subsection 26 (2) of the *Judges Act* was amended to provide that the report of this and all future Commissions shall be submitted to the Minister within 12 months of their appointment.

3. Meetings and Conference Calls

The Commission held meetings and/or telephone conference calls as follows:

December 6, 1995 – Toronto
January 10, 1996 – Ottawa
January 26, 1996 – telephone conference
February 12, 1996 – Toronto
May 15, 1996 – Ottawa
June 27, 1996 – Toronto
July 20, 1996 – telephone conference
August 13, 1996 – Calgary
September 5, 1996 – Toronto

4. Notice to the Public

The Commission published a Notice in newspapers across Canada, inviting written submissions and presentations at an oral hearing, in either official language, concerning matters within the Commission's terms of reference. Specific notices were also sent to a number of interested organizations and individuals, including all of the provincial and territorial Ministers of Justice and Attorneys General. Copies of the Notice in English and

French and a listing of the newspapers in which they were placed are reproduced at annex "A" to this Appendix.

5. Written Submissions and Public Hearing

Written submissions were received from the organizations, groups and individuals listed in Appendix "B". A public hearing took place on January 11, 1996, in Hearing Room Three, of the Canadian International Trade Tribunal, 333 Laurier Avenue West, Ottawa. The following organizations appeared before the Commission:

- the Canadian Judges' Conference and the Canadian Judicial Council[2]; and
- the Canadian Bar Association[3]

The Commission held two other meetings with delegates from the Conference and Council; Mr. Andy Watt of the Department of Justice also attended. These meetings were held in Ottawa and Toronto on May 15, and June 27, 1996 respectively. Additionally, the Commissioners met with Chief Justice C.A. Fraser and a group of women judges in Alberta on August 13, 1996.

6. Previous Committees and Commissions

The 1995 Commission on Judges' Salaries and Benefits is the eighth federal committee or commission established in recent years to inquire into and make recommendations to the Minister of Justice with respect to judicial compensation. It is the fifth Triennial Commission appointed pursuant to subsection 26(1) of the *Judges Act*.

For the Conference and Council: The Hon.Mr. Justice Guy Kroft, Chief Justice Constance Glube, The Hon. Mr. Justice Coulter Osborne, The Hon. Mr. Justice Douglas Lambert, The Hon. Madam Justice Susan Lang, L'hon.juge André Brossard, The Hon. Mr. Justice Stuart Leggatt and Chief Judge Jean-Claude Couture

For the Canadian Bar Association: Mr. Ronald Pink, Q.C., and Ms. Joan Berkovitch

7. Acknowledgments

The Commission wishes to thank Guy Goulard, Q.C., Commissioner for Federal Judicial Affairs (Ottawa), and members of his staff, in particular Denis Guay, Joan Lamoureux, Marie Burgher, and the Finance Office for their cooperation and support. We also thank Andy Watt, Senior General Counsel and Harold Sandell, Legal Counsel of the Department of Justice; L. M. Cornelis Office of the Superintendent Financial Institutions Canada; and Charles Watt who served as the Executive Secretary to the Commission.

Annex A

Notices to the Public

List of Newspapers

1. St. John's Evening Telegram
2. Charlottetown Guardian
3. La Voix Acadiene
4. Halifax Chronical-Herald
5. Le Courrier
6. Saint John Telegraph Journal
7. L'Acadie Nouvelle
8. Le Soleil
9. La Press
10. Montreal Gazette
11. Le Droit
12. Ottawa Citizen
13. The Globe and Mail
14. The Toronto Star
15. The Lawyers Weekly
16. Winnipeg Free Press
17. La Liberté
18. Regina Leader Post
19. Saskatoon Star-Phoenix
20. Journal L'Eau Vive
21. Calgary Herald
22. Edmonton Journal
23. Le Franco-Albertain
24. Vancouver Province
25. Le Soleil de Colombie
26. The Yellowknifer
27. Whitehorse Star

Commission on Judges' Salaries and Benefits

CANADA

OTTAWA, K1A 1E3

Commission sur le traitement et les avantages des juges

1995 COMMISSION ON JUDGES' SALARIES AND BENEFITS

NOTICE

This Commission was appointed on September 30, 1995, by the Minister of Justice and Attorney General of Canada, pursuant to section 26 of the Judges Act, to inquire into the adequacy of the salaries and other amounts payable under the Act to federally appointed judges and into the adequacy of federally appointed judges' benefits generally, including the process by which judicial compensation is established.

The Commission invites written submissions in either official language concerning the matters within the Commission's terms of reference. Written submissions must reach the Commission by December 20, 1995, in ten copies. A party intending to file a written submission with the Commission may also request an opportunity to make a presentation at an oral hearing. The Commission must be notified by December 8, 1995, of the party's desire to appear at an oral hearing. A party filing a written submission need not request to appear at an oral hearing.

Copies of the Commission's terms of reference are available upon request.

David W. Scott, Q.C.
Chairman

1995 Commission on Judges'
Salaries and Benefits
Room 1114
110 O'Connor Street
Ottawa, Ontario
K1A 1E3

Commission on Judges' Salaries and Benefits

CANADA

OTTAWA, K1A 1E3

Commission sur le traitement et les avantages des juges

COMMISSION DE 1995 SUR LE TRAITEMENT ET LES AVANTAGES DES JUGES

AVIS

La Commission de 1995 sur le traitement et les avantages des juges a été instituée le 30 septembre 1995 par le ministre de la Justice et procureur général du Canada, en application de l'article 26 de la Loi sur les juges. Elle a pour mandat de déterminer si le traitement et les avantages des juges nommés par le gouvernement fédéral incluant le processus d'établissement du traitement des juges sont satisfaisants.

La Commission invite toute personne intéressée à lui soumettre par écrit ses vues sur les sujets qu'elle a reçu pour mission d'examiner. Ces interventions doivent prendre la forme d'un document écrit, établi dans l'une ou l'autre des deux langues officielles, et être déposées auprès de la Commission en dix exemplaires au plus tard le 20 décembre 1995. Quiconque dépose un tel document écrit peut en outre demander à la Commission d'être entendu par celle-ci. En pareil cas, il convient d'aviser la Commission au plus tard le 8 décembre 1995 du souhait de présenter des observations orales. Il convient de noter que le dépôt de documents écrits n'oblige nullement à présenter les observations orales.

Il est possible d'obtenir le texte définissant le mandat de la Commission sur simple demande.

Commission de 1995 sur le
traitement et les avantages
des juges
110, rue O'Connor
Bureau 1114
Ottawa (Ontario)
K1A 1E3

Le président de la Commission

David W. Scott, c.r.

Appendix B

List of Submissions

1. The Canadian Bar Association
2. The Canadian Judges Conference
3. The Canadian Judicial Council
4. The Law Society of Alberta
5. The Law Society of British Columbia
6. The Law Society of Manitoba
7. The Ontario Superior Court Judges Association
8. The Hon. Edward D. Bayda, Chief Justice (Saskatchewan)
9. The Hon. Marie Corbett (Ontario)
10. The Hon. N.A. Drossos (British Columbia)
11. The Hon. C.A. Fraser, on her own behalf and on behalf of a group of women judges (Alberta)
12. The Hon. Elizabeth A. McFadyen (Alberta)
13. The Hon. Margaret J. Trussler (Alberta)
14. The Hon. Rosemary Vodrey, Minister of Justice and Attorney General (Manitoba)
15. Colin L. Campbell (Ontario)
16. Mr. W. Chapman (Prince Edward Island)
17. Mr. W. T. Metzger (Ontario)
18. Mr. John T. Nilson, Minister of Justice & Attorney General (Saskatchewan)
19. Mr. & Mrs. E. Toker (Manitoba)
20. Mr. R. Walker (Saskatchewan)

Province of Alberta

COURT OF KING'S BENCH ACT

Revised Statutes of Alberta 2000
Chapter C-31

Current as of December 7, 2023

Office Consolidation

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

Copyright and Permission Statement

Regulations

The following is a list of the regulations made under the *Court of Queen's Bench Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	*Amendments*
Court of King's Bench Act		
Judicial Districts	117/2010	
Provincial Judges and Applications Judges Compensation	176/98	*14/99, 104/99, 211/99, 216/2000, 54/2001, 197/2001, 251/2001, 198/2002, 131/2003, 221/2004, 239/2004, 66/2005, 117/2005, 266/2006, 104/2007, 170/2007, 61/2008, 12/2009, 43/2009, 20/2012, 170/2012, 178/2015, 179/2019, 136/2022, 216/2022, 218/2022, 255/2022, 9/2023, 76/2023, 137/2023, 19/2024*
Provincial Judges and Applications Judges Registered and Unregistered Pension Plans	196/2001	*251/2001, 24/2002, 78/2002, 97/2002, 118/2005, 267/2006, 68/2008, 13/2009, 43/2009, 21/2012, 31/2012, 170/2012, 222/2017, 8/2019, 160/2019, 136/2022, 216/2022, 218/2022, 9/2023, 76/2023*

COURT OF KING'S BENCH ACT

Chapter C-31

Table of Contents

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "applications judge" means an applications judge appointed or approved to continue in office under this Act and includes a half-time applications judge, a part-time applications judge and an ad hoc applications judge;

(a.01) "Associate Chief Justice" means an Associate Chief Justice of the Court of King's Bench of Alberta;

(a.1) "Chief Justice", except in sections 5 and 25(1)(a), means the Chief Justice of the Court of King's Bench of Alberta;

(a.2) "Court" means the Court of King's Bench of Alberta;

(b) "judge" includes a supernumerary judge of the Court of King's Bench of Alberta;

(b.1) "Judicial Council" means the Judicial Council established under Part 6 of the *Judicature Act*;

(b.2) repealed AR 137/2022;

(c) "Minister" means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act.

RSA 2000 cC-31 s1;2008 c13 s2;2011 c20 s4;2015 c12 s2; 2017 c22 s15;AR 137/2022;AR 217/2022

Constitution of the Court

Continuation of Court

2(1) The Trial Division of the Supreme Court of Alberta is continued as a superior court of civil and criminal jurisdiction styled the Court of King's Bench of Alberta.

(1.1) The Surrogate Court of Alberta is continued in the Court of King's Bench.

(2) Repealed 2018 c20 s6.

(3) The Lieutenant Governor in Council may authorize a seal to be used by the Court as occasion requires.

RSA 2000 cC-31 s2;RSA 2000 c16(Supp) s35;2018 c20 s6; AR 217/2022

Name of Court

2.1 The Court shall, during the reign of the King, be styled the Court of King's Bench of Alberta and shall, during the reign of the Queen, be styled the Court of Queen's Bench of Alberta.

2019 c14 s2;AR 217/2022

Composition of Court

3(1) The Court consists of

(a) the chief judge, who shall be called the Chief Justice of the Court of King's Bench of Alberta,

(b) 2 associate chief judges, who shall each be called Associate Chief Justice of the Court of King's Bench of Alberta,

(c) 80 other judges, who shall be called justices of the Court of King's Bench of Alberta, and

(d) the supernumerary judges of the Court.

(2) The Lieutenant Governor in Council may by order increase the number of judges of the Court.

(3) Notwithstanding subsection (1), each judge of the Court of Appeal of Alberta is by virtue of that office a judge of the Court of King's Bench.

(4) Notwithstanding subsection (1), there is an additional office of judge of the Court that a Chief Justice who has resigned the office of Chief Justice may elect to hold on compliance with, and on meeting the qualifications under, the *Judges Act* (Canada).

(5) Notwithstanding subsection (1), there is an additional office of judge of the Court that an Associate Chief Justice who has resigned the office of Associate Chief Justice may elect to hold on compliance with, and on meeting the qualifications under, the *Judges Act* (Canada).

RSA 2000 cC-31 s3;2008 c13 s3;2013 c23 s4;2015 c12 s2; 2017 c22 s15;AR 217/2022;2023 c8 s2

Supernumerary judges

4(1) For each office of judge under section 3(1)(a), (b) and (c) there is an additional office of supernumerary judge that any judge of the Court may elect to hold on compliance with, and on meeting the qualifications under, the *Judges Act* (Canada).

(2) If the Chief Justice or an Associate Chief Justice makes an election under subsection (1), that Justice shall hold only the office of supernumerary judge of the Court.

RSA 2000 cC-31 s4;2008 c13 s4;2015 c12 s2

Judges

Oath of office

5 Each judge and applications judge, before entering on the duties of that office, shall take the oath prescribed by the *Oaths of Office Act* before the Lieutenant Governor, the Chief Justice of Alberta, the Chief Justice of the Court of King's Bench of Alberta or an Associate Chief Justice.

RSA 2000 cC-31 s5;2008 c13 s5;2015 c12 s2; AR 137/2022;AR 217/2022

Residence

6(1) The Chief Justice shall reside at or in the neighbourhood of Edmonton or Calgary.

(2) Before entering on the duties of office, each judge other than the Chief Justice shall reside at or in the neighbourhood of a city approved in writing by the Minister and may subsequently with the approval in writing of the Minister change the judge's place of residence so as to reside at or in the neighbourhood of another city.

(3) In exercising the Minister's powers of approval under subsection (2), the Minister shall, as far as possible, ensure that one or more judges reside at or in the neighbourhood of each of Calgary, Edmonton, Grande Prairie, Lethbridge, Medicine Hat and Red Deer.

(4) Subsection (3) applies only in respect of a power of approval exercised

(a) in respect of a judge who was not a judge of The Trial Division of the Supreme Court of Alberta or The District Court of Alberta immediately before June 30, 1979, or

(b) in respect of a judge who was a judge of The Trial Division of the Supreme Court of Alberta or The District Court of Alberta immediately before June 30, 1979 and who changes the judge's place of residence after June 30, 1979.

RSA 2000 cC-31 s6;2008 c13 s6

Judgment by former judge

7 If a judge ceases to hold office without giving a judgment in any matter that was fully heard by him or her, the judge may, within 3 months after ceasing to hold office, give judgment in that matter as if the judge were still a judge of the Court and that judgment has the same effect as though given by a judge of the Court.

RSA 1980 cC-29 s7

Judges are justices of the peace

7.1 Every judge is, by virtue of the judge's office, a justice of the peace for the purposes of an application made under section 492.1 or 492.2 of the *Criminal Code* (Canada) when that application is made in conjunction with an application under Part VI of the *Criminal Code* (Canada).

2009 c42 s2

Applications Judges

Appointment of applications judges

8(1) The Lieutenant Governor in Council may appoint officers of the Court called applications judges.

(2) The Lieutenant Governor in Council shall make regulations respecting the remuneration and benefits to be paid to applications judges.

(3) Repealed 2008 c13 s7.

RSA 2000 cC-31 s8;2008 c13 s7;O.C. 250/2022;AR 137/2022

Retirement age

8.1(1) An applications judge shall retire on attaining the age of 70 years.

(2) Subject to Part 6 of the *Judicature Act*, no applications judge may be removed from office before attaining retirement age.

2008 c13 s8;AR 137/2022

Reappointment of applications judges

8.2(1) Notwithstanding section 8.1(1), an applications judge may, in accordance with this section, continue in office as an applications judge.

(2) Where an applications judge is approaching the age of 70 years, the Chief Justice may approve that person to continue in office as an applications judge for a term of one year.

(3) Where an applications judge has been approved to continue in office as an applications judge under this section, the Chief Justice may approve that person to continue in office as an applications judge for a further term of one year.

(4) The Chief Justice may approve a person to continue in office as an applications judge under this section if

(a) the Chief Justice determines that approving that person to continue in office will enhance the efficient and effective administration of the Court, and

(b) the approval is given in accordance with and subject to the criteria established by the Chief Justice and approved by the Judicial Council.

(5), **(5.1)** Repealed 2017 c22 s15.

(6) An applications judge may only be approved to continue in office under this section if

(a) repealed 2017 c22 s15,

(b) the applications judge has consented to continue in office,

(c) the applications judge is not nor has been an ad hoc applications judge, and

(d) the applications judge has not attained the age of 75 years.

(7) An applications judge who has been approved to continue in office under this section may, subject to subsection (6), be

approved to continue in office under subsection (3) for further terms of one year.

(8) Notwithstanding anything in this section, if an applications judge who is approved to continue in office under this section attains the age of 75 years at any time during the applications judge's term, that applications judge's term expires when that applications judge attains that age.

(9) If an applications judge is approved to continue in office under this section, the Chief Justice shall notify the person designated by the Minister no later than 20 days before the effective date of the approval in the form approved by the Minister.

(10) An applications judge who, on the coming into force of this subsection, is serving a term of office after having been reappointed under subsection (2) or (3), as they read at any time before the coming into force of this subsection, is deemed, on the coming into force of this subsection, to have been approved to continue in office for the same term.

2008 c13 s8;2014 c13 s1;2017 c22 s15;AR 137/2022

Reappointment of half-time applications judges

8.21(1) Notwithstanding section 8.1(1), an applications judge may, in accordance with this section, continue in office as a half-time applications judge.

(2) Where an applications judge

(a) has attained the age of 55 years and has completed 10 years of service as half-time applications judge, and

(b) states in writing to the Chief Justice that the applications judge is prepared to retire as a full-time applications judge in order to continue in office as a half-time applications judge,

the Chief Justice may approve that person to continue in office as a half-time applications judge on that person's retirement as a full-time applications judge if the Chief Justice determines that approving that person to continue in office will enhance the efficient and effective administration of the Court.

(3) Where an applications judge

(a) is approaching the age of 70 years but has not attained age 70, and

(b) states in writing to the Chief Justice that the applications judge is prepared to retire at age 70 as a full-time

applications judge in order to continue in office as a half-time applications judge,

the Chief Justice may approve that person to continue in office as a half-time applications judge on that person's retirement as a full-time applications judge if the conditions in subsection (6) are met.

(4) Where an applications judge

(a) has been approved to continue in office as a full-time applications judge pursuant to section 8.2, and

(b) states in writing to the Chief Justice that the applications judge is prepared to retire as a full-time applications judge in order to continue in office as a half-time applications judge,

the Chief Justice may approve that person to continue in office as a half-time applications judge on that person's retirement as a full-time applications judge if the conditions in subsection (6) are met.

(5) Where an applications judge

(a) is a half-time applications judge whose term is about to expire, and

(b) states in writing to the Chief Justice that the applications judge is prepared to continue as a half-time applications judge,

the Chief Justice may approve that person to continue in office for one year as a half-time applications judge if the conditions in subsection (6) are met.

(6) The Chief Justice may approve a person to continue in office under subsection (3), (4) or (5) if

(a) the Chief Justice determines that approving that person to continue in office under subsection (3), (4) or (5) will enhance the efficient and effective administration of the Court, and

(b) the approval is given in accordance with and subject to the criteria established by the Chief Justice and approved by the Judicial Council.

(7), **(7.1)** Repealed 2017 c22 s15.

(8) An applications judge shall only be approved to continue in office as a half-time applications judge if

(a) the applications judge has consented to continue in office as a half-time applications judge,

(b) the applications judge is not nor has been approved to continue in office as an ad hoc applications judge, and

(c) the applications judge has not attained the age of 75 years.

(9) The term for which a half-time applications judge is approved to continue in office under this section is as follows:

(a) if the applications judge is approved to continue in office under subsection (2), the term commences on the date the applications judge is approved to continue in office as a half-time applications judge and expires on the commencement of the applications judge's 70th birthday;

(b) if the applications judge is approved to continue in office under subsection (3), the term is one year commencing on the applications judge's 70th birthday;

(c) if the applications judge is approved to continue in office under subsection (4), the term commences on the date the applications judge is approved to continue in office as a half-time applications judge and expires on the commencement of the applications judge's next birthday;

(d) if the applications judge is approved to continue in office under subsection (5), the term is one year commencing on the expiry of the previous term.

(10) A half-time applications judge must serve the equivalent of 6 months of full-time service during the year.

(11) Half-time applications judges shall, in addition to any pension benefits, be paid an annual salary of up to 50% of the annual salary of a full-time applications judge, but the total annual salary and pension benefits payable to a half-time applications judge cannot exceed the annual salary of a full-time applications judge.

(12) Notwithstanding anything in this section, the term of a half-time applications judge expires when the applications judge attains the age of 75 years.

(12.1) If an applications judge is approved to continue in office under this section, the Chief Justice shall notify the person

designated by the Minister no later than 20 days before the effective date of the approval in the form approved by the Minister.

(13) Subject to Part 6 of the *Judicature Act*, no half-time applications judge approved to continue in office under this section may be removed from office before the expiry of that applications judge's.

(14) An applications judge who, on the coming into force of this subsection, is serving a term of office after having been appointed or reappointed under subsection (2), (3), (4) or (5), as they read at any time before the coming into force of this subsection, is deemed, on the coming into force of this subsection, to have been approved to continue in office for the same term.

2011 c20 s4;2014 c13 s1;2017 c22 s15;2019 c14 s2;AR 137/2022

Appointment of ad hoc applications judge

8.3(1) Where

(a) an applications judge retires or resigns, or

(b) the term of office of an applications judge approved to continue in office under section 8.2 expires,

that person may elect to become an ad hoc applications judge.

(2) An applications judge who is retired from office under Part 6 of the *Judicature Act* is not entitled to elect to become an ad hoc applications judge.

(3) The Chief Justice may approve a person to continue in office as an ad hoc applications judge if the person has made an election under subsection (1).

(4) The term of an ad hoc applications judge is 2 years, but the Chief Justice may approve the ad hoc applications judge to continue in office for further periods of 2 years.

(5) Section 8.1 does not apply to an ad hoc applications judge.

(6) If an applications judge is approved to continue in office under this section, the Chief Justice shall notify the person designated by the Minister no later than 20 days before the effective date of the approval in the form approved by the Minister.

(7) An applications judge who, on the coming into force of this subsection, is serving a term of office after having been appointed under subsection (3), as it read at any time before the coming into force of this subsection, is deemed, on the coming into force of this subsection, to have been approved to continue in office for the same term.

2008 c13 s8;2017 c22 s15;AR 137/2022

Resignation

8.4 An applications judge may at any time resign from being an applications judge by giving a written notice signed by that applications judge that includes the effective date of the resignation and delivering that notice to the Minister.

2008 c13 s8;AR 137/2022

Jurisdiction

9(1) In regard to all matters brought or proposed to be brought in the Court, an applications judge

(a) has the same power and may exercise the same jurisdiction as a judge sitting in chambers except in respect of

(i) appeals, applications in the nature of appeals, applications concerning the hearing of appeals and applications to vary or rescind an order made by a judge,

(ii) subject to subsection (2), stays of proceedings after verdict or on judgment after trial or hearing before a judge, unless all parties consent to the exercise of that jurisdiction by the applications judge, and

(iii) a matter for which the Chief Justice has given a direction that an applications judge is not to exercise that jurisdiction,

and

(b) with the consent of the parties, has the same power and may exercise the same jurisdiction as a judge for hearing, determining and disposing of all applications and other matters.

(2) An applications judge may, under section 181(1)(a) of the *Traffic Safety Act*, order that a suspension of a licence be stayed.

(3) Notwithstanding subsection (1), the power of and the jurisdiction exercisable by an applications judge does not include

(a) the trial of actions,

(b) the determination of disputed or contentious questions of fact unless the parties agree to the disposition of the questions in chambers on affidavit evidence and without the trial of an issue or the hearing of oral evidence,

(c) any matters relating to criminal proceedings or the liberty of the subject,

(d) applications relating to civil contempt or for an injunction or a judgment or order in the nature of certiorari, prohibition, mandamus or quo warranto, or

(e) anything that by law is required to be done by a judge.

(4) Notwithstanding subsection (3), an applications judge has the same power and may exercise the same jurisdiction as the Court under sections 17 and 27 to 32 of the *Maintenance Enforcement Act*.

RSA 2000 cC-31 s9;RSA 2000 cT-6 s195;RSA 2000 c17(Supp) s4;2001 c23 s8;2009 c53 s4;2015 c12 s2;AR 137/2022

Jurisdiction

10 Notwithstanding section 48 of the *Law of Property Act*, an applications judge has power and jurisdiction

(a) to postpone the day fixed for redemption in any order made by the applications judge, and

(b) to reopen a final order for foreclosure made by the applications judge.

RSA 2000 cC-31 s10;AR 137/2022

Inability of applications judge to complete proceedings

10.1 If a proceeding has commenced and the presiding applications judge is unable for any reason to complete the proceedings, any applications judge requested by the Chief Justice to act may

(a) continue the proceedings to completion from where the proceedings were left off, or

(b) recommence the proceedings if in the opinion of the applications judge that is required to ensure justice.

2008 c13 s9;AR 137/2022

Judgment by former applications judge

10.2 If an applications judge ceases to hold office without giving a judgment or making an order in any matter that was fully heard by that applications judge, that person may, within 3 months after ceasing to hold office, give judgment or make an order in that

matter as if that person were still an applications judge, and that judgment or order has the same effect as though given by an applications judge.

2008 c13 s9;AR 137/2022

Referee

11 An applications judge is an official referee for the purposes of a reference by a judge.

RSA 2000 cC-31 s11;AR 137/2022

Appeal

12 An appeal lies to a judge in chambers from a decision of an applications judge.

RSA 2000 cC-31 s12;AR 137/2022

Reference to judge

13 An applications judge may refer any matter before the applications judge to a judge for decision and the judge may dispose of or refer back the matter in whole or in part.

RSA 2000 cC-31 s13;AR 137/2022

Protection from action

14(1) No action may be brought against an applications judge for any act done or omitted to be done in the execution of the applications judge's duty or for any act done in a matter in which the applications judge lacked jurisdiction or exceeded the applications judge's jurisdiction unless it is proved that the applications judge acted maliciously and without reasonable and probable cause.

(2) No action for the recovery of damages lies against any person in respect of an act or thing done or omitted to be done at any time, whether before or after the coming into force of this section, in the execution of an order, warrant or judgment to which subsection (1) relates, or purporting to be done in compliance with or incidental to an order, warrant or judgment.

(3) The Minister may make a payment for damages or costs, including lawyer's charges, incurred by the applications judge in respect of an act, omission or matter described in subsection (1).

RSA 2000 cC-31 s14;2008 c32 s2;2009 c53 s4;2013 c10 s34; AR 137/2022;2022 c21 s17

Confidentiality of selection process

14.1 Records containing information arising from the process for the selection of applications judges are confidential and notwithstanding the *Freedom of Information and Protection of Privacy Act* are not subject to that Act.

2008 c13 s10;AR 137/2022

Complaints

15 A complaint about an applications judge respecting the applications judge's

(a) competence,

(b) conduct or misbehaviour,

(c) neglect of duty, or

(d) inability to perform the applications judge's duty

must be dealt with in accordance with Part 6 of the *Judicature Act*.

RSA 2000 cC-31 s15;AR 137/2022

Restriction on other employment

15.1(1) Unless otherwise authorized by the Lieutenant Governor in Council, an applications judge who is appointed as a full-time, half-time or part-time applications judge shall not carry on or practise any other business, profession, trade or occupation.

(2) This section applies only to applications judges appointed on or after the date this section comes into force.

2011 c20 s4;AR 137/2022

Regulations

16(1) The Lieutenant Governor in Council shall make regulations

(a) fixing the salaries to be paid to applications judges;

(b) fixing the amount to be paid to applications judges sitting part time and half-time;

(c) providing for the benefits to which applications judges are entitled, including

(i) personal expense allowances and services;

(ii) travel and moving allowances;

(iii) leaves of absence and vacations;

(iv) sick leave credits and payments in respect of those credits;

(v) benefits under one or more pension plans for applications judges and other individuals deriving benefit entitlements through them;

(d) without limiting anything in clause (c), providing for the continuation or establishment of

(i) one or more pension plans, including a supplemental retirement plan that may or may not be registrable under the *Income Tax Act* (Canada), and

(ii) one or more pension funds,

including the making of any provisions in respect of those plans or funds that are made, or that are similar to or that correspond to provisions made, by or under, or that could be made under, the *Public Sector Pension Plans Act* with respect to any pension plan or pension fund continued or established by that Act;

(e) providing for the transfer or other disposition of those benefits to which persons appointed as applications judges under this Act were entitled under the *Public Service Act* and the regulations under that Act or the Public Service Pension Plan, the Public Service Management (Closed Membership) Pension Plan or the Management Employees Pension Plan at the time of their appointment under this Act.

(2) Regulations made under subsection (1) shall, if so provided in the regulation, be effective from a date prior to the making of the regulation.

RSA 2000 cC-31 s16;2011 c20 s4;AR 137/2022

Case Management Counsel

Appointment of case management counsel

16.1 In accordance with the *Public Service Act*, there may be appointed officers of the Court called case management counsel as the business of the Court requires.

2014 c13 s1

Power and duties of case management counsel

16.2(1) Subject to this section, a case management counsel may perform all duties with respect to the case management of matters before the Court that are

(a) assigned by the Chief Justice, or

(b) expressly assigned for performance by a case management counsel in the *Alberta Rules of Court*.

(2) The powers and duties of a case management counsel do not include functions that require judicial independence and those

functions shall not be assigned to case management counsel by the Chief Justice.

2014 c13 s1

Officers and Employees Generally

Personnel

17 In accordance with the *Public Service Act*, there may be appointed all officers and employees that the business of the Court requires.

RSA 1980 cC-29 s15

Powers of officers of Court

18(1) An officer of the Court, for the purpose of matters directed by the Court to be taken before the officer, has power to administer oaths, take affidavits and statutory declarations, receive affirmations and question parties and witnesses, as the Court may direct.

(2) An officer of the Court, at the direction of the Court, may assist the Court with respect to the management of matters before the Court and the business of the Court.

RSA 2000 cC-31 s18;RSA 2000 c16(Supp) s72; 2008 c13 s11;2009 c53 s4

Duties of sheriffs, etc.

19 Sheriffs, civil enforcement bailiffs, jailers and peace officers shall give assistance to and comply with the directions of the Court and the judges in the exercise of the jurisdiction of the Court.

RSA 1980 cC-29 s17;1994 cC-10.5 s119

Miscellaneous

20 Repealed 2009 c53 s4.

Costs

21 Subject to an express provision to the contrary in any enactment, the costs of and incidental to any matter authorized to be taken before the Court or a judge are in the discretion of the Court or judge and the Court or judge may make any order relating to costs that is appropriate in the circumstances.

RSA 1980 cC-29 s19

Court sittings

22 The Chief Justice, in consultation with the Associate Chief Justices, may designate the sittings of the Court.

RSA 2000 cC-31 s22;2015 c12 s2

Judicial districts

23 The Lieutenant Governor in Council may by regulation

(a) establish judicial districts and sub-districts;

(b) alter the boundaries of any judicial district or sub-district;

(c) provide for and govern the transfer and the effect of the transfer of documents and judicial processes from one judicial district or sub-district to another judicial district or sub-district;

(d) make any provision that the Lieutenant Governor in Council considers necessary to protect any interests affected by the operation of a regulation made under this section.

RSA 1980 cC-29 s21;1994 cC-10.5 s119

Council of judges

24(1) A council comprised of the judges shall, at least once in every year on a day fixed by the Chief Justice and of which the Chief Justice shall give notice to the judges, assemble for the purpose of

(a) considering

(i) the operation of this Act and the rules made under this Act, and

(ii) the working of, and the arrangements governing the performance of duties by, the officers of the Court,

and

(b) inquiring into and examining any defects that appear to exist in the procedure of any court or other authority.

(2) If it considers it necessary and appropriate to do so, the council may form one or more subcommittees to deal with any matter referred to in subsection (1) and each subcommittee so formed shall meet at the times and places necessary to achieve the purpose for which it was formed.

(3) The council shall report its recommendations to the Lieutenant Governor in Council.

RSA 2000 cC-31 s24;2008 c13 s12

Meetings, conferences and seminars

24.1 For the purpose of section 41 of the *Judges Act* (Canada), a judge is authorized to attend, with the approval of the Chief Justice,

a meeting, conference or seminar that is held for a purpose relating to the administration of justice.

2019 c14 s2

25 Repealed 2009 c53 s4.

Transitional and Consequential

References

26 If in any statute, ordinance, regulation, rule, order, bylaw, agreement or other instrument or document reference is made to

(a) the Supreme Court of the North-West Territories sitting other than en banc, and the reference occurred prior to September 1, 1905,

(b) The Supreme Court of Alberta without words indicating the Division of that Court,

(c) The Trial Division of the Supreme Court of Alberta,

(d) The District Court of Northern Alberta,

(e) The District Court of Southern Alberta,

(f) The District Court of Alberta,

(f.1) the Court of Queen's Bench of Alberta, or

(g) a judge of any of those courts,

the reference shall be read as a reference to the Court of King's Bench of Alberta or a judge of that Court, as the case may be, unless the context otherwise requires.

RSA 2000 cC-31 s26;AR 217/2022

Transition to new name

27(1) The Lieutenant Governor in Council may amend sections 2(1) and 8(1) so that

(a) the superior court of civil and criminal jurisdiction is styled as something other than the Court of King's Bench of Alberta, and

(b) officers appointed under section 8(1) are called something other than masters in chambers.

(2) For the purposes of making any necessary changes as a result of amendments made under subsection (1), the Lieutenant Governor in Council may, by regulation,

(a) amend the title to this Act, and

(b) amend this Act, the regulations under this Act or any other Act or any regulation.

(3) The regulations authorized by this section may be made notwithstanding that a regulation being amended was made by a member of the Executive Council or some other person or body.

2018 c20 s6;AR 217/2022

Printed on Recycled Paper

M A N I T O B A

THE COURT OF KING'S BENCH ACT

C.C.S.M. c. C280

LOI SUR LA COUR DU BANC DU ROI

c. C280 de la *C.P.L.M.*

As of 25 June 2024, this is the most current version available. It is current for the period set out in the footer below.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 25 juin 2024. Son contenu était à jour pendant la période indiquée en bas de page.

LEGISLATIVE HISTORY

The Court of King's Bench Act, C.C.S.M. c. C280, (formerly *The Court of Queen's Bench Act*)

Enacted by	Proclamation status (for provisions in force by proclamation)
SM 1988-89, c. 4	whole Act: in force on 1 Mar 1989 (Man. Gaz.: 18 Feb 1989)
Amended by	
SM 1989-90, c. 90, s. 6	
SM 1991-92, c. 41, s. 7	
SM 1992, c. 46, s. 53	in force on 15 Aug 1993 (Man. Gaz.: 3 Jul 1993)
SM 1993, c. 19	s. 2, 3, 4 and 7: in force on 1 Jul 1994 (Man. Gaz.: 25 Jun 1994)
SM 1993, c. 48, s. 52	
SM 1995, c. 3, s. 1	in force on 31 Dec 1995 (Man. Gaz.: 16 Dec 1995)
SM 1996, c. 6	
SM 1998, c. 41, s. 28	in force on 30 Sep 1999 (Man. Gaz.: 17 Jul 1999)
SM 1999, c. 18, s. 9	
SM 1999, c. 34	in force on 1 Jan 2000 (Man. Gaz.: 1 Jan 2000)
SM 2000, c. 27	
SM 2001, c. 33, s. 45	in force on 31 Jan 2003 (Man. Gaz.: 1 Feb 2003)
SM 2001, c. 37, s. 2	
SM 2001, c. 40, Part 2	
SM 2001, c. 43, s. 5	
SM 2002, c. 47, s. 5 and 30	
SM 2002, c. 48, s. 3	in force on 30 Jun 2004 (Man. Gaz.: 29 May 2004)
SM 2004, c. 13, s. 15	in force on 31 Oct 2005 (Man. Gaz.: 23 Apr 2005)
SM 2004, c. 14, s. 17	in force on 31 Mar 2005 (Man. Gaz.: 26 Mar 2005)
SM 2004, c. 42, s. 21	
SM 2005, c. 33, Part 2	
SM 2008, c. 6, s. 3	
SM 2008, c. 14, s. 136	
SM 2008, c. 42, s. 16	
SM 2009, c. 15, s. 230	in force on 1 Jan 2014 (Man. Gaz.: 28 Dec 2013)
SM 2010, c. 28, s. 28	
SM 2010, c. 33, s. 11	
SM 2012, c. 40, s. 15	
SM 2013, c. 39, Sch. A, s. 45	in force on 1 May 2014 (Man. Gaz.: 3 May 2014)
SM 2014, c. 32, s. 6	
SM 2015, c. 43, s. 10	
SM 2019, c. 8, Sch. A, s. 46	not yet proclaimed
SM 2019, c. 8, Sch. C, s. 19	in force on 1 Jul 2019 (proclamation published: 25 Jun 2019)
SM 2019, c. 8, Sch. D, s. 2	
SM 2019, c. 16, Part 3	s. 19 and 26 to 29: in force on 1 Jul 2019 (proclamation published: 25 Jun 2019) s. 20 to 23 and 25: in force on 1 Jan 2020 (proclamation published: 25 Nov 2019) remainder of Part 3 (am. by SM 2023, c. 34, s. 65) : in force on 1 Feb 2023 (proclamation published: 23 Jan 2023)
SM 2021, c. 11, s. 79	in force on 26 Feb 2022 (proclamation published: 18 Feb 2022)
SM 2021, c. 40, Part 3	in force on 1 Jan 2022 (proclamation published: 14 Oct 2021)

SM 2022, c. 15, Sch. A, s. 109	in force on 1 Jul 2023 (proclamation published: 26 May 2023)
SM 2022, c. 15, Sch. B, s. 91	in force on 1 Jul 2023 (proclamation published: 26 May 2023)
SM 2022, c. 29, s. 27	in force on 1 Jan 2024 (proclamation published: 5 Jun 2023)
SM 2023, c. 10, s. 8	
SM 2023, c. 12	
SM 2023, c. 26, Part 4	
SM 2023, c. 34, Part 1	
SM 2024, c. 9, s. 45 and 53	

HISTORIQUE

Loi sur la Cour du Banc du Roi, c. C280 de la C.P.L.M., (auparavant *Loi sur la Cour du Banc de la Reine*)

Édictée par	**État des dispositions qui entrent en vigueur par proclamation**
L.M. 1988-89, c. 4	l'ensemble de la Loi : en vigueur le 1er mars 1989 (Gaz. du Man. : 18 févr. 1989)
Modifiée par	
L.M. 1989-90, c. 90, art. 6	
L.M. 1991-92, c. 41, art. 7	
L.M. 1992, c. 46, art. 53	en vigueur le 15 août 1993 (Gaz. du Man. : 3 juill. 1993)
L.M. 1993, c. 19	art. 2, 3, 4 et 7 : en vigueur le 1er juill. 1994 (Gaz. du Man. : 25 juin 1994)
L.M. 1993, c. 48, art. 52	
L.M. 1995, c. 3, art. 1	en vigueur le 31 déc. 1995 (Gaz. du Man. : 16 déc. 1995)
L.M. 1996, c. 6	
L.M. 1998, c. 41, art. 28	en vigueur le 30 sept. 1999 (Gaz. du Man. : 17 juill. 1999)
L.M. 1999, c. 18, art. 9	
L.M. 1999, c. 34	en vigueur le 1er janv. 2000 (Gaz. du Man. : 1er janv. 2000)
L.M. 2000, c. 27	
L.M. 2001, c. 33, art. 45	en vigueur le 31 janv. 2003 (Gaz. du Man. : 1er févr. 2003)
L.M. 2001, c. 37, art. 2	
L.M. 2001, c. 40, partie 2	
L.M. 2001, c. 43, art. 5	
L.M. 2002, c. 47, art. 5 et 30	
L.M. 2002, c. 48, art. 3	en vigueur le 30 juin 2004 (Gaz. du Man. : 29 mai 2004)
L.M. 2004, c. 13, art. 15	en vigueur le 31 oct. 2005 (Gaz. du Man. : 23 avr. 2005)
L.M. 2004, c. 14, art. 17	en vigueur le 31 mars 2005 (Gaz. du Man. : 26 mars 2005)
L.M. 2004, c. 42, art. 21	
L.M. 2005, c. 33, partie 2	
L.M. 2008, c. 6, art. 3	
L.M. 2008, c. 14, art. 136	
L.M. 2008, c. 42, art. 16	
L.M. 2009, c. 15, art. 230	en vigueur le 1er janv. 2014 (Gaz. du Man. : 28 déc. 2013)
L.M. 2010, c. 28, art. 28	
L.M. 2010, c. 33, art. 11	
L.M. 2012, c. 40, art. 15	
L.M. 2013, c. 39, ann. A, art. 45	en vigueur le 1er mai 2014 (Gaz. du Man. : 3 mai 2014)
L.M. 2014, c. 32, art. 6	

L.M. 2015, c. 43, art. 10	
L.M. 2019, c. 8, ann. A, art. 46	non proclamé
L.M. 2019, c. 8, ann. C, art. 19	en vigueur le 1er juill. 2019 (proclamation publiée : 25 juin 2019)
L.M. 2019, c. 8, ann. D, art. 2	
L.M. 2019, c. 16, partie 3	art. 19 et 26 à 29 : en vigueur le 1er juill. 2019 (proclamation publiée : 25 juin 2019) art. 20 à 23 et 25 : en vigueur le 1er janv. 2020 (proclamation publiée : 25 nov. 2019) restant de la partie 3 (modifiée par L.M. 2023, c. 34, art. 65) : en vigueur le 1er févr. 2023 (proclamation publiée : 23 janv. 2023)
L.M. 2021, c. 11, art. 79	en vigueur le 26 févr. 2022 (proclamation publiée : 18 févr. 2022)
L.M. 2021, c. 40, partie 3	en vigueur le 1er janv. 2022 (proclamation publiée : 14 oct. 2021)
L.M. 2022, c. 15, ann. A, art. 109	en vigueur le 1er juill. 2023 (proclamation publiée : 26 mai 2023)
L.M. 2022, c. 15, ann. B, art. 91	en vigueur le 1er juill. 2023 (proclamation publiée : 26 mai 2023)
L.M. 2022, c. 29, art. 27	en vigueur le 1er janv. 2024 (proclamation publiée : 5 juin 2023)
L.M. 2023, c. 10, art. 8	
L.M. 2023, c. 12	
L.M. 2023, c. 26, partie 4	
L.M. 2023, c. 34, partie 1	
L.M. 2024, c. 9, art. 45 et 53	

(c) the Associate Chief Justice of the Court of King's Bench (Family Division) who shall be called the "Associate Chief Justice of the Court of King's Bench (Family Division)"; and

(d) 31 other judges, of whom

(i) 19 are judges of the court, other than the family division, and

(ii) 12 are judges of the family division.

c) un juge en chef adjoint de la Cour du Banc du Roi (Division de la famille) appelé le « juge en chef adjoint de la Cour du Banc du Roi (Division de la famille) »;

d) 31 autres juges, dont parmi eux :

(i) 19 juges de la Cour n'exerçant pas leurs fonctions au sein de la Division de la famille,

(ii) 12 juges de la Cour exerçant leurs fonctions au sein de la Division de la famille.

Additional offices
5(2) The court shall consist of as many additional judicial offices as are required for purposes of subsections (3) and (4).

Postes supplémentaires
5(2) La Cour est composée des postes supplémentaires de juge qui sont requis pour l'application des paragraphes (3) et (4).

C.J.K.B., A.C.J.K.B. election
5(3) Where the requirements of the *Judges Act* (Canada) are otherwise met, the Chief Justice of the Court of King's Bench, the Associate Chief Justice of the Court of King's Bench or the Associate Chief Justice of the Court of King's Bench (Family Division), may elect to cease to perform the duties of chief justice or associate chief justice and to perform the duties of a judge of the court.

Choix
5(3) Si les exigences de la *Loi sur les juges* (Canada) sont par ailleurs respectées, le juge en chef de la Cour du Banc du Roi, le juge en chef adjoint de la Cour du Banc du Roi ou le juge en chef adjoint de la Cour du Banc du Roi (Division de la famille) peut choisir de ne plus exercer les fonctions de juge en chef ou de juge en chef adjoint et d'exercer les fonctions d'un juge de la Cour.

Supernumerary election
5(4) Where the requirements of the *Judges Act* (Canada) are otherwise met a judge may elect to act as a supernumerary judge.

S.M. 1996, c. 6, s. 2; S.M. 2005, c. 33, s. 6; S.M. 2008, c. 42, s. 16.

Juge surnuméraire
5(4) Si les exigences de la *Loi sur les juges* (Canada) sont par ailleurs respectées, un juge peut choisir d'agir à titre de juge surnuméraire.

L.M. 1996, c. 6, art. 2; L.M. 2005, c. 33, art. 6; L.M. 2008, c. 42, art. 16.

L.G. in C. may increase judges
6 The Lieutenant Governor in Council may by regulation increase the number of judges under clause 5(1)(d) but may not, by revoking a regulation or otherwise, decrease the number of judges under clause 5(1)(d).

Augmentation du nombre de juges
6 Le lieutenant-gouverneur en conseil peut, par règlement, augmenter le nombre de juges prévu à l'alinéa 5(1)d) mais ne peut, par l'abrogation d'un règlement ou d'une autre manière, diminuer le nombre de juges prévu à cet alinéa.

PART III

JUDGES OF THE COURT

Oath or affirmation by Judges

7 A judge shall, before entering on the duties of office, take the following oath or affirmation to be administered by the Lieutenant Governor or a judge:

I, _____, solemnly and sincerely promise and swear (affirm) that I will duly and faithfully and to the best of my skill and knowledge exercise the powers and trusts reposed in me as (title of office) of the Court of King's Bench of Manitoba.

So Help Me God (omit this line where person affirms)

Powers of a judge

8 A judge has all the powers, rights, incidents, privileges and immunities of a judge of a superior court of record, and all other powers, rights, incidents, privileges and immunities as they were, on and prior to July 15, 1870, used, exercised and enjoyed by any of the judges of any of the superior courts of law or equity in England.

Residence of Chief Justice

9(1) The Chief Justice shall reside in, or in the vicinity of, the City of Winnipeg.

Residence of judges

9(2) A judge shall, upon appointment, reside in, or in the vicinity of, the judicial centre that the Lieutenant Governor in Council, with the recommendation of the Minister of Justice after consultation with the Chief Justice, may direct.

PARTIE III

JUGES DE LA COUR

Serment ou affirmation solennelle

7 Un juge, avant d'entrer en fonction, fait l'affirmation solennelle ou le serment suivant devant le lieutenant-gouverneur ou un juge :

Je soussigné(e), _____, promets et jure solennellement et sincèrement (ou affirme solennellement) d'exercer dûment et fidèlement et au mieux de ma capacité et de mes connaissances les pouvoirs et charges qui me sont confiés à titre de (titre du poste) de la Cour du Banc du Roi du Manitoba.

Que Dieu me soit en aide. (omettre cette dernière phrase dans le cas d'une affirmation solennelle)

Pouvoirs d'un juge

8 Un juge a tous les pouvoirs, droits, privilèges et immunités d'un juge d'un tribunal supérieur d'archives ainsi que tous ceux qu'ont eus et exercés en Angleterre, jusqu'au 15 juillet 1870, les juges des tribunaux supérieurs de common law ou d'equity.

Résidence du juge en chef

9(1) Le juge en chef réside dans la ville de Winnipeg ou à proximité de celle-ci.

Résidence des juges

9(2) Suite à sa nomination, un juge réside dans le centre judiciaire ou à proximité du centre judiciaire que prescrit le lieutenant-gouverneur en conseil, sur recommandation du ministre de la Justice et après consultation du juge en chef.

Change in residence

9(3) Where a judge establishes a residence in accordance with a direction made under subsection (2), the judge shall not afterwards

(a) be directed to move the residence to, or to the vicinity of, another judicial centre unless the judge consents to the move;

(b) move the residence to, or to the vicinity of, another judicial centre unless the Lieutenant Governor in Council, with the recommendation of the Minister of Justice after consultation with the Chief Justice, approves the move.

Judges away from Winnipeg

9(4) Not less than three judges shall reside in, or in the vicinity of, a judicial centre located outside The City of Winnipeg.

S.M. 1993, c. 48, s. 52.

Meetings of judges

10 The Chief Justice shall, whenever necessary and at least once in each year, convene a meeting of the judges for the purpose of dealing with matters relating to the administration of and practice in the courts or for any purpose relating to the administration of justice or for the purposes of an Act of the Legislature.

Conferences re administration of justice

10.1 For the purpose of section 41 of the *Judges Act* (Canada), a judge is authorized to attend, with the approval of the chief justice, a meeting, conference or seminar that is held for a purpose relating to the administration of justice.

S.M. 2021, c. 40, s. 11.

Changement de résidence

9(3) Le juge qui établit sa résidence en conformité à une directive donnée en vertu du paragraphe (2) ne peut, par la suite :

a) être obligé d'établir sa résidence dans un autre centre judiciaire ou à proximité de cet autre centre, sauf s'il y consent;

b) établir sa résidence dans un autre centre judiciaire ou à proximité de cet autre centre, sauf si le lieutenant-gouverneur en conseil, sur recommandation du ministre de la Justice et après consultation du juge en chef, consent à ce changement de résidence.

Juges à l'extérieur de Winnipeg

9(4) Au moins trois juges résident dans un centre judiciaire ou à proximité d'un centre judiciaire situé hors de la ville de Winnipeg.

L.M. 1993, c. 48, art. 52.

Réunion des juges

10 Le juge en chef convoque les juges, au besoin et au moins une fois par année, à une réunion portant sur les questions relatives à l'administration des tribunaux et à la pratique au sein de ces tribunaux. Cette réunion peut porter aussi sur l'administration de la justice ou sur les lois de la Législature.

Colloques — administration de la justice

10.1 Pour l'application de l'article 41 de la *Loi sur les juges* (Canada), les juges sont autorisés à participer, avec l'approbation du juge en chef, à des réunions, à des conférences et à des colloques ayant un rapport avec l'administration de la justice.

L.M. 2021, c. 40, art. 11.

Updated to 28 March 2001

chapter T-16

COURTS OF JUSTICE ACT

1. The Courts of Québec, in civil, criminal and mixed matters, are:

The Court of Appeal;

The Superior Court;

The Court of Québec;

The Municipal Courts.

R. S. 1964, c. 20, s. 1; 1965 (1st sess.), c. 17, s. 1; 1966-67, c. 18, s. 1; 1974, c. 11, s. 1; 1977, c. 20, s. 138; 1988, c. 21, s. 1; 1992, c. 61, s. 612.

2. The jurisdictions of the Court of Appeal, the Superior Court and the Court of Québec are general and cover the whole of Québec; the jurisdiction of the Municipal Courts is restricted to localities and the jurisdiction of the justices of the peace is provided for by law or by their deed of appointment.

R. S. 1964, c. 20, s. 2; 1965 (1st sess.), c. 17, s. 3; 1974, c. 11, s. 4; 1977, c. 20, s. 138; 1975, c. 7, s. 2; 1988, c. 21, s. 2; 1992, c. 61, s. 613.

3. The Public Officers Act (chapter E-6), the Public Service Act (chapter F-3.1.1) and the Labour Code (chapter C-27) shall not apply to the judges of the Court of Québec, the justices of the Peace or the municipal judges acting in that capacity.

1965 (1st sess.), c. 17, s. 3; 1965 (1st sess.), c. 14, s. 82; 1965 (1st sess.), c. 15, s. 1; 1977, c. 20, s. 138; 1978, c. 15, s. 140; 1983, c. 55, s. 161; 1988, c. 21, s. 3; 1988, c. 74, s. 7; 1990, c. 44, s. 1; 1992, c. 61, s. 614.

4. The officers of justice shall be: the sheriff, the clerk of the Superior Court, the clerk of the Court of Québec and all other officers necessary for the administration of justice in Québec.

The officers of justice shall be appointed by order of the Minister of Justice who may assign them jurisdiction in more than one district.

R. S. 1964, c. 20, s. 3; 1965 (1st sess.), c. 17, s. 2; 1983, c. 54, s. 87; 1983, c. 41, s. 209; 1986, c. 86, s. 35; 1988, c. 21, s. 4; 1992, c. 61, s. 615; 1995, c. 42, s. 47; 1999, c. 40, s. 324.

4.1. A special clerk contemplated in subparagraph *e* of article 4 of the Code of Civil Procedure (chapter C-25) may, in accordance with the said subparagraph, be given jurisdiction in more than one judicial district, even if he has not been appointed clerk of each of those districts.

1983, c. 28, s. 65; 1992, c. 57, s. 705; 1995, c. 42, s. 47.

5. The Minister of Justice shall also, by order, appoint a clerk of appeals for Montréal, a clerk of appeals for Québec, and as many deputy clerks of appeals as he may deem necessary.

R. S. 1964, c. 20, s. 4; 1983, c. 54, s. 88.

5.1. Notwithstanding any other legislative provision, the clerk of a court is required to furnish at a hearing, in order to fill the office of court bailiff, only the available court bailiffs at his disposal.

1982, c. 58, s. 79; 1995, c. 42, s. 47.

5.2. In no case may an employer or his agent dismiss, suspend or transfer an employee, practise discrimination or take reprisals against him, or impose any other sanction upon him on the ground that the latter is summoned or has acted as a witness.

21. The Superior Court, which is a court of record, is composed of 143 judges including a Chief Justice, a Senior Associate Chief Justice and an Associate Chief Justice.

It shall also be composed of not more than 111 supernumerary judges governed by the Judges Act (Revised Statutes of Canada, 1985, chapter J-1). The residence of such a judge shall be the same as it was before he became a supernumerary judge.

R. S. 1964, c. 20, s. 21; 1966, c. 7, s. 1; 1966-67, c. 18, s. 2; 1968, c. 15, s. 1; 1971, c. 14, s. 1; 1972, c. 11, s. 3; 1973, c. 13, s. 1; 1974, c. 11, s. 13; 1975, c. 10, s. 1; 1976, c. 8, s. 1; 1977, c. 17, s. 3; 1977, c. 17, s. 4; 1979, c. 42, s. 1; 1982, c. 58, s. 80; 1984, c. 26, s. 37; 1984, c. 46, s. 33; 1985, c. 29, s. 29; 1987, c. 50, s. 2; 1988, c. 21, s. 17; 1989, c. 45, s. 3.

22. The Chief Justice has charge of the general policy of the court in judicial matters.

However, the Chief Justice, the Senior Associate Chief Justice or the Associate Chief Justice shall, in the division where he resides, coordinate and apportion the work of the judges, and they must comply with his orders and directives in that regard.

Such paragraphs apply subject to the provisions which follow.

1974, c. 11, s. 13; 1976, c. 8, s. 2.

23. Such judges shall exercise their functions in the judicial districts assigned to them.

R. S. 1964, c. 20, s. 22.

24. Whenever the Chief Justice of the Superior Court resides in the territory of Ville de Québec, the Senior Associate Chief Justice shall perform his duties in the division of Montréal formed by the judicial districts of Beauharnois, Bedford, Drummond, Hull, Iberville, Joliette, Labelle, Laval, Longueuil, Mégantic, Montréal, Pontiac, Richelieu, Saint-François, Saint-Hyacinthe and Terrebonne, and shall reside in the territory of or in the vicinity of Ville de Montréal.

R. S. 1964, c. 20, s. 23; 1973, c. 13, s. 2; 1975, c. 10, s. 2; 1979, c. 15, s. 4; 1985, c. 29, s. 30; 1996, c. 2, s. 974.

25. Whenever the Chief Justice of the Superior Court resides in the territory of Ville de Montréal, the Senior Associate Chief Justice shall perform his duties in the division of Québec formed by the judicial districts of Abitibi, Alma, Arthabaska, Baie-Comeau, Beauce, Bonaventure, Charlevoix, Chicoutimi, Frontenac, Gaspé, Kamouraska, Mingan, Montmagny, Québec, Rimouski, Roberval, Rouyn-Noranda, Saint-Maurice, Témiscamingue and Trois-Rivières, and shall reside in the territory of or in the vicinity of Ville de Québec.

R. S. 1964, c. 20, s. 24; 1966, c. 7, s. 2; 1971, c. 8, s. 5; 1973, c. 13, s. 3; 1975, c. 10, s. 3; 1979, c. 15, s. 4; 1982, c. 58, s. 81; 1985, c. 29, s. 31; 1996, c. 2, s. 975.

26. The Senior Associate Chief Justice shall, under the authority of the Chief Justice, exercise the latter's powers.

The Associate Chief Justice shall assist the Chief Justice or, as the case may be, the Senior Associate Chief Justice, residing in the territory of Ville de Montréal, in the performance of his duties.

1973, c. 13, s. 4; 1996, c. 2, s. 976.

27. The Associate Chief Justice shall exercise the powers of the Chief Justice or Senior Associate Chief Justice, as the case may be, residing in the territory of Ville de Montréal, to the extent determined by the Chief Justice or the Senior Associate Chief Justice.

The authority of the Senior Associate Chief Justice and Associate Chief Justice shall be that of the Chief Justice; their orders must be executed in the same manner as those of the Chief Justice and their official signatures shall give force and effect to any document within the competence of the Chief Justice.

1973, c. 13, s. 4; 1996, c. 2, s. 977.

28. Where the Chief Justice or, as the case may be, the Senior Associate Chief Justice, residing at Montréal, is prevented from performing his duties, the Associate Chief Justice may perform such duties until the Chief Justice or, as the case may be, the Senior Associate Chief Justice, resumes them or is replaced.

1973, c. 13, s. 4; 1999, c. 40, s. 324.

29. The Senior Associate Chief Justice shall have a right of precedence immediately after the Chief Justice.

The Associate Chief Justice shall have a right of precedence immediately after the Senior Associate Chief Justice.

R. S. 1964, c. 20, s. 25; 1973, c. 13, s. 5.

30. Whenever the Chief Justice, the Senior Associate Chief Justice or, as the case may be, the Associate Chief Justice is unable to perform his duties, the senior puisne judge, according to the date of his appointment, residing in Montréal or Québec, as the case may be, may perform such duties until the Chief Justice, the Senior Associate Chief Justice, or, as the case may be, Associate Chief Justice resumes the performance thereof or is replaced.

1965 (1st sess.), c. 17, s. 6; 1973, c. 13, s. 6; 1999, c. 40, s. 324.

30.1. Where the chief justice, the senior associate chief justice or the associate chief justice informs the Minister of Justice and the federal Minister of Justice of his decision to abandon his office of chief justice, senior associate chief justice or associate chief justice, as the case may be, the Superior Court is then deemed to be composed, until a vacancy occurs, of the number of judges provided for by section 21 and of one additional office of judge.

1978, c. 19, s. 51 (*part*).

31. No judge of the Superior Court shall, while a judge, sit in the Conseil exécutif or in the National Assembly, or hold any other remunerated public office.

R. S. 1964, c. 20, s. 26; 1968, c. 9, s. 74, s. 90; 1977, c. 5, s. 14; 1999, c. 40, s. 324.

31.1. For the purposes of section 41 of the Judges Act (Revised Statutes of Canada, 1985, chapter J-1), a judge of the Superior Court may, in his quality as a judge of that court and with the authorization of the chief justice, take part in an event connected with the administration of justice.

1987, c. 92, s. 2.

32. The judges of the Superior Court shall be appointed for the several districts of Québec, as follows:

(1) For the district of Montréal, with residence in the territory of Ville de Montréal or in the immediate vicinity thereof, 89 judges; one of whom shall have special charge of the district of Terrebonne, another of the district of Beauharnois, another of the district of Richelieu, another of the district of Saint-Hyacinthe, another of the district of Pontiac, another of the district of Hull, another of the district of Labelle, who shall also exercise his ordinary functions in the district of Hull, another of the district of Bedford, another of the district of Iberville, and another of the district of Joliette;

The judges appointed for the district of Montréal shall also exercise their ordinary functions in the districts of Laval and Longueuil in accordance with the orders of the Chief Justice, the Senior Associate Chief Justice or the Associate Chief Justice, as the case may be.

The judges appointed with residence in the territory of Ville de Montréal may also reside in the districts of Laval and Longueuil.

(1.1) For the district of Longueuil, with residence in the territory of Ville de Longueuil or in its vicinity, one judge;

(2) For the district of Québec, with residence in the territory of Ville de Québec or in the immediate vicinity thereof, 30 judges, one of whom shall have special charge of the districts of Gaspé and Bonaventure, another of the district of Beauce, another of the district of Montmagny, another of the district of Arthabaska, another of the district of Kamouraska, another of the district of Charlevoix and another of the district of Roberval;

(3) For districts of Mégantic and Saint-François, with residence in the territory of Ville de Sherbrooke or in the immediate vicinity thereof, three judges;

(4) For the district of Trois-Rivières, with residence in the territory of Ville de Trois-Rivières or in its immediate vicinity, three judges;

(5) For the districts of Abitibi, Rouyn-Noranda and Témiscamingue, with residence at Amos or at Rouyn or in the immediate vicinity thereof, three judges;

(6) For the districts of Saint-François and Bedford, three judges, including two with residence at Sherbrooke or in the vicinity and one with residence at Cowansville or in the vicinity;

(7) For the districts of Hull, Labelle and Pontiac, with residence at Hull or in its immediate vicinity, four judges;

(7.1) For the district of Alma, with residence in Alma or in the immediate vicinity thereof, one judge;

(8) For the district of Chicoutimi, with residence at Chicoutimi or in its immediate vicinity, three judges;

(9) For the district of Rimouski, with residence, at the option of the judge, at Rimouski or Rivière-du-Loup or in the immediate vicinity thereof, one judge;

(10) For the district of Saint-Maurice, with residence at Shawinigan or its immediate vicinity, one judge;

(11) For the districts of Baie-Comeau and Mingan, with residence at Sept-Iles or in its immediate vicinity, one judge.

Such judges must administer justice in turn in each of the other districts of Québec, as instructed by the Chief Justice, of the Senior Associate Chief Justice or the Associate Chief Justice, as the case may be.

The Government, upon the recommendation of the Minister of Justice and with the consent of the Chief Justice, may authorize a judge to reside at a place other than that provided for in this section.

R. S. 1964, c. 20, s. 27; 1966, c. 7, s. 3; 1966-67, c. 18, s. 3; 1968, c. 15, s. 2; 1970, c. 9, s. 1; 1971, c. 14, s. 2; 1971, c. 8, s. 6; 1973, c. 13, s. 7; 1974, c. 11, s. 14; 1975, c. 10, s. 4; 1976, c. 8, s. 3; 1977, c. 17, s. 5; 1977, c. 17, s. 6; 1979, c. 15, s. 5; 1982, c. 58, s. 82; 1984, c. 26, s. 38; 1984, c. 46, s. 34; 1985, c. 29, s. 32; 1986, c. 95, s. 332; 1987, c. 50, s. 3; 1988, c. 21, s. 18; 1989, c. 45, s. 4; 1991, c. 70, s. 3; 1996, c. 2, s. 978.

33. (1) The judges to whom are assigned respectively the districts of Terrebonne, Beauharnois, Richelieu, Saint-Hyacinthe and Pontiac shall exercise their ordinary functions in any court wherein the judges of the court have jurisdiction, whenever their services are not required in their respective districts.

(2) One of the judges of the districts from which appeals are heard in the territory of Ville de Québec, may be called upon by competent authority to exercise his ordinary functions in the district of Québec, when such functions are not required in his district, and such judge shall reside in the territory of Ville de Québec.

R. S. 1964, c. 20, s. 28; 1996, c. 2, s. 979.

34. Whenever the despatch of judicial business in any district requires the services of more judges than there are in such district, the chief justice shall require one or more judges to discharge their duties temporarily in such district.

R. S. 1964, c. 20, s. 29.

35. All the powers which by any Act were vested in any judges or *quorum* of the Superior Court, in term or out of term, at the time of the coming into force of the Consolidated Statutes for Lower Canada, and which were by the said statutes vested in any such judge, have since been and are now, vested in any one judge of the court, so that one judge constitutes a quorum of the court and may hear and determine all causes and matters within the jurisdiction of the court, and exercise all the powers of the court with regard thereto.

R. S. 1964, c. 20, s. 32; 1995, c. 42, s. 5.

36. Any judge may continue and complete any matter commenced or continued by another, but shall not reverse any decision of such other judge, unless the decision be such that he might reverse it if it were his own.

The Chief Justice, the Senior Associate Chief Justice or, as the case may be, the Associate Chief Justice may order that a matter under advisement for more than six months be replaced on the roll to be completed by another judge.

Likewise, the chief justice of the Superior Court, the Senior Associate Chief Justice or the associate chief justice, as the case may be, may and has always had the power to sign a judgment rendered by a judge since deceased, provided that he be satisfied that the text of the judgment presented to him to be signed is in conformity with the judgment which has been rendered.

R. S. 1964, c. 20, s. 33; 1973, c. 13, s. 8.

37. In all proceedings commenced in vacation before one judge, it shall be competent, in case of the illness or absence of such judge, for any other judge to sit in his place and to exercise the power and authority which would have been exercised by the judge so ill or absent, had he continued to sit.

R. S. 1964, c. 20, s. 34.

38. Two or more judges discharging their duties in the same district may and shall, whenever the despatch of business requires, sit at the same time and at the same place, but in separate apartments, in term or in vacation, and each shall have jurisdiction to hear and determine all cases and matters submitted to him, and the same power as if he were the only judge sitting in such place.

R. S. 1964, c. 20, s. 35.

§ 2. — *General Powers of the Court*

39. As regards any unrepealed provisions of any Act in force in Québec at the time the Act 12 Victoria, Chapter 38, came into force, the Superior Court shall continue to be substituted for the Court of Queen's Bench, abolished by the said Act.

Such unrepealed provision shall continue to apply to the Superior Court, as it theretofore applied to the said Court of Queen's Bench.

Such superintending and reforming power and control shall continue to be vested in and assigned to the Superior Court and the judges thereof.

R. S. 1964, c. 20, s. 36.

§ 3. — *Sittings of the Court*

1988, c. 21, s. 19.

40. *(Repealed).*

1975, c. 10, s. 5; 1988, c. 21, s. 20.

41. *(Repealed).*

R. S. 1964, c. 20, s. 37; 1975, c. 7, s. 3; 1979, c. 15, s. 6; 1988, c. 21, s. 20.

42. *(Repealed).*

R. S. 1964, c. 20, s. 38; 1975, c. 7, s. 4; 1988, c. 21, s. 20.

43. *(Repealed).*

R. S. 1964, c. 20, s. 39; 1975, c. 7, s. 5; 1988, c. 21, s. 20.

44. *(Repealed).*

R. S. 1964, c. 20, s. 40; 1972, c. 11, s. 5; 1973, c. 13, s. 9; 1975, c. 98, s. 1; 1975, c. 7, s. 6.

45. *(Repealed).*

R. S. 1964, c. 20, s. 41; 1975, c. 7, s. 7; 1987, c. 92, s. 3; 1988, c. 21, s. 20.

46. *(Repealed).*

1970, c. 10, s. 3; 1988, c. 21, s. 20.

47. *(Repealed).*

1973, c. 13, s. 10; 1975, c. 10, s. 6; 1988, c. 21, s. 20.

48. *(Repealed).*

R. S. 1964, c. 20, s. 42; 1975, c. 7, s. 8; 1988, c. 21, s. 20.

CHAPTER J-2

CHAPITRE J-2

Judicature Act

Loi sur l’organisation judiciaire

Chapter Outline

Sommaire

11.3(2) Repealed: 1979, c.36, s.8

1978, c.32, s.9; 1979, c.36, s.8; 2024, c.18, s.8

Report by family counsellor, social worker

11.4(1) Upon *ex parte* application or on the judge's own motion a judge of the Family Division may direct a family counsellor, social worker, probation officer or other person to make a report concerning any matter that, in the opinion of the judge, is a subject of the proceeding.

11.4(2) A person directed to make a report under subsection (1) shall file a written report with the clerk together with a copy of the report for each party to the proceeding and for the judge, and the clerk shall cause a copy of the report to be served on each party to the proceeding, and a copy to be delivered to the judge.

11.4(2.1) The parties to the proceeding shall pay for the costs of the report made under subsection (1) in equal portions unless the judge of the Family Division directs that one party pay the cost in total or that the parties pay the cost in unequal portions as specified by the judge.

11.4(3) Notwithstanding any rule of evidence to the contrary, the contents of a report filed under subsection (2) shall be evidence in the proceeding.

11.4(4) A person filing a report under subsection (2) is a competent and compellable witness.

11.4(5) Any party, including the party calling the person as a witness, may cross-examine the person referred to in subsection (4).

11.4(6) The judge may order that a report filed under subsection (2) and any cross-examination of the person making the report shall be treated as confidential and shall not form part of the public record.

1978, c.32, s.9; 1979, c.36, s.8; 1980, c.28, s.3; 1997, c.3, s.1; 2024, c.18, s.9

11.3(2) Abrogé : 1979, ch. 36, art. 8

1978, ch. 32, art. 9; 1979, ch. 36, art. 8; 2024, ch. 18, art. 8

Rapport d'un conseiller familial, travailleur social ou agent de probation

11.4(1) À la suite d'une demande *ex parte* ou de sa propre initiative, un juge de la Division de la famille peut charger un conseiller familial, un travailleur social, un agent de probation ou toute autre personne de faire un rapport sur toute question qui, selon lui, a des liens avec la procédure.

11.4(2) La personne chargée de rédiger un rapport en vertu du paragraphe (1) doit déposer auprès du greffier un rapport écrit, plus une copie de ce rapport pour le juge et pour chacune des parties en cause; et le greffier doit en faire signifier une copie à chacune des parties en cause et en faire remettre une au juge.

11.4(2.1) Les parties en cause doivent payer les frais de préparation du rapport prévu au paragraphe (1) à parts égales, à moins que le juge de la Division de la famille n'ordonne le paiement de la totalité des frais par une des parties ou le paiement des frais à parts inégales par les parties selon les indications du juge.

11.4(3) Nonobstant toutes règles contraires en matière de preuve, le contenu d'un rapport déposé en vertu du paragraphe (2) constitue une preuve dans la procédure.

11.4(4) La personne qui dépose le rapport en vertu du paragraphe (2) est un témoin qualifié et contraignable.

11.4(5) Toute partie, y compris celle qui a fait assigner la personne mentionnée au paragraphe (4) en qualité de témoin, peut la contre-interroger.

11.4(6) Le juge peut ordonner que le rapport déposé en vertu du paragraphe (2) et tout contre-interrogatoire de l'auteur dudit rapport soient considérés comme confidentiels et par conséquent ne fassent pas partie du dossier public.

1978, ch. 32, art. 9; 1979, ch. 36, art. 8; 1980, ch. 28, art. 3; 1997, ch. 3, art. 1; 2024, ch. 18, art. 9

Commencement

Repealed: 2024, c.18, s.10

2024, c.18, s.10

11.5 Repealed: 2024, c.18, s.11

1978, c.32, s.9; 2024, c.18, s.11

Appeal in accordance with subsection 8(3)

Repealed: 2024, c.18, s.12

2024, c.18, s.12

11.51 Repealed: 2024, c.18, s.13

1981, c.36, s.9; 2023, c.17, s.129; 2024, c.18, s.13

Powers of Lieutenant-Governor in Council

11.6 The Lieutenant-Governor in Council may prescribe that with respect to any judicial district only a designated portion of Schedules A and B is to apply.

1978, c.32, s.9

Role of Chief Justice

12(1) The Chief Justice of New Brunswick shall determine the general policy of the Court of Appeal and the Court of King's Bench in judicial matters.

12(2) The Chief Justice of New Brunswick and the Chief Justice of the Court of King's Bench shall coordinate and apportion the work of the judges in their respective Courts and all the judges shall comply with any orders and directions of the Chief Justices relating thereto.

12(3) An Associate Chief Justice shall carry out the duties assigned by the Chief Justice of the Court of King's Bench.

R.S., c.120, s.15; 1966, c.70, s.11; 1978, c.32, s.10; 2001, c.29, s.5; 2023, c.17, s.129

Responsibilities of the Chief Justice

12.01(1) For the purpose of ensuring the proper functioning of the Court, the Chief Justice of the Court of King's Bench is responsible for the administration of the judicial responsibilities of the Court of King's Bench in relation to the judiciary.

12.01(2) In carrying out the Chief Justice's duties under subsection (1) and any other provision of this Act,

Entrée en vigueur

Abrogé : 2024, ch. 18, art. 10

2024, ch. 18, art. 10

11.5 Abrogé : 2024, ch. 18, art. 11

1978, ch. 32, art. 9; 2024, ch. 18, art. 11

Appel conformément au paragraphe 8(3)

Abrogé : 2024, ch. 18, art. 12

2024, ch. 18, art. 12

11.51 Abrogé : 2024, ch. 18, art. 13

1981, ch. 36, art. 9; 2023, ch. 17, art. 129; 2024, ch. 18, art. 13

Pouvoirs du lieutenant-gouverneur en conseil

11.6 Le lieutenant-gouverneur en conseil peut décider de la partie des Annexes A et B qui s'applique dans une circonscription judiciaire en particulier.

1978, ch. 32, art. 9

Fonctions du juge en chef

12(1) Le juge en chef du Nouveau-Brunswick détermine la politique générale de la Cour d'appel et de la Cour du Banc du Roi en matière judiciaire.

12(2) Le juge en chef du Nouveau-Brunswick et le juge en chef de la Cour du Banc du Roi doivent répartir et coordonner le travail des juges dans leur cour respective et tous les juges doivent observer les ordonnances et directives des juges en chef qui s'y rapportent.

12(3) Un juge en chef adjoint doit exercer les fonctions que lui assigne le juge en chef de la Cour du Banc du Roi.

S.R., ch. 120, art. 15; 1966, ch. 70, art. 11; 1978, ch. 32, art. 10; 2001, ch. 29, art. 5; 2023, ch. 17, art. 129

Responsabilités du juge en chef

12.01(1) Pour assurer le bon fonctionnement de la Cour, le juge en chef de la Cour du Banc du Roi est chargé de l'administration des responsabilités judiciaires de la Cour du Banc du Roi relativement à la magistrature.

12.01(2) Dans l'exercice des fonctions que lui confèrent le paragraphe (1) et toute autre disposition de la

and without limiting the generality of that subsection or any other provision, the Chief Justice

(a) shall direct and supervise the assignment of judicial duties to individual judges and may alter those duties from time to time,

(b) shall determine the total annual, monthly and weekly workload of individual judges,

(c) may require a judge to act during the absence of another judge in the place of the judge who is absent,

(d) may designate the place where a judge is to hold sittings and the days on which he or she is to hold such sittings, and

(e) may designate the place where a judge is to establish and maintain an office.

12.01(3) Subject to subsections (4) and (5), the Chief Justice of the Court of King's Bench, with the consent of the Minister of Justice, may designate the place at which a judge is to establish residence.

12.01(4) If the Chief Justice of the Court of King's Bench designates a place at which a judge is to establish residence under subsection (3), the Chief Justice of the Court of King's Bench shall not designate a new place of residence for the judge without first obtaining the consent of the Minister of Justice and the judge.

12.01(5) If, before the commencement of this subsection, the Chief Justice of the Court of King's Bench designated a place at which a judge was to establish residence, the Chief Justice of the Court of King's Bench shall not designate a new place of residence for the judge without first obtaining the consent of the Minister of Justice and the judge.

2001, c.29, s.6; 2017, c.8, s.1; 2020, c.25, s.64; 2022, c.28, s.30; 2023, c.17, s.129; 2024, c.18, s.14

Council of Court of Appeal judges

12.1 A council comprised of the judges of the Court of Appeal shall, at least once in every year at a time and place fixed by the Chief Justice of New Brunswick and of which the Chief Justice shall give notice to the judges, assemble for the purpose of considering the operation of this Act and the Rules made under this Act.

1981, c.36, s.10; 2024, c.18, s.15

présente loi, et sans que soit limitée la portée générale de ce paragraphe ou de toute autre disposition, le juge en chef

a) est chargé de l'assignation des fonctions judiciaires à chacun des juges et exerce une surveillance sur l'assignation, et peut modifier ces fonctions lorsqu'il y a lieu,

b) détermine l'entière charge de travail annuelle, mensuelle et hebdomadaire de chacun des juges,

c) peut requérir d'un juge qu'il remplace un autre juge durant son absence,

d) peut désigner le lieu où un juge doit siéger ainsi que les jours où il doit y siéger, et

e) peut désigner le lieu où un juge doit établir et tenir un bureau.

12.01(3) Sous réserve des paragraphes (4) et (5), le juge en chef de la Cour du Banc du Roi peut, avec le consentement du ministre de la Justice, désigner le lieu où un juge doit établir sa résidence.

12.01(4) Si le juge en chef de la Cour du Banc du Roi désigne le lieu de résidence d'un juge en vertu du paragraphe (3), il ne peut par la suite désigner un nouveau lieu de résidence pour lui sans avoir d'abord obtenu son consentement et celui du ministre de la Justice.

12.01(5) Si le juge en chef de la Cour du Banc du Roi a désigné le lieu de résidence d'un juge avant l'entrée en vigueur du présent paragraphe, il ne peut par la suite désigner un nouveau lieu de résidence pour lui sans avoir d'abord obtenu son consentement et celui du ministre de la Justice.

2001, ch. 29, art. 6; 2017, ch. 8, art. 1; 2020, ch. 25, art. 64; 2022, ch. 28, art. 30; 2023, ch. 17, art. 129; 2024, ch. 18, art. 14

Conseil des juges de la Cour d'appel

12.1 Un conseil formé des juges de la Cour d'appel se réunit au moins une fois par an aux date, heure et lieu fixés par le juge en chef du Nouveau-Brunswick qui en avise les juges, afin d'examiner le fonctionnement de la présente loi et des règles établies sous son régime.

1981, ch. 36, art. 10; 2024, ch. 18, art. 15

Council of Court of King's Bench judges

2023, c.17, s.129

12.2 A council comprised of the judges of the Court of King's Bench shall, at least once in every year at a time and place fixed by the Chief Justice of the Court of King's Bench and of which the Chief Justice shall give notice to the judges, assemble for the purpose of considering the operation of this Act and the Rules made under this Act.

1981, c.36, s.10; 2023, c.17, s.129; 2024, c.18, s.16

Conseil des juges de la Cour du Banc du Roi

2023, ch. 17, art. 129

12.2 Un conseil formé des juges de la Cour du Banc du Roi se réunit au moins une fois par an aux date, heure et lieu fixés par le juge en chef de la Cour du Banc du Roi qui en avise les juges, afin d'examiner le fonctionnement de la présente loi et des règles établies sous son régime.

1981, ch. 36, art. 10; 2023, ch. 17, art. 129; 2024, ch. 18, art. 16

Special court of oyer and terminer

13 Special courts of oyer and terminer and general gaol delivery may be held when necessary for any judicial district, with the same powers, privileges, incidents and duties in all respects as to crimes and offences as hereinbefore provided, where such court is authorized under the written authority of the Chief Justice of the Court of King's Bench.

R.S., c.120, s.16; 1967, c.49, s.3; 1972, c.39, s.2; 1973, c.39, s.2; 1973, c.74, s.46; 1978, c.32, s.11; 2023, c.17, s.129

Cours extraordinaires d'*oyer and terminer*

13 Peuvent siéger pour une circonscription judiciaire, lorsque cela s'impose, des cours extraordinaires d'*oyer and terminer and general gaol delivery*, qui ont les mêmes pouvoirs, privilèges, accessoires et fonctions à tous égards en ce qui concerne les crimes et infractions ainsi qu'il est prévu ci-dessus, lorsque la convocation de cette Cour est autorisée en vertu d'une autorisation écrite du juge en chef de la Cour du Banc du Roi.

S.R., ch. 120, art. 16; 1967, ch. 49, art. 3; 1972, ch. 39, art. 2; 1973, ch. 39, art. 2; 1973, ch. 74, art. 46; 1978, ch. 32, art. 11; 2023, ch. 17, art. 129

CHAMBERS

Repealed

14 Repealed: 1978, c.32, s.12

R.S., c.120, s.17; 1978, c.32, s.12

AUDIENCES EN CABINET

Abrogé

14 Abrogé : 1978, ch. 32, art. 12

S.R., ch. 120, art. 17; 1978, ch. 32, art. 12

Chambers sitting, appeal

15(1) A judge appointed to the Court of King's Bench sitting in Chambers may, with the consent of the parties, hear and determine any action in that Court in which no jury is demanded, whether the action has or has not been entered for trial, and all officers who formerly attended at non-jury Circuits shall attend at Chambers upon any such trial, if required so to do by the judge.

15(2) A judge of the Court of Appeal, sitting in Chambers, has and may exercise the same jurisdiction in respect to matters assigned to the Court of King's Bench as may be exercised by a judge of the Court of King's Bench in Chambers.

15(3) Subject to subsection 8(3.1), all judgments, rules, decisions and orders given, pronounced, granted or

Audiences en cabinet, appel

15(1) Un juge nommé à la Cour du Banc du Roi siégeant en cabinet peut, du consentement des parties, entendre et juger toute action soumise à cette Cour, pour laquelle aucun jury n'est exigé, que l'action ait été ou non mise au rôle pour être instruite et tous les fonctionnaires qui avaient précédemment assisté à des sessions de circuit sans jury doivent être présents en cabinet lors d'une telle audition, si le juge l'exige.

15(2) Un juge de la Cour d'appel siégeant en cabinet, possède et peut exercer dans les questions attribuées à la Cour du Banc du Roi, la même compétence que celle qu'un juge en cabinet de cette dernière Cour peut exercer.

15(3) Sous réserve du paragraphe 8(3.1) tous les jugements, toutes les décisions et toutes les ordonnances que prononce, prend ou rend un juge en application des para-

RSNL1990 CHAPTER J-4

JUDICATURE ACT

Amended:

1991 c39; 1993 c41; 1993 c53 s17; 1995 c6; 1996 cJ-1.1 s194;
1997 c43 s1; 1998 c6 s16; 1999 c37; 2001 cN-3.1 s2; 2001 c42 s24; 2004 c36 s20; 2006 c40 s21;
2008 c28; 2009 c16; 2010 c29;
2011 cA-4.01 s37; 2013 c16;
2016 c37 (s2 – not in force – not included); 2017 cC37.002 s46;
2018 cC-12.3 s122; 2021 cA-4.02 s43; 2022 c4

CHAPTER J-4

AN ACT RESPECTING THE SUPREME COURT AND PROCEDURE IN THAT COURT

Analysis

Rep. by 2017 cC37.002 s46

17. [Rep. by 2017 cC37.002 s46]

2017 cC37.002 s46

Back to Top

Rep. by 2017 cC37.002 s46

18. [Rep. by 2017 cC37.002 s46]

2017 cC37.002 s46

Back to Top

Rep. by 2017 cC37.002 s46

19. [Rep. by 2017 cC37.002 s46]

2017 cC37.002 s46

Back to Top

Rep. by 2017 cC37.002 s46

20. [Rep. by 2017 cC37.002 s46]

2017 cC37.002 s46

PART II
THE SUPREME COURT

2017 cC37.002 s46

Division 1
General Provisions

2009 c16 s1

Back to Top

Rep. by 2017 cC37.002 s46

20.1 [Rep. by 2017 cC37.002 s46].

2017 cC37.002 s46

Back to Top

Supreme Court

21. (1) The court consists of

(a) a chief justice, who shall be called the Chief Justice of the Supreme Court;

(b) an associate chief justice, who shall be called the Associate Chief Justice of the Supreme Court; and

(c) the number of other judges as prescribed in the regulations.

(2) The Chief Justice, the Associate Chief Justice and the judges referred to in paragraph (1)(c) shall collectively be called the judges of the Supreme Court.

(3) The court shall be composed of 2 divisions called the General Division and the Family Division.

(4) A judge who is not assigned to the Family Division under subsection 43.6(1) shall be considered to be assigned to the General Division.

(5) The Chief Justice and the Associate Chief Justice may hear and determine proceedings brought in the General Division and the Family Division and for that purpose the Chief Justice and the Associate Chief Justice are judges of the General Division and the Family Division.

2009 c16 s3; 2016 c37 s1; 2017 cC37.002 s46; 2022 c4 s1

Back to Top

Judicial centres

22. (1) Except as may be otherwise provided by order of the Lieutenant-Governor in Council, each of the following places shall be a judicial centre: Corner Brook, Gander, Grand Bank, Grand Falls-Windsor , Happy Valley-Goose Bay and St. John's .

(2) Each judge appointed to the court shall live and serve in the judicial centre that may be approved by the Lieutenant-Governor in Council upon the judge's appointment and shall not be transferred to live and serve in another judicial centre without the judge's consent.

(3) Each judge of the court shall maintain the judge's principal residence within an area of 50 kilometres by road from the judicial centre to which that judge has been appointed.

1986 c42 s22; 1993 c41 s1; 2017 cC37.002 s46; 2022 c4 s2

Back to Top

Jurisdiction

23. The court has jurisdiction over all civil and criminal proceedings that were within the jurisdiction of the Trial Division immediately before the commencement of this section, including all proceedings pending in the Trial Division.

2009 c16 s4 2017 cC37.002 s46

Back to Top

Single judge

24. Except where otherwise expressly provided by an Act, a proceeding in the court and all proceedings arising from that proceeding shall, where practicable and convenient, be heard, determined and disposed of before a single judge.

1986 c42 s24; 2017 cC37.002 s46

Back to Top

Same judge

25. All proceedings after the hearing or trial including the final order, with the exception of proceedings on appeal or by application for a new trial, shall, where practicable and convenient, be taken before the judge before whom the trial or hearing of the proceeding took place.

1986 c42 s25

Back to Top

Sitting apart

26. The judges of the court may sit separately and apart from the other judges at the same time to hear and determine a proceeding that may be heard by 1 or more judges, and the rising of 1 or more of the judges does not affect the right of the other judges to continue to sit.

1986 c42 s26; 2017 cC37.002 s46

Back to Top

Jurisdiction of judges

27. (1) Each judge may exercise the jurisdiction of the court in chambers, in court or as may be directed or authorized to be heard by the rules.

(2) A judge sitting in the court, in chambers or in a manner directed or authorized by the rules constitutes the court.

2009 c16 s5; 2017 cC37.002 s46

Back to Top

Rep. by 2009 c16 s6

28. [Rep. by 2009 c16 s6]

2009 c16 s6

Back to Top

Substitution of judge

29. (1) Where a judge is absent, ill, or the office has become vacant, or where there is some other cause, and it is urgent to do so, another judge may sit for that judge to hear or dispose of a proceeding heard in part by that judge.

(2) Evidence that has been heard by a judge before the substitution of that judge under subsection (1) may be used by the judge who sits pursuant to subsection (1).

1986 c42 s29

Back to Top

Transfer of judge

30. (1) Where, in a proceeding, there is no judge of the court who is able or eligible to sit or it is desirable for good reason that no judge of the court should sit, the Chief Justice may request the Chief Justice of Newfoundland and Labrador to appoint one of the judges of the Court of Appeal to sit and act as a judge of the Supreme Court for the hearing of the proceeding.

(2) A judge appointed under subsection (1) shall attend at the hearing of the proceeding to which that judge has been appointed and while that judge sits and acts the judge has all the jurisdiction, power and authority of a judge of the court.

1986 c42 s30; 2001 cN-3.1 s2; 2017 cC37.002 s46

Back to Top

Retired judge's reserved decision

31. (1) When a judge has reserved a decision in a proceeding and retires, resigns, or is appointed to another court, that judge may, within 6 months after the retirement, resignation or appointment, give the decision as if that judge were still a judge.

(2) A decision given under subsection (1) is of the same effect as if the judge had not retired, resigned or been appointed to another court.

1986 c42 s31 2022 c4 s3

Back to Top

Rehearing of decision

32. (1) When a judge who has reserved a decision in a proceeding

(a) dies without giving a decision;

(b) retires, resigns or is appointed to another court without having given the decision within the time set out in section 31; or

(c) does not give the decision within 12 months from the time it was reserved by that judge,

a judge may upon application order that the proceeding be retried or reheard by another judge.

(2) Upon the retrial or rehearing under subsection (1), the judge retrying or rehearing the proceeding may direct that the retrial or rehearing

(a) be upon a transcript of the court reporter's notes;

(b) be upon that transcript and additional evidence given orally or by affidavit;

(c) be upon that transcript and additional evidence given orally and by affidavit;

(d) be upon new evidence; or

(e) otherwise.

(3) The judge presiding at the retrial or rehearing may give direction as to the disposition of the costs of the original trial or hearing and the cost of obtaining and providing copies of the transcript of the court reporter's notes.

1986 c42 s32 2017 cC37.002 s46

Judicature Act

CHAPTER 240 OF THE REVISED STATUTES, 1989

as amended by

1989, c. 20, s. 1; 1992, c. 16, ss. 30-68; 1996, c. 23, ss. 10, 11;
1997 (2nd Sess.), c. 5; 1998, c. 12, ss. 3-10; 2000, c. 28, s. 55;
2003 (2nd Sess.), c. 1, s. 26; 2008, c. 60; 2009, c. 17; 2019, c. 17

Published by Authority of the Speaker of the House of Assembly
Halifax

(2) The Chief Justice of the Supreme Court shall have precedence next after the Chief Justice of Nova Scotia over all other judges of the Court.

(3) The Associate Chief Justice of the Supreme Court shall have precedence next after the Chief Justice of the Supreme Court over all other judges of the Court.

(3A) The Associate Chief Justice of the Supreme Court (Family Division) shall have precedence next after the Associate Chief Justice of the Supreme Court over all other judges of the Court.

(4) The other judges of the Court of Appeal shall have precedence next after the Associate Chief Justice of the Supreme Court (Family Division) according to seniority of appointment.

(5) The other judges of the Supreme Court shall have precedence next after the judges of the Court of Appeal according to seniority of first appointment to a court pursuant to section 96 of the *Constitution Act, 1867*. R.S., c. 240, s. 22; 1992, c. 16, s. 49; 1997 (2nd Sess.), c. 5, s. 4.

Acting Chief Justices and judges

23 (1) In the absence or incapacity of the Chief Justice of Nova Scotia or if such office is vacant, the next senior judge, other than a supernumerary judge of the Court of Appeal shall have and exercise the powers and perform the duties of the Chief Justice of Nova Scotia.

(2) In the absence or incapacity of a judge of the Court of Appeal or in case of a vacancy in the Court of Appeal, the Chief Justice of Nova Scotia may designate a judge of the Supreme Court to act as a judge of the Court of Appeal.

(3) In the absence or incapacity of the Chief Justice of the Supreme Court or if such office is vacant, the Associate Chief Justice of the Supreme Court shall have and exercise the powers and perform the duties of the Chief Justice.

(3A) In the absence or incapacity of the Chief Justice of the Supreme Court and the Associate Chief Justice of the Supreme Court or if such offices are vacant, the Associate Chief Justice (Family Division) shall have and exercise the powers and perform the duties of the Chief Justice.

(4) In the absence or incapacity of the Chief Justice of the Supreme Court, the Associate Chief Justice of the Supreme Court and the Associate Chief Justice of the Supreme Court (Family Division) or if such offices are vacant, the next senior judge, other than a supernumerary judge, of the Supreme Court shall have and exercise the powers and perform the duties of the Chief Justice. R.S., c. 240, s. 23; 1992, c. 16, s. 50; 1997 (2nd Sess.), c. 5, s. 5.

Attendance at meetings

24 The judges of the Court are authorized from time to time to attend meetings, on the call of either the Chief Justice of Nova Scotia or the Chief Justice of the Supreme Court, for the purpose of considering the operation of this Act or any other matters relating to the administration of justice. R.S., c. 240, s. 24; 1992, c. 16, s. 51.

JUDICIAL DISTRICTS

Descriptions of districts and resident judges

25 **(1)** The Province consists of the following judicial districts:

(a) Cape Breton District, consisting of the counties of Cape Breton, Inverness, Richmond and Victoria;

(b) Central District, consisting of the counties of Antigonish, Colchester, Cumberland, Guysborough and Pictou and the Municipality of the District of East Hants;

(c) Halifax District, consisting of the County of Halifax;

(d) Southwestern District, consisting of the Counties of Annapolis, Digby, Kings, Lunenburg, Queens, Shelburne and Yarmouth and the Municipality of the District of West Hants.

(2) There shall be for each judicial district at least two judges of the Supreme Court designated as resident judges.

(3) Subject to subsection (4), the resident judges shall be designated by the Chief Justice of the Supreme Court after consultation with the Attorney General.

(4) A judge of the Supreme Court who was, immediately prior to the coming into force of this subsection, a judge of a county court is deemed to be designated as a resident judge for the judicial district in which that county court would be located but for its abolition.

(5) A designation of a judge pursuant to or deemed by this Section shall not be changed or rescinded except with the consent of that judge.

(6) A resident judge shall reside within the judicial district for which the judge is designated. 1992, c. 16, s. 52.

Power to establish justice centres and areas

26 The Minister of Justice may establish justice centres and for each the justice centre area it serves. 1996, c. 23, s. 11.

OATH OF JUSTICES

Oath of office

27 **(1)** Before assuming the duties of his office, a judge of the Court shall take the following oath:

> I do solemnly and sincerely promise and swear, that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as . . . . . So help me God.

(2) The oath shall be administered by the Lieutenant Governor or such person as is appointed by him to administer the same or by any person who is appointed by the Governor General to administer oaths of office. R.S., c. 240, s. 27.

SESSIONS AND SITTINGS

Sessions and sittings

28 Subject to the Rules, the Supreme Court and the judges thereof shall have power to sit and act at any time and at any place for the transaction of any part of the business of the Supreme Court, or of a judge, or for the discharge of any duty which by any statute or otherwise is required to be discharged. R.S., c. 240, s. 28; 1992, c. 16, s. 54.

Rules

29 The judges of the Supreme Court or a majority of them, in addition to any other such power granted to them by this Act, may make rules respecting sessions, sittings or circuits of the Supreme Court and any matter relating thereto. R.S., c. 240, s. 29; 1992, c. 16, s. 54.

Special sittings

30 **(1)** Whenever it appears necessary for the disposal of any proceeding in any county, the Supreme Court may order special sittings of the Supreme Court to be held in such county for the trial and disposal of such proceeding.

(2) The judge presiding at such sittings may hear and determine any proceeding which may be disposed of by a judge sitting in court or chambers. R.S., c. 240, s. 30; 1992, c. 16, s. 54.

Extension and adjournment of sittings

31 The presiding judge may from time to time in his discretion extend and adjourn any sittings for such time as he deems necessary for the disposal of any proceeding on the docket. R.S., c. 240, s. 31.

Delay of sittings

32 If a judge is prevented for any reason from arriving at the place appointed for holding sittings on the day fixed for holding the same, the sheriff shall

This Act is current to December 10, 2024

See the Tables of Legislative Changes for this Act's legislative history, including any changes not in force.

SUPREME COURT ACT

[RSBC 1996] CHAPTER 443

Contents

Definitions

1 In this Act:

"associate judge" means an associate judge of the court;

"court" means the Supreme Court of British Columbia;

"judge" means a judge of the court;

"judicial district" means a judicial district defined by this Act;

"order" includes a judgment and a decree;

"proceeding" includes an action, suit, cause, matter, appeal, petition proceeding or requisition proceeding;

"registry" means an office of the Supreme Court in a judicial district.

Supreme Court of British Columbia

2 (1) The Supreme Court of British Columbia is continued under the name and style of the "Supreme Court of British Columbia".

(2) The court consists of

(a) a Chief Justice, who is called "Chief Justice of the Supreme Court",

(b) an Associate Chief Justice, and

(c) 95 other judges.

(3) The court has for each office established under subsection (2) an additional office of supernumerary judge.

(4) The judges appointed to the offices established under subsections (2) and (3) are and are to be called "judges of the Supreme Court".

(5) For the office of Chief Justice, there is, subject to subsection (2), an additional office of judge that the Chief Justice may elect, under the *Judges Act* (Canada), to hold.

(6) The court is properly constituted despite a vacancy in the office of Chief Justice, of Associate Chief Justice or of a judge.

Powers of Chief Justice

2.1 (1) The Chief Justice has responsibility for

(a) the administration of the judges of court, and

(b) the administration of associate judges, registrars and district registrars.

(2) Powers of the Chief Justice may be delegated to the Associate Chief Justice.

(3) If the Chief Justice and the Associate Chief Justice are absent or unable to act, the powers of the Chief Justice may be exercised by the next senior non-supernumerary judge who resides in the judicial district of Vancouver Westminster.

(4) Each judge, associate judge, registrar and district registrar must, as soon as practicable after being appointed, reside at the place or within the area approved in writing by the Chief Justice.

(5) Before giving approval under subsection (4), the Chief Justice must consult with the Attorney General.

(6) A judge, associate judge, registrar or district registrar must not change their residence from the place or area referred to in subsection (4) unless

(a) the judge, associate judge, registrar or district registrar, as applicable, consents to the move, and

(b) the Chief Justice approves the move.

(7) Before giving approval under subsection (6), the Chief Justice must consult with the Attorney General.

(8) The Chief Justice may direct that a judge, associate judge, registrar or district registrar sit at a location other than the one in which the judge, associate judge, registrar or district registrar resides.

(9) The Chief Justice may require a judge, associate judge, registrar or district registrar to attend a meeting, conference or seminar for a purpose relating to the administration of justice.

Powers and privileges

3 (1) The Chief Justice, Associate Chief Justice and judges have all the powers, rights, incidents, privileges and immunities of a judge of a superior court of record, and all other powers, rights, incidents, privileges and immunities that on March 29, 1870, were vested in the Chief Justice and the other justices of the court.

(2) The court may be held before the Chief Justice or before any one of the judges.

Precedence

4 (1) The Chief Justice and the Associate Chief Justice have the rank and precedence set out in section 7 of the *Court of Appeal Act*.

(2) The judges have rank and precedence immediately after the most junior justice of the Court of Appeal, and among themselves, according to the seniority of their appointment to the court.

(3) Those judges of the County Courts who were appointed on the occasion of the merger of the County Courts and Supreme Court as a result of the enactment of this Act, have rank and precedence after all judges then holding office, and among themselves, after the Chief Judge of the County Courts, according to the seniority of their first appointment to a County Court.

Repealed

4.1 [Repealed 2018-36-11.]

Repealed

5 [Repealed 2018-36-11.]

Powers after leaving office — judges

6 (1) A judge who resigns the judge's office, is appointed to another court or ceases to hold office under section 99 (2) of the *Constitution Act, 1867*, may, after the resignation, appointment or ceasing to hold office, give judgment in a proceeding the judge heard while holding office, and the judgment is effective as though the judge still held office.

(2) A judge who is appointed to another court may continue with the hearing of any proceeding of which the judge was seized, and the jurisdiction to hear the proceeding and give judgment is effective as though the judge still held office.

Seal

7 (1) The court must have a seal bearing Her Majesty's Royal Arms and the name "Supreme Court of British Columbia" and other words the Attorney General considers necessary.

(2) The seal is to be used by the court as the occasion requires.

(3) A print of the seal stamped on a document requiring a seal of the court is, for all purposes, deemed to be an impression of the seal of the court.

Judicial districts

8 (1) Judicial districts are constituted by counties, as defined by the *County Boundary Act*, such that:

(a) the County of Victoria is a judicial district under the name of the "Victoria Judicial District";

(b) the County of Nanaimo is a judicial district under the name of the "Nanaimo Judicial District";

(c) and (d) [Repealed 1997-28-17.]

(d.1) the County of Vancouver and the County of Westminster are collectively a judicial district under the name of the "Vancouver Westminster Judicial District";

(e) the County of Yale is a judicial district under the name of the "Yale Judicial District";

(f) the County of Cariboo is a judicial district under the name of the "Cariboo Judicial District";

(g) the County of Kootenay is a judicial district under the name of the "Kootenay Judicial District";

(h) the County of Prince Rupert is a judicial district under the name of the "Prince Rupert Judicial District".

(2) and (3) [Repealed 2013-7-30.]

(4) [Repealed 2002-37-21.]

(5) [Repealed 2018-36-11.]

Jurisdiction and sittings

9 (1) The court continues to be a court of original jurisdiction and has jurisdiction in all cases, civil and criminal, arising in British Columbia.

(2) The court may sit and act, at any time and at any place, for the transaction of any part of its business, civil or criminal, or for the discharge of any duty.

(2.1) Without limiting subsection (2), and despite any rule of law or enactment to the contrary, any criminal or civil matter that under any rule of law or enactment is to be or must be heard, or that an accused or a party is entitled to have heard, by the court in one of the County of Vancouver or the County of Westminster may be heard at any place within the Vancouver Westminster Judicial District that the court appoints.

(3) Subject to the direction of the Chief Justice, the court must sit in each place where there is a registry of the court as often as is necessary for the reasonable dispatch of civil trials and other business.

(4) The registrar must prepare a calendar of the dates when the court proposes to sit in any place to be published in the registry located there.

Repealed

10 [Repealed 2018-36-11.]

Appointment of associate judges

11 (1) On the recommendation of the Attorney General after consultation with the Chief Justice, the Lieutenant Governor in Council may appoint one or more associate judges of the court.

(2) A person must not be appointed as an associate judge unless that person is a member in good standing of the Law Society of British Columbia at the time of appointment.

(3) An associate judge is entitled to the remuneration, allowances and benefits established under the following sections of the *Judicial Compensation Act*, as those sections apply to Provincial Court judges:

(a) and (a.1) [Repealed 2023-47-3.]

(a.2) section 5.1 (3), (4) and (6) *[Lieutenant Governor in Council may accept all recommendations]*;

(a.3) section 6 (2) to (6) *[reports before the Legislative Assembly]*;

(b) section 8 *[salary of judges]*;

(c) section 10 *[expenses reimbursed]*;

(d) section 11 *[vacation leave]*;

(e) section 12 *[leave of absence]*;

(f) section 13 *[sickness or disability benefit plan]*.

Associate judges electing senior status

11.1 (1) On or after reaching 55 years of age, an associate judge with at least 10 years' service as an associate judge may elect to hold office part time as a senior associate judge under this section, with judicial duties assigned by the Chief Justice.

(2) Unless otherwise approved by the Chief Justice, an associate judge who wishes to elect senior status under subsection (1) must give notice to the Chief Justice and the Attorney General at least 6 months before the date on which the associate judge wishes to cease full time service.

(3) The Chief Justice may specify the form and manner in which notice is to be given under subsection (2).

(4) An election of senior status under subsection (1) is irrevocable once the associate judge begins service as a senior associate judge under subsection (1), and the senior associate judge may not resume full time service.

(5) The number of sitting days in each year of a senior associate judge's service is calculated according to the following formula:

$$\frac{\text{PT annual salary}}{\text{FT annual salary}} \times 1.25 \times \text{FT sitting days} = \text{number of sitting days}$$

where

PT annual salary	is the annual salary of the senior associate judge,
FT annual salary	is the annual salary of an associate judge who has not elected senior status under this section, and
FT sitting days	is the annual number of sitting days, set by the Chief Justice, of an associate judge who has not elected senior status under this section.

Term of office of associate judge

11.2 (1) Subject to this Act, an associate judge holds office during good behaviour.

(2) An associate judge may resign by submitting to the Attorney General and the Chief Justice a notice of resignation in writing that states the effective date of the resignation, and the resignation becomes effective on that date.

(3) An associate judge ceases to hold office as an associate judge on the earliest of the following:

(a) the end of the month in which the associate judge reaches 75 years of age;

(b) 7 years from the date that the associate judge elects senior status and ceases full time service;

(c) the effective date of a resignation submitted under subsection (2).

Duties and powers of associate judge

11.3 (1) Associate judges must devote themselves exclusively to judicial duties and must not engage, directly or indirectly, in any other occupation, profession or business.

(2) Subject to the limitations of section 96 of the *Constitution Act, 1867*, an associate judge has the same jurisdiction under any enactment or the Rules of Court as a judge in chambers unless, in respect of any matter, the Chief Justice has given a direction that an associate judge is not to exercise that jurisdiction.

(3) Wherever a power is given to the registrar, a district registrar or a deputy district registrar under an enactment, that power may be exercised by an associate judge.

(4) An associate judge may administer an oath.

(5) An action must not be brought against an associate judge for damages for anything done or omitted in good faith by the associate judge

(a) in the performance or intended performance of any duty, or

(b) in the exercise or intended exercise of any power.

(6) Subsection (5) does not absolve the government from vicarious liability for an act or omission for which the government would be vicariously liable if subsection (5) were not in force.

Powers after leaving office — associate judges

11.4 An associate judge who resigns an appointment as associate judge or who is appointed as a judge may, within 180 days after the resignation or appointment, give judgment in a proceeding the associate judge heard while holding office, and the judgment is effective as though the associate judge still held office.

Pensions for associate judges

12 (1) Subject to this section, an associate judge is entitled to the pension benefits established under sections 16 to 24 of the *Judicial Compensation Act*.

(2) For purposes of giving effect to subsection (1),

(a) "December 1, 2002" is substituted for "January 1, 2001" wherever it appears in sections 16 to 24 of the *Judicial Compensation Act*, and

(b) sections 16 to 24 of the *Judicial Compensation Act* are to be read with necessary changes.

Pensions for senior associate judges

12.1 (1) This section applies to associate judges who have elected senior status under section 11.1.

(2) In this section:

"pension plan rules" means the rules of the Public Service Pension Plan;

"Public Service Pension Plan" means the Public Service Pension Plan continued under the Public Service Pension Plan Joint Trust Agreement;

"Public Service Pension Plan Joint Trust Agreement" means the agreement established under section 18 of Schedule C of the *Public Sector Pension Plans Act*.

(3) Despite section 18 of the *Judicial Compensation Act*, a senior associate judge is not entitled to make contributions or have contributions made on the senior associate judge's behalf to the Public Service Pension Plan in respect of service as a senior associate judge.

(4) A senior associate judge is, on the date that the associate judge's full time service ceases, entitled to receive a pension under the Public Service Pension Plan in accordance with the pension plan rules and with Part 3 of the *Judicial Compensation Act*, as that Part applies to Provincial Court judges, and the cessation of full time service is deemed to be a termination of the senior associate judge's employment, but only for the purposes of those pension plan rules.

(5) Service as a senior associate judge does not, for any purpose, count as contributory service or pensionable service.

Registrars

13 (1) A registrar and one or more district registrars, deputy district registrars and persons necessary to assist them may be appointed under the *Public Service Act*.

(2) The registrar, district registrars and deputy district registrars may carry out the duties assigned to a registrar by the rules and under any other enactment.

(3) The registrar may appoint a person to act temporarily as a district registrar or a deputy district registrar.

(4) Registrars and district registrars must devote themselves exclusively to judicial duties and must not engage, directly or indirectly, in any other occupation, profession or business.

Trial and subsequent proceedings

14 (1) All proceedings in the court and all business arising from those proceedings, if practicable and convenient, must be heard, determined and disposed of before a single judge.

(2) All proceedings subsequent to the hearing or trial including the final order, except as otherwise provided, and on a rehearing must, if practicable and convenient, be before the judge before whom

the trial or hearing took place.

Transfer to Provincial Court

15 A judge or associate judge may transfer proceedings to the Provincial Court of British Columbia if

(a) the proceedings are within the jurisdiction of the Provincial Court under the *Small Claims Act*,

(b) a party to the proceedings applies to the judge or associate judge, or all parties to the proceedings agree to the transfer, and

(c) the judge or associate judge considers it appropriate to do so.

Power to reserve decision

16 A judge, associate judge, registrar or district registrar may reserve their own decision.

Issues may be submitted to jury

17 Nothing in an Act or the rules takes away or prejudices the right of a party to an action to have the issues for trial by jury submitted and left by the judge to the jury before whom the party comes for trial, with a proper and complete direction to the jury on the law and the evidence applicable to the issues.

Vexatious proceedings

18 If, on application by any person, the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person or giving the person an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.

Court administration

18.1 (1) The Attorney General is responsible for the provision, operation and maintenance of court facilities, registries and administrative services.

(2) A chief administrator of court services, an administrator of court services for each registry and other persons necessary to carry out this Act and the duties assigned to a registry may be appointed under the *Public Service Act*.

(3) Subject to the direction of the Attorney General, and to the direction of the Chief Justice in matters of judicial administration and the use of courtroom facilities, the chief administrator of court services must direct and supervise registries and administrative services for the court.

(4) The chief administrator of court services, for the purposes of carrying out the duties of that person under this Act, may disclose to the Chief Justice information regarding the conduct of persons appointed under subsection (2) in the performance of their duties under this Act.

The King's Bench Act

being

Chapter 28 of the *Statutes of Saskatchewan, 2023*
(effective May 17, 2023).

(iii) a third party against a subsequent party; or

(iv) a subsequent party against any other subsequent party;

(b) a defence or counterclaim of a defendant, third party or subsequent party to a claim or demand mentioned in clause (a);

(c) a reply to a defence or counterclaim mentioned in clause (b); and

(d) a rejoinder to a reply mentioned in clause (c); (« *plaidoirie* »)

"Provincial Court" means the Provincial Court of Saskatchewan; (« *Cour provinciale* »)

"public guardian and trustee" means the public guardian and trustee as defined in *The Public Guardian and Trustee Act*; (« *tuteur et curateur public* »)

"registrar" means the Registrar of the Court of King's Bench appointed pursuant to section 3 of *The Court Officials Act, 2012*; (« *registraire* »)

"rules of court" means the rules of court made pursuant to section 6-2, and includes rules of court made by the judges of the court pursuant to any other Act; (« *règles de procédure* »)

"sheriff" means a sheriff, a deputy sheriff or a sheriff's bailiff appointed pursuant to section 3 of *The Court Officials Act, 2012*; (« *shérif* »)

"will" includes:

(a) a testament;

(b) a codicil;

(c) an appointment by will or by writing in the nature of a will in the exercise of a power; and

(d) any other testamentary disposition. (« *testament* »)

2023, c 28, s.1-2.

PART 2
The Court and Judges

Continuation of court

2-1(1) His Majesty's Court of King's Bench for Saskatchewan is continued as the superior court of record in and for Saskatchewan that has civil and criminal jurisdiction.

(2) During the reign of a king, the court shall be called His Majesty's Court of King's Bench for Saskatchewan and, during the reign of a queen, the court shall be called Her Majesty's Court of Queen's Bench for Saskatchewan.

(3) In all documents and proceedings in the court, the court is sufficiently designated by the words "In the King's Bench" or "In the Queen's Bench".

(4) The Lieutenant Governor in Council may determine the seal to be used in the court.

2023, c 28, s.2-1.

Judges

2-2(1) The court consists of:

(a) a chief justice, who is styled the Chief Justice of the King's Bench;

(b) an associate chief justice, who is styled the Associate Chief Justice of the King's Bench; and

(c) 36 other judges.

(2) The Lieutenant Governor may, by proclamation, increase or decrease the number of judges and, in the case of a decrease, may provide for the decrease to take effect when a vacancy occurs in the court.

(3) For each office of judge provided for by subsection (1) or by proclamation pursuant to subsection (2), there shall be the additional office of supernumerary judge.

(4) Each supernumerary judge shall carry out the judicial duties that the chief justice assigns to that supernumerary judge.

2023, c 28, s.2-2.

Duties of associate chief justice

2-3(1) The associate chief justice shall carry out the administrative duties that the chief justice assigns to the associate chief justice.

(2) If the chief justice is absent or unable to act, the powers and duties of the chief justice shall devolve on the associate chief justice, or, in the absence or inability to act of the associate chief justice, on a judge designated by the chief justice.

2023, c 28, s.2-3.

Oath of office

2-4 Before entering on the duties of office, a judge shall take the following oath, administered by the Lieutenant Governor, the chief justice or another judge:

I, _____ , do swear (*or* solemnly affirm) that I will well and truly serve our Sovereign Lord the King in the office of Chief Justice (*or* a Judge) of His Majesty's Court of King's Bench for Saskatchewan, and that I will duly and faithfully, and according to the best of my skill and knowledge, exercise the powers and trusts reposed in me as Chief Justice (*or* a Judge) of that court. (So help me God).

2023, c 28, s.2-4.

Residence of judges

2-5(1) Each judge shall reside at any judicial centre or other place in Saskatchewan that the chief justice directs.

(2) A judge, on taking up residence in accordance with a direction made pursuant to subsection (1), shall not be required to make a change of residence unless the judge consents to the change.

2023, c 28, s.2-5.

Family Law Division

2-6(1) The division of the court called the Family Law Division is continued.

(2) Family law proceedings brought in the court are to be brought in the Family Law Division.

(3) Subject to subsection (4), the chief justice shall assign 10 judges to act as judges of the Family Law Division.

(4) In a proclamation pursuant to subsection 2-2(2) increasing or decreasing the number of judges, the Lieutenant Governor may provide for an increase or decrease in the number of judges to be assigned to the Family Law Division.

(5) The chief justice may assign a judge of the Family Law Division to hear actions or matters outside the Family Law Division, but only if the assignment does not prevent that judge from spending the substantial majority of the judge's time hearing actions or matters in the Family Law Division.

(6) In addition to the judges assigned to the Family Law Division pursuant to subsection (3), the chief justice may, from time to time, assign any other judge to act as a judge of the Family Law Division.

2023, c 28, s.2-6.

Judges are justices of peace, etc., by virtue of office

2-7 Each judge is, by virtue of that office, a coroner, a justice of the peace and a judge of the Provincial Court, and is deemed to have been appointed to each of those offices.

2023, c 28, s.2-7.

PART 3
Jurisdiction and Powers

Jurisdiction of the court

3-1(1) The court has original jurisdiction throughout Saskatchewan, with full power and authority to consider, hear, try and determine actions and matters.

(2) Subject to this Act and the rules of court, the court may be held before one or more judges.

(3) Judges have jurisdiction throughout Saskatchewan.

(4) Every judge has jurisdiction to hear and determine any action or matter in the court, including actions or matters in the Family Law Division.

(5) On the direction of the Lieutenant Governor in a particular case, the court may exercise the jurisdiction and powers of the Lieutenant Governor as a visitor.

2023, c 28, s.3-1.

Ethical Principles for Judges

Principes de déontologie judiciaire

CJC
CCM
Canadian Judicial Council
Conseil canadien de la magistrature

Foreword

As the Canadian Judicial Council marks its 50th anniversary of service to Canadians, it is timely that we have revised and modernized *Ethical Principles for Judges*. From their first publication in 1998, these principles have laid out the ethical frame of reference to which all judges aspire: judicial independence, integrity and respect, diligence and competence, equality and impartiality.

Canada is fortunate to be served by a highly competent and skilled judiciary. Judges can face ethical questions as we go about our personal and professional lives. While the 1998 document served us well, and indeed was the model on which other judicial systems around the world relied, we understand that ethical considerations evolve and need to keep pace with society's expectations.

When I was appointed Chief Justice of Canada, I was pleased to learn that the Canadian Judicial Council had embarked on a public consultation exercise to hear firsthand from Canadians and our valued partners, what they expect of our judges. From those extensive consultations, and the tireless work of the Council's Judicial Independence and Appointment Process Committee, co-chaired by Chief Justice Martel D. Popescul and Chief Justice Deborah K. Smith, a new and refreshed document emerged.

Préface

L'édition revue et actualisée des *Principes de déontologie* judiciaire arrive à point nommé, alors que le Conseil canadien de la magistrature célèbre 50 ans de service à la population canadienne. Depuis la parution de la première édition en 1998, ces principes constituent le cadre de référence déontologique auquel tous les juges aspirent : l'indépendance judiciaire, l'intégrité et le respect, la diligence et la compétence, l'égalité et l'impartialité.

Le Canada a la chance d'être servi par une magistrature hautement compétente et qualifiée. Les juges sont parfois confrontés à des questions déontologiques dans leur vie personnelle et professionnelle. Bien que l'édition de 1998 nous ait bien servi, et qu'elle ait été prise pour modèle par d'autres systèmes judiciaires du monde entier, nous comprenons que les considérations d'ordre déontologique évoluent et qu'elles doivent s'adapter aux attentes de la société.

Lorsque j'ai été nommé juge en chef du Canada, j'ai été heureux d'apprendre que le Conseil canadien de la magistrature avait amorcé un processus de consultation publique pour entendre directement ce que la population canadienne et nos partenaires estimés attendent de nos juges. À la suite de ces vastes consultations et du travail inlassable du Comité sur l'indépendance judiciaire et le processus de nomination du Conseil, coprésidé par le juge en chef Martel D. Popescul et la juge en chef Deborah K. Smith, un nouveau document actualisé a pris forme. Je sais que le comité a examiné attentivement tous les commentaires qu'il a reçus, et je remercie personnellement toutes les personnes qui ont fait connaître leurs points de vue.

I know that the Committee carefully considered every comment received and I personally extend my thanks to every person who provided his or her views.

The revised *Ethical Principles* build on the original publication, and explore new and emerging issues relevant to our modern times: case management and settlement conferences, social media, interacting with self-represented litigants, professional development and the post-judicial role. While these principles are intended to assist judges with the ethical and professional questions they may confront, they are also written to provide the public with a better understanding of the judicial role.

I am proud of this document and proud of the dedication of those who developed it. It is my sincere hope that *Ethical Principles* will be consulted regularly by judges for years to come.

Sincerely,

The Right Honourable
Richard Wagner, P.C.

Chief Justice of Canada and
Chairperson of the Canadian
Judicial Council

Cette version révisée des *Principes de déontologie judiciaire* s'appuie sur l'édition originale et traite de questions nouvelles et naissantes qui ont rapport à nos temps modernes : la gestion des instances et les conférences de règlement, les médias sociaux, l'interaction avec les parties non représentées par un avocat, le perfectionnement professionnel, et le rôle des juges après leur départ de la magistrature. Ces principes visent à aider les juges à trouver réponse aux questions déontologiques et professionnelles qui peuvent se poser à la magistrature, mais ils sont aussi rédigés pour permettre au public de mieux comprendre le rôle des juges.

Je suis fier de ce document et fier du dévouement des personnes qui y ont travaillé. J'espère sincèrement que les juges consulteront régulièrement les *Principes de déontologie judiciaire* dans les années à venir.

Je vous offre mes meilleures salutations.

Le très honorable
Richard Wagner, c.p.

Juge en chef du Canada et
Président du Conseil canadien
de la magistrature

Table of Contents

Table des matières

Introduction

Purpose

1. *Ethical Principles for Judges [Ethical Principles]* provides ethical guidance for federally appointed judges. In doing so, it expresses a vision of what it means to be a judge. Taken together, the principles of independence, integrity and respect, diligence and competence, equality and impartiality define the judicial role. *Ethical Principles* was drafted with confidence that it would be read by judges and the public as an expression of the judiciary's highest ethical aspirations in the service of justice and the rule of law.

2. An independent and impartial judiciary is the right of all and constitutes a fundamental pillar of democratic governance, the rule of law and justice in Canada. Everyone needs and deserves impartial, competent, and respectful judges. All members of the judiciary commit to perform their role in such a manner so as to maintain the confidence of the public. The guidance that follows describes the high ethical standards that all judges strive to maintain in their professional and personal lives. While the overarching principles that guide the judiciary are largely immutable, evolving expectations of the public, societal developments and new understandings of issues relevant to the judiciary will serve to constantly inform the interpretation of *Ethical Principles* in the future.

Introduction

Objet

1. Les *Principes de déontologie judiciaire [Principes de déontologie]* offrent des conseils d'ordre déontologique aux juges de nomination fédérale. Ce faisant, ils expriment une vision de ce que cela représente que d'être un juge. Le rôle des juges est défini par les principes d'indépendance, d'intégrité et de respect, de diligence et de compétence, d'égalité et d'impartialité. Les Principes de déontologie se veulent l'expression des idéaux d'ordre déontologique les plus élevés auxquels aspirent les juges, au service de la justice et de la primauté du droit; c'est l'intention que devraient y lire les juges et le public.

2. Piliers fondamentaux de la gouvernance démocratique, de la primauté du droit et de la justice, l'indépendance et l'impartialité de la magistrature sont des droits reconnus à chacun. Toute personne doit et mérite d'être entendue par des juges impartiaux, compétents et respectueux. Tous les membres de la magistrature s'engagent à exercer leur charge de manière à préserver la confiance du public. Les recommandations qui suivent exposent les normes d'ordre déontologique élevées que les juges s'efforcent d'observer dans leurs fonctions professionnelles et dans leur vie personnelle. Si les grands principes qui guident les juges demeurent largement immuables, en revanche les attentes du public, la société elle-même et notre compréhension des questions qui touchent la fonction judiciaire évoluent, et cette évolution éclairera de façon constante l'interprétation des *Principes de déontologie* à l'avenir.

3. A judge must be and be seen to be free to decide honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone. Nothing in *Ethical Principles* can or is intended to limit or restrict this judicial independence in any manner. Judges have the duty to uphold and defend judicial independence, not as a privilege of judicial office but as the constitutionally guaranteed right of everyone to have their disputes heard and decided in a fair way by impartial and independent judges.

4. The ethical principles articulated in this document are aspirational. They are not intended to be a code of conduct that sets minimum standards. They are advisory in nature and are designed to (i) describe exemplary behaviour which all judges strive to maintain; (ii) assist judges with the difficult ethical and professional issues that confront them; and (iii) help members of the public better understand the judicial role. The guidance provided in *Ethical Principles* does not preclude reasonable disagreements about their application in particular cases or imply that any departure from them necessarily warrants disapproval. The ethical principles are intended to be applied in light of all of the relevant circumstances and consistently with the requirements of judicial independence and the law. They should not be viewed as an exhaustive expression of the ethical considerations that judges may face in their professional or personal lives.

3. Les juges doivent être libres et paraître libres de juger avec intégrité et impartialité sur le seul fondement du droit et de la preuve présentée, sans pressions ni influences extérieures et sans crainte d'ingérence de la part de qui que ce soit. Les *Principes de déontologie* ne sauraient limiter ou restreindre en aucune façon cette indépendance de la magistrature et ils ne visent pas à le faire. Les juges sont tenus de soutenir et de défendre l'indépendance de la magistrature, non parce qu'elle constitue un privilège rattaché à leur charge, mais parce que la Constitution garantit à quiconque le droit de voir son litige entendu et tranché de façon équitable par des juges impartiaux et indépendants.

4. Les principes d'ordre déontologique exposés dans ce document articulent un idéal à atteindre. Ils ne constituent pas un code de conduite imposant des normes minimales à suivre. Ce sont des recommandations ayant pour objectif (i) de décrire la conduite exemplaire que les juges s'efforcent d'observer; (ii) d'aider les juges à résoudre les épineuses questions d'ordre déontologique et professionnel auxquelles ils sont confrontés; et (iii) d'aider les membres du public à mieux comprendre la fonction judiciaire. Il n'est pas exclu que les recommandations énoncées dans les *Principes de déontologie* puissent faire l'objet d'interprétations divergentes raisonnables quant à leur application dans un cas donné; de plus, le fait d'énoncer ces recommandations n'implique pas qu'il y aurait nécessairement matière à réprobation si on s'en écartait. Les principes de déontologie doivent être appliqués au regard de toutes les circonstances pertinentes ainsi qu'en conformité avec le principe de l'indépendance de la magistrature et avec le droit. On ne saurait y voir l'énumération complète des questions éthiques auxquelles les juges peuvent faire face dans l'exercice de leurs fonctions ou dans leur vie personnelle.

Context

5. The Canadian Judicial Council [the CJC] has been attentive to judicial ethics for decades. It published *Commentaries on Judicial Conduct* in 1991. This was followed by *Ethical Principles for Judges [Ethical Principles 1998]*. It provided ethical guidance to judges aligned with a set of central principles and better informed the public about the high ideals which judges embrace and toward which they strive. While drawing heavily on existing resources, *Ethical Principles 1998* was the most comprehensive treatment of the subject at that time in Canada. Further, it was uniquely the work of Canadian judges. An extensive process of consultation within the judiciary and beyond ensured that *Ethical Principles 1998* was the subject of painstaking examination and vigorous debate. The intention was that Canadian judges would accept *Ethical Principles 1998* as reflective of their high ethical aspirations and would find it worthy of respect and deserving of careful consideration when facing ethical issues

Contexte

5. Le Conseil canadien de la magistrature [le Conseil] s'intéresse aux questions de déontologie judiciaire depuis des décennies. En 1991, il a publié des *Commentaires sur la conduite des juges*. Puis, a suivi les *Principes de déontologie judiciaire [Principes de déontologie de 1998]* qui a proposé un ensemble de principes fondamentaux pour guider les juges sur des questions d'ordre déontologique et mieux renseigner le public sur les normes élevées auxquelles les juges adhèrent et qu'ils s'efforcent d'observer. Les *Principes de déontologie de 1998*, qui puisaient abondamment aux sources existantes, représentaient néanmoins l'exposé le plus complet en cette matière jamais publié au Canada. De plus, ils étaient entièrement le fruit du travail de juges canadiens. De vastes consultations menées auprès de la magistrature et du public avaient permis de soumettre les *Principes de déontologie de 1998* à un examen minutieux et à un débat vigoureux. Cette démarche avait pour but d'assurer que les juges du Canada verraient dans les *Principes de déontologie de 1998* le reflet de leurs aspirations élevées en matière de déontologie, qu'ils les considéreraient comme un document digne de respect et leur accorderaient une attention soutenue lorsqu'ils seraient confrontés à des questions d'ordre déontologique.

6. Over the past twenty years *Ethical Principles 1998* has provided valuable ethical guidance to federally appointed judges in a broad range of complex circumstances. It has become a crucial resource in the training provided to judges upon appointment, and forms part of ongoing discussions in professional development settings throughout a judge's career. In addition, the publication of *Ethical Principles 1998* coincided with the establishment of an Advisory Committee on Judicial Ethics [Advisory Committee] to which specific ethical questions have been submitted by judges. The Advisory Committee continues to respond to these queries with advisory opinions that contribute to the ongoing review and elaboration of the subjects dealt with in *Ethical Principles 1998*. These opinions may also identify new issues that this version of *Ethical Principles* does not directly address. The Advisory Committee continues to ensure that help is readily available to judges looking for guidance.

6. Depuis deux décennies, les *Principes de déontologie de 1998* ont fourni aux juges de nomination fédérale des conseils précieux en matière déontologique dans un éventail de situations complexes. Les *Principes de déontologie* sont au cœur de la formation offerte aux juges à la suite de leur nomination, et ils sont examinés et discutés dans les programmes de perfectionnement professionnel auxquels participent les juges tout au long de leur carrière. Par ailleurs, la publication des *Principes de déontologie de 1998* a coïncidé avec la création d'un comité consultatif sur la déontologie judiciaire [le Comité consultatif] auquel les juges soumettent depuis des questions précises touchant la déontologie. Les avis que le Comité consultatif fournit en réponse à ces demandes contribuent à l'examen et à l'approfondissement continus des questions traitées dans les *Principes de déontologie de 1998*. Ils peuvent également contribuer à mettre en lumière des problèmes qui ne sont pas abordés directement dans la présente version des *Principes de déontologie*. Le Comité consultatif continue de veiller à ce que les juges qui recherchent des conseils puissent aisément recevoir de l'aide.

7. A document of this nature can never be viewed as the "final word" on such an important and complex subject. After more than twenty years from its initial publication, *Ethical Principles 1998* needed modernization to address significant societal changes, changes in the role of the judiciary, and the social context in which judges serve. In 2016, the revision of *Ethical Principles 1998* was commenced by the Judicial Independence and Appointment Process Committee of the CJC [Independence Committee], with input from Chief Justices and puisne judges from across Canada. As was done in 1998, broad consultations were conducted within the judiciary and beyond to ensure that *Ethical Principles* is responsive to the needs of judges and takes community expectations into account. The consultations included an on-line survey of issues relevant to judicial ethics and a series of meetings and dialogue with organizations representing the judiciary and other interested parties. Once a draft document was prepared it was made public and judges, judges' organizations, other professional organizations and members of the public were invited to provide comments and feedback. Throughout the project, the Independence Committee reviewed every submission and every proposed amendment, and incorporated into the final version of *Ethical Principles* many of the proposals and suggestions submitted to it.

7. De par sa nature, un document comme celui-ci ne saurait prétendre apporter une réponse définitive sur un sujet aussi important et complexe. Plus de vingt ans après leur publication, les *Principes de déontologie de 1998* étaient mûrs pour une mise à jour qui permette de traiter d'enjeux importants soulevés par l'évolution de la société, de la fonction judiciaire et du contexte social dans lequel les juges s'acquittent de leur charge. À partir de 2016, le Comité sur l'indépendance judiciaire et le processus de nomination du Conseil [Comité sur l'indépendance] s'est attelé à la tâche de réviser les *Principes de déontologie de 1998*, avec l'apport des juges en chef et des juges puînés de partout au Canada. Comme ce fut le cas en 1998, de vastes consultations ont été menées au sein de la magistrature et auprès du public afin que les *Principes de déontologie* répondent aux besoins des juges et tiennent compte des attentes du public. Ces consultations ont compris, entre autres, un sondage en ligne sur des questions de déontologie judiciaire, de même qu'une série de rencontres et d'échanges avec des organisations représentant la magistrature et d'autres parties intéressées. L'ébauche rédigée à la suite de ces consultations a été rendue publique, et les juges, les associations qui les représentent, des organismes professionnels et les membres du public ont été invités à présenter des commentaires. Tout au long du projet, le Comité sur l'indépendance s'est penché sur chacun des commentaires reçus et chacune des modifications proposées et a intégré dans la version définitive des *Principes de déontologie* bon nombre des propositions et suggestions qui lui avaient été soumises.

8. Today, judges' work includes case management, settlement conferences, judicial mediation, and frequent interaction with self-represented litigants. These responsibilities invite further consideration with respect to ethical guidance. In the same manner, the digital age, the phenomenon of social media, the importance of professional development for judges and the transition to post-judicial roles all raise ethical issues that were not fully considered twenty years ago. Judges are expected to be alert to the history, experience and circumstances of Canada's Indigenous peoples, and to the diversity of cultures and communities that make up this country. In this spirit, the judiciary is now more actively involved with the wider public, both to enhance public confidence and to expand its own knowledge of the diversity of human experiences in Canada today.

9. The format of *Ethical Principles 1998* is preserved. Each chapter is organized hierarchically, beginning with a Statement, followed by a set of Principles and then a series of Commentaries aligned with each Principle. At the highest level of abstraction, each Statement expresses a fundamental value or theme of judicial ethics. The Principles identify components of each Statement and articulate behaviours that would constitute the highest aspirations of an ethical judge with respect to that Principle. With occasional exceptions, the Statements and Principles are stated in 'declarative' language – essentially statements of what an ethical judge does or how an ethical judge acts, consistent with the goal of describing the attributes of an ethical judge. The Commentaries associated with each Principle provide explanations, context and further elucidation of the Principles, almost always in aspirational language, often using concrete examples.

8. De nos jours, les responsabilités des juges s'étendent à la gestion des instances ainsi qu'aux conférences de règlement et aux séances de médiation judiciaires. De plus, il arrive fréquemment que les juges doivent interagir avec des parties non représentées. Ces responsabilités appellent une nouvelle réflexion sur le soutien à apporter en matière déontologique. Parallèlement, d'autres phénomènes soulèvent des enjeux déontologiques qui n'avaient pas été pleinement considérés il y a vingt ans : l'arrivée de l'ère numérique, l'émergence des médias sociaux, l'importance du perfectionnement professionnel des juges et le passage de certains de ceux-ci à une autre carrière après leur départ de la magistrature. On attend des juges qu'ils soient sensibles et au fait de l'histoire, du vécu et de la réalité des peuples autochtones au Canada, ainsi que de la diversité des cultures et des communautés qui composent le pays. C'est dans cet esprit que la magistrature joue un rôle plus actif qu'auparavant auprès du public, aussi bien pour soutenir la confiance que le public accorde à la magistrature que pour approfondir sa connaissance de la diversité des expériences humaines au Canada.

9. L'organisation générale des matières établie dans les *Principes de déontologie de 1998* a été préservée. Structuré de façon hiérarchique, chaque chapitre commence par un Énoncé, suivi par des Principes auxquels succèdent une série de Commentaires liés à chacun des Principes. L'Énoncé exprime une valeur ou un thème fondamental de la déontologie judiciaire, à un niveau élevé d'abstraction. Les Principes exposent les éléments qui découlent de l'Énoncé et décrivent la conduite idéale vers laquelle tendrait le juge éthique au regard de ceux-ci. En règle générale, les Énoncés et les Principes sont rédigés de manière déclarative, énonçant essentiellement ce que fait un juge éthique ou comment il agit, l'objectif étant de décrire la conduite exemplaire d'un juge éthique. Quant aux Commentaires, ils servent à expliquer les Principes et à les mettre en contexte, presque toujours sous la forme de recommandations, et présentent souvent des exemples concrets.

10. When an ethical issue arises for a judge more than one principle may be relevant. The approach taken in *Ethical Principles* is to discuss the aspects of each Principle discretely, recognizing that multiple Principles and chapters of *Ethical Principles* may need to be considered in obtaining comprehensive guidance in the resolution of the ethical issue. The comprehensive Index, as well as links within electronic versions of *Ethical Principles*, will enable the reader to identify and access associated Principles and Commentaries.

11. The language adopted in this edition of *Ethical Principles* provides greater consistency of meaning between the English and French versions. *Ethical Principles* was co-drafted in English and French and each version is equally authoritative. As well, the document is written in gender-neutral language. Whenever pronouns are used, they are intended to be inclusive of all genders.

12. This edition of *Ethical Principles* also addresses circumstances associated with judges contemplating or undertaking post-judicial legal careers. In particular, it discusses unique ethical issues that may arise in the transition to post-judicial legal careers and those that continue after judges leave office. This guidance is provided to present and former judges for their benefit and with a view to maintaining public confidence in the judiciary.

10. Lorsqu'un juge fait face à une question d'ordre déontologique, il se peut que plus d'un principe entre en jeu. L'approche retenue dans les *Principes de déontologie* consiste à aborder de façon distincte les différents aspects de chaque principe; il est donc possible qu'il faille considérer plusieurs principes et consulter plus d'un chapitre des *Principes de déontologie* pour obtenir des conseils sur l'ensemble des éléments permettant de résoudre une question. L'index détaillé et les hyperliens insérés dans les versions électroniques des *Principes de déontologie* permettront au lecteur de repérer les principes pertinents et les commentaires qui s'y rapportent, et d'y accéder facilement.

11. La présente édition des *Principes de déontologie* assure une meilleure harmonisation des versions française et anglaise. Les *Principes de déontologie* ont fait l'objet d'une corédaction, et les versions anglaise et française ont la même valeur. De plus, le présent document est rédigé sans distinction de genre. L'utilisation d'un genre inclut tous les genres.

12. La présente édition des *Principes de déontologie* traite également de la situation des juges qui envisagent ou amorcent une nouvelle carrière après leur départ de la magistrature. Ainsi, elle examine certaines des questions particulières qui sont susceptibles de se poser sur le plan déontologique à l'occasion du passage à une nouvelle carrière, ainsi que les principes qui continuent de s'appliquer après le départ de la magistrature. Ces conseils s'adressent aussi bien aux juges en poste qu'aux anciens juges et visent à préserver la confiance du public envers la magistrature.

I. Judicial Independence

Statement

An independent judiciary is indispensable to impartial justice under law. Judges uphold and exemplify judicial independence in both its individual and institutional aspects.

Principles

A. Judges exercise their judicial functions independently and free of extraneous influence.

B. Judges firmly reject improper attempts to influence their decisions in any matter before the court.

C. Judges exhibit and promote high standards of judicial conduct so as to reinforce public confidence in the independence of the judiciary.

D. Judges encourage and uphold arrangements and safeguards to maintain and enhance the institutional and administrative independence of the judiciary.

I. Indépendance de la magistrature

Énoncé

L'indépendance de la magistrature est indispensable à l'exercice d'une justice impartiale sous un régime de droit. Les juges soutiennent l'indépendance de la magistrature et l'incarnent tant dans ses éléments individuels qu'institutionnels.

Principes

A. Les juges exercent leurs fonctions judiciaires de façon indépendante, à l'abri de toute influence extérieure.

B. Dans les affaires dont la cour est saisie, les juges repoussent fermement toute tentative inappropriée visant à influencer leur décision.

C. Les juges observent des normes élevées de conduite judiciaire et en favorisent l'application, afin de renforcer la confiance du public envers l'indépendance de la magistrature.

D. Les juges encouragent et soutiennent les mesures et les garanties qui visent à préserver et à accroître l'indépendance de la magistrature, tant sur le plan institutionnel qu'administratif.

Commentary

General

1.A.1 Judicial independence refers to the liberty and responsibility of judges to hear and decide cases that come before them in accordance with their conscience, without interference from others. The guarantee of judicial independence aims to make judges impervious to improper external intervention in the exercise of their functions. Judges are, and must reasonably be perceived to be, independent, both individually and institutionally. Judicial independence is not the private right of judges. It is the foundation of judicial impartiality and a constitutional right of all. The right to be tried by an independent and impartial tribunal is an integral principle of fundamental justice protected by the *Canadian Charter of Rights and Freedoms*.

1.A.2 Judges are called upon to resolve a wide array of disputes and generally to determine legal rights and obligations. Public confidence in the judiciary rests on the fact that their decisions are made according to law.

1.A.3 Judicial independence refers to a state of mind or attitude in the actual exercise of judicial functions. It also connotes a status or relationship with others, including the executive branch of government and other judges. Judicial independence is the foundation for impartial decision-making. The first qualification of a judge is the ability to make independent and impartial decisions. Judges apply the law without fear or favour and without regard to whether the decision is popular. This is a cornerstone of the rule of law, and it is secured through respect for the principle of judicial independence.

Commentaires

Général

1.A.1 L'indépendance judiciaire s'entend de la liberté et de la responsabilité du juge d'instruire et de trancher une affaire donnée selon sa conscience, sans l'intervention d'autres personnes. La garantie d'indépendance judiciaire vise à rendre les juges imperméables aux interventions extérieures indues dans l'exercice de leurs fonctions. Les juges sont indépendants et doivent être raisonnablement perçus comme tels, tant sur le plan individuel que sur le plan institutionnel. L'indépendance judiciaire n'est pas un droit qui appartient en propre à chaque juge. Elle constitue le fondement de l'impartialité judiciaire et est un droit constitutionnel qui appartient à chacun. Le droit d'être jugé par un tribunal indépendant et impartial est un principe essentiel de justice fondamentale garanti par la *Charte canadienne des droits et libertés de la personne*.

1.A.2 Il incombe aux juges de trancher une large gamme de litiges et, de manière générale, de déterminer les droits et obligations juridiques. La confiance du public envers la magistrature s'appuie sur le fait que les décisions des juges sont rendues en fonction du droit.

1.A.3 L'indépendance judiciaire désigne un état d'esprit ou une attitude dans l'exercice concret des fonctions judiciaires. Elle connote aussi un statut ou une relation à l'égard d'autrui, y compris le pouvoir exécutif et les autres juges. L'indépendance judiciaire est le fondement permettant la prise de décisions impartiales. La qualité première du juge réside dans sa capacité de rendre des décisions de manière indépendante et impartiale. Les juges appliquent la loi, sans crainte de représailles ni favoritisme, et indépendamment de l'accueil, favorable ou non, de leur décision. C'est là une des pierres angulaires de la primauté du droit, garantie par le respect du principe d'indépendance de la magistrature.

1.A.4 Judicial independence is fundamental to ensuring that decisions are made without external influence and to maintaining individual and public confidence in the administration of justice. Preserving the constituent elements of judicial independence is critical to the public's perception of the impartiality of judges. In that sense, judicial independence is an important means to a fundamental end. Judicial independence ensures that judges are impartial in fact, and also that they are perceived to be so.

1.A.5 Judges protect judicial independence not for their own benefit but for the benefits of all Canadians. Solely self-interested claims for judicial independence risk undermining public confidence in the judiciary.

1.A.6 Informing the public with respect to the role of the judiciary and judicial independence is an important judicial function. It is in the public interest for judges to take advantage of appropriate opportunities to enhance the public's understanding of the fundamental importance of judicial independence.

Avoiding and Rejecting Improper Influence

1.B.1 Judges should avoid all communications with anyone external to a case that might raise reasonable concerns about judicial independence. Judges must firmly reject improper attempts to influence their decisions. Communications intended to influence a specific judicial decision can only be received within the judicial process.

1.A.4 L'indépendance de la magistrature est fondamentale afin d'assurer que les décisions sont rendues sans influence extérieure et de soutenir la confiance individuelle et collective dans l'administration de la justice. Le maintien des conditions de l'indépendance de la magistrature est essentiel à la perception qu'a le public de l'impartialité des juges. En ce sens, l'indépendance de la magistrature constitue un moyen crucial d'atteindre cet objectif fondamental. L'indépendance de la magistrature garantit l'impartialité objective des juges et fait en sorte qu'ils soient perçus comme des personnes impartiales.

1.A.5 Les jugent protègent l'indépendance de la magistrature dans l'intérêt de tous, et non par intérêt personnel. Revendiquer la protection de l'indépendance de la magistrature par pur intérêt personnel risquerait de miner la confiance du public à l'endroit des juges.

1.A.6 L'une des fonctions importantes des juges consiste à renseigner le public sur le rôle de la magistrature et sur son indépendance. Il est dans l'intérêt public que les juges profitent d'occasions appropriées pour aider le public à mieux comprendre l'importance fondamentale de l'indépendance de la magistrature.

Éviter et repousser les tentatives d'influence indue

1.B.1 Les juges devraient éviter toute communication – avec quiconque est étranger à l'affaire dont ils sont saisis – qui pourrait soulever des craintes raisonnables en ce qui concerne l'indépendance de la magistrature. Les juges doivent fermement repousser toute tentative inappropriée d'influencer leurs décisions. Les communications ayant pour objet d'influencer une décision dans une affaire donnée doivent s'inscrire dans le cadre du processus judiciaire.

1.B.2 Attempts to influence judges may come from many sources, including social media. Judges should be cautious in their communications on social media relating to matters that could come before the court. Also, their social media activities should be undertaken in ways that avoid compromising public confidence in the judiciary.

Public Confidence

1.C.1 Judicial independence and judicial ethics are interrelated. Judges should exemplify and promote high standards of judicial conduct as one element of assuring the independence of the judiciary. In turn, the independence and integrity of the judiciary preserves public confidence in the rule of law and acceptance of court decisions. Unethical conduct by judges erodes that confidence. Thus, judges share a collective responsibility to promote and observe high standards of conduct.

Institutional and Administrative Independence

1.D.1 Judicial independence is secured by institutional and operational structures that protect judges and courts from external influence so that judicial decisions are made according to law in a fair process. For example, judges have security of tenure and their remuneration is set through an independent process so that neither fear of sanction nor hope of reward stands in the way of rendering justice. For the same reasons, judges also have immunity from liability in relation to their decisions.

1.B.2 Les tentatives d'influencer les juges peuvent provenir de plusieurs sources, y compris les médias sociaux. Les juges devraient se garder de diffuser dans les médias sociaux des communications qui concernent des affaires dont la cour pourrait être saisie. De plus, l'activité des juges dans les médias sociaux ne devrait pas avoir pour effet d'affaiblir la confiance du public à l'endroit de la magistrature.

Confiance du public

1.C.1 L'indépendance judiciaire et le respect des principes déontologiques sont interdépendants. Les juges devraient observer des normes de conduite élevées contribuant à assurer l'indépendance de la magistrature et en favoriser l'application. En retour, l'indépendance et l'intégrité des juges préservent la confiance du public dans la primauté du droit et l'acceptation par celui-ci des décisions des tribunaux. Une conduite contraire à l'éthique de la part d'un juge mine cette confiance. C'est pourquoi les juges ont la responsabilité collective de favoriser et d'observer des normes de conduite élevées.

Indépendance institutionnelle et administrative

1.D.1 L'indépendance de la magistrature est garantie par des structures institutionnelles et opérationnelles qui protègent les juges et les tribunaux contre toute influence extérieure afin qu'ils puissent rendre leurs décisions judiciaires conformément au droit, dans le cadre d'un processus équitable. Ainsi, afin d'assurer que ni la crainte d'une sanction ni l'espoir d'un gain ne puissent nuire à l'application juste du droit, les juges sont inamovibles et leur rémunération est déterminée dans le cadre d'un processus indépendant. Pour les mêmes raisons, les juges jouissent d'une immunité contre les poursuites à l'égard des décisions qu'ils rendent.

1.D.2 In keeping with the principle of judicial independence, professional development for judges is organized, designed and delivered under the authority of the judiciary.

1.D.3 At an institutional level, courts require sufficient autonomy to guarantee that the administration of justice is free from any political or other improper influence.

1.D.4 The judiciary should remain vigilant with respect to any initiative that may have the effect of undermining its institutional or administrative independence. That said, not every proposed change in the administrative arrangements affecting the judiciary constitutes a threat to judicial independence.

1.D.2 Afin de préserver le principe de l'indépendance de la magistrature, les programmes de perfectionnement professionnel destinés aux juges sont organisés, élaborés et prodigués sous l'égide de la magistrature.

1.D.3 Au niveau institutionnel, les tribunaux ont besoin d'une autonomie suffisante pour garantir que l'administration de la justice est libre de toute influence indue, notamment politique.

1.D.4 La magistrature devrait rester à l'affût de toute tentative susceptible de miner son indépendance institutionnelle ou administrative. Cela dit, ce ne sont pas tous les changements qu'on propose d'apporter aux dispositions administratives affectant les juges qui constituent une menace pour l'indépendance judiciaire.

II. Integrity and Respect

Statement

Judges conduct themselves respectfully and with integrity so as to sustain and enhance public confidence in the judiciary.

Principles

A. Judges comply with the law and conduct themselves both inside and outside the courtroom in a manner that is above reproach in the view of reasonable and informed persons.

B. Judges are discreet and do not use or disclose confidential information acquired in their judicial capacity for any purpose not related to judicial duties.

C. Judges treat everyone with civility and respect in the performance of their judicial duties.

D. Judges foster access to justice for all. Judges carry out their duties with appropriate consideration for all the parties, whether or not they are represented, and ensure that they are treated fairly and respectfully, so as to provide them with reasonable access to court processes.

E. Judges avoid all forms of harassment and abuse of authority or status.

F. Judges do not allow their status or the prestige of judicial office to be used to advance a private interest.

G. Judges encourage and support the observance of *Ethical Principles* by their judicial colleagues.

II. Intégrité et respect

Énoncé

Les juges font preuve, dans leur conduite, de respect et d'intégrité de façon à soutenir et à renforcer la confiance du public à l'endroit de la magistrature.

Principes

A. Les juges se conforment au droit et adoptent, tant à l'intérieur qu'à l'extérieur de la salle d'audience, une conduite irréprochable aux yeux d'une personne raisonnable et bien renseignée.

B. Les juges font preuve de discrétion et n'utilisent ni ne divulguent les renseignements confidentiels acquis dans l'exercice de leurs fonctions judiciaires, si ce n'est pour une fin liée à ces fonctions.

C. Les juges traitent toutes les personnes avec courtoisie et respect dans l'exercice de leurs fonctions judiciaires.

D. Les juges favorisent l'accès à la justice. Dans l'exercice de leurs fonctions, les juges accordent la considération appropriée à toutes les parties, représentées et non représentées, et veillent à ce qu'elles soient traitées avec équité et respect, afin de leur assurer un accès raisonnable aux processus judiciaires.

E. Les juges évitent toute forme de harcèlement et d'abus d'autorité ou de statut.

F. Les juges ne permettent pas que leur statut ou le prestige de la fonction judiciaire soit utilisé au profit d'un intérêt privé.

G. Les juges encouragent et soutiennent le respect des *Principes de déontologie* par leurs collègues de la magistrature.

Commentary

General

2.A.1 Public confidence in the judiciary is essential to an effective judicial system and, ultimately, the rule of law. Within that system, judges hold positions of significant trust, confidence and responsibility. Conduct, in and out of court, that exhibits integrity ensures public respect for and confidence in the individual judge and, more significantly, contributes to public confidence in the judiciary and the judicial system as a whole. Judges should therefore act with a high degree of decorum, propriety and humanity.

2.A.2 Public expectations of the integrity of judges are understandably high. Behaviour considered acceptable if exhibited by some members of the public may not be appropriate for members of the judiciary. Judges should therefore be mindful of the ways in which their conduct would be perceived by reasonable and informed members of the community and whether that perception is likely to lessen respect for the judge or the judiciary as a whole. Behaviour that would diminish that respect in the minds of such persons should be avoided.

Behaviour in Private Life

2.A.3. Public expectations of judges are not limited to the actions of judges in their judicial capacities. Judges should exhibit respect for the law and act with integrity in their private lives and should avoid the appearance of impropriety.

Commentaires

Général

2.A.1 La confiance du public à l'endroit de la magistrature est essentielle au bon fonctionnement du système de justice et, en définitive, à la primauté du droit. Les juges occupent une position de grande confiance et de responsabilité au sein de ce système. Les juges qui adoptent, en salle d'audience ou ailleurs, une conduite empreinte d'intégrité s'assurent du respect et de la confiance du public et, surtout, contribuent à soutenir la confiance du public à l'endroit de la magistrature et du système de justice tout entier. Les juges devraient en conséquence se conduire avec décorum, décence et humanité.

2.A.2 Les attentes du public à l'égard de l'intégrité des juges sont bien entendu élevées. Les comportements qu'on jugerait acceptables pour un membre du public pourraient ne pas convenir à un membre de la magistrature. Les juges devraient donc être conscients de la perception que des personnes raisonnables et bien renseignées pourraient avoir de leur conduite et de la possibilité que cette perception diminue le respect dont jouissent les juges individuellement et la magistrature dans son ensemble. Tout comportement qui porterait atteinte à ce respect dans l'esprit de ces personnes est à proscrire.

Le comportement dans la vie privée

2.A.3 Les attentes du public à l'endroit des juges ne se limitent pas aux actes que ces derniers posent dans l'exercice de leur charge. Les juges devraient faire montre de leur respect pour la loi, agir avec intégrité dans leur vie personnelle et éviter toute apparence d'inconduite.

2.A.4 After appointment, judges are not required to withdraw from the world. They may lead a normal life in the community, while retaining a sense of the dignity of judicial office and realizing that the public expects virtually irreproachable conduct from judges.

2.A.5 A judge's conduct, in and out of court, may be the subject of public scrutiny and comment. At the same time, judges have private lives and are entitled to enjoy, as much as possible, the rights and freedoms generally available to all. Nevertheless, judges accept some restrictions on their activities — even activities that would not elicit adverse notice if carried out by other members of the community. For example, judges should exercise caution in their use of social media. Judges should strive to strike a balance between the expectations of judicial office and their personal lives. In finding this balance, judges should be guided by these *Ethical Principles*.

2.A.4 Les juges ne sont pas tenus de se tenir à l'écart du monde après leur nomination. Ils peuvent participer à la vie de leur collectivité, tout en gardant à l'esprit la dignité rattachée à leur charge et le fait que le public s'attend à une conduite quasi irréprochable de la part des juges.

2.A.5 La conduite des juges, en salle d'audience ou ailleurs, peut être soumise à l'examen attentif et à la critique du public. Par ailleurs, les juges ont aussi une vie privée et jouissent, dans toute la mesure du possible, des mêmes droits et libertés que ceux qui sont conférés aux autres personnes de manière générale. Néanmoins, les juges acceptent certaines restrictions à l'égard de leurs activités — même celles qui ne susciteraient aucune critique si elles étaient le fait d'autres membres de la collectivité. Par exemple, les juges devraient utiliser les médias sociaux avec prudence. Ils devraient s'efforcer de maintenir l'équilibre entre les attentes associées à leur charge et la conduite de leur vie personnelle. *Les Principes de déontologie* peuvent les guider à cet égard.

Confidentiality and Discretion[1]

2.B.1 Judges are entrusted with preserving confidentiality. The performance of judicial duties necessarily entails that judges receive or come into possession of confidential information. While justice is, in principle, transparent, open and public, some of the facts, documents, records and circumstances of a dispute may be subject to confidentiality orders, including the identity of one or more parties. Judges should not use or reveal confidential information except where, in the performance of their judicial duties, such disclosure is necessary, or done in accordance with relevant rules on archiving and disclosure. When judges work as a group, their internal discussions remain confidential.

2.B.2 Judges should be discreet when discussing their work, including in contexts in which what they say may be inadvertently overheard by others.

2.B.3 Confidentiality and discretion extend past a judge's departure from judicial office.

Civility and Respect

2.C.1 A hallmark of judicial proceedings is that all participants, including judges, will conduct themselves in a manner that preserves the honour and dignity of both the individual proceedings and the administration of justice more generally. Judges should endeavor to treat all participants in the judicial process with civility and respect.

1 *Canadian Judicial Council, Use of Personal Information in Judgments and Recommended Protocol (2005)*

Confidentialité et discrétion[1]

2.B.1 Les juges sont les gardiens de la confidentialité. L'exercice des fonctions judiciaires a pour conséquence que les juges, inévitablement, reçoivent des renseignements de nature confidentielle ou entrent en possession de tels renseignements. Même si, en principe, la justice est publique, ouverte et transparente, certains faits, documents, dossiers ou circonstances entourant un litige, y compris l'identité d'une ou de plusieurs parties, peuvent être assujettis à des ordonnances de confidentialité. Les juges ne devraient jamais utiliser ou révéler des renseignements de nature confidentielle, sauf lorsque cela est nécessaire dans l'exercice de leurs fonctions judiciaires, ou conformément aux règles applicables qui régissent l'archivage et la divulgation. Lorsqu'ils travaillent en groupe, leurs discussions demeurent confidentielles.

2.B.2 Les juges devraient faire preuve de discrétion lorsqu'ils discutent de leur travail, y compris dans des contextes où leurs propos peuvent être entendus par inadvertance.

2.B.3 La confidentialité et la discrétion demeurent importantes pour les juges même après leur départ de la magistrature.

Courtoisie et respect

2.C.1 L'une des caractéristiques du processus judiciaire est que toutes les personnes qui y participent, y compris les juges, se comportent de manière à préserver l'honneur et la dignité tant des instances individuelles que de l'administration de la justice en général. Les juges devraient s'efforcer de traiter chaque personne qui intervient dans le processus judiciaire avec courtoisie et respect.

1 *Conseil canadien de la magistrature, L'usage de renseignements personnels dans les jugements et protocole recommandé (2005)*

2.C.2 The commitment of judges to civility and respect is not limited to judicial proceedings. Judges should attempt, in all of their engagements with others, including their judicial colleagues, to act in accordance with these values. By showing dignified consideration for others, judges enhance public respect for and confidence in the judiciary as an institution.

2.C.3 The circumstances of some cases and the conduct of counsel and parties sometimes require judges to act with an appropriate measure of firmness and to emphasize decisiveness, promptness, the prevention of abuse of process or improper treatment of participants in the adjudicative process. Maintaining civility and respect requires judges to ensure a proper balance between upholding the right of parties to be heard and ensuring the efficiency of the process.

2.C.4 It is often necessary for judges in the adjudication process to make findings of credibility and to rule on the propriety of a person's conduct. That being said, in court proceedings or in their judgments, judges should not make inappropriate remarks about a person's conduct or motives. Furthermore, judges should not make comments about persons who are not before the court unless, in the judge's opinion, it is necessary for the proper disposition of the case.

2.C.5 Judges should be alert to the possibility that ill-considered, comical or facetious remarks, often made spontaneously and intended to be humorous, may give offence or diminish the dignity of the proceedings.

2.C.2 Cet engagement des juges envers la courtoisie et le respect ne se limite pas au processus judiciaire. Les juges devraient s'efforcer de respecter ces valeurs dans tous leurs rapports avec autrui, y compris les autres membres de la magistrature. Les juges contribuent au respect de la magistrature et à la confiance que le public lui accorde en tant qu'institution en se comportant de manière digne et respectueuse avec autrui.

2.C.3 Les aspects particuliers d'une affaire et la conduite des avocats et des parties peut parfois obliger les juges à utiliser une certaine fermeté et à privilégier l'efficacité dans la prise de décision, la célérité ainsi que la prévention des abus de procédure et des comportements répréhensibles envers les participants au processus judiciaire. Le maintien d'une attitude courtoise et respectueuse exige des juges qu'ils préservent un juste équilibre entre le droit des parties d'être entendues et l'efficacité du processus.

2.C.4 Il arrive souvent aux juges de devoir se prononcer sur la crédibilité ou la conduite de certaines personnes pour trancher un litige. Cela étant, les juges devraient s'abstenir, au cours du processus judiciaire ou dans leurs jugements, de formuler des commentaires inappropriés concernant la conduite d'une personne ou ses motivations. Les juges devraient aussi s'abstenir de formuler des commentaires concernant des personnes qui ne comparaissent pas devant le tribunal, à moins que cela ne soit nécessaire au règlement de l'affaire du point de vue du juge.

2.C.5 Les juges devraient être sensibles au fait que les commentaires inconsidérés, humoristiques ou facétieux, qui sont souvent formulés spontanément et se veulent drôles, peuvent être offensants et miner la dignité des procédures.

2.C.6 It is a delicate question whether and in what circumstances a judge should report, or cause to be reported, a lawyer's conduct to the lawyer's professional governing body. Taking such action may affect the ability of the judge to continue in the proceeding in which that lawyer is appearing, given that the judge's view of the lawyer's conduct may give rise to a reasonable apprehension of bias against the lawyer or the lawyer's client. On the other hand, a judge is in a special position to observe lawyers' conduct before the court. Judges should remain alert to the lawyer's legal and ethical duty of resolute advocacy on behalf of a client and commitment to the client's cause.
A judge should take, or cause to be taken, appropriate action where the judge becomes aware of misconduct by a lawyer or incompetence that seriously compromises the interests of justice. Where a judge intends to take action, the judge should follow court protocols and consider whether the interests of justice require that such action await the end of the proceeding or whether the circumstances require earlier action.

Access to Justice and Self-Represented Litigants[2]

2.D.1 Judges have a responsibility to promote and foster access to justice. In fulfilling their role, judges should be aware of the different ways in which disputes can be resolved fairly and efficiently.

2.C.6 La question de savoir si les juges devraient signaler ou faire signaler certains agissements d'un avocat à l'ordre professionnel de celui-ci, et dans quelles circonstances ils devraient le faire, est délicate. Les juges qui prennent ce genre de mesures risquent de ne plus être aptes à entendre la cause dans laquelle agit l'avocat dénoncé, puisque l'opinion exprimée sur la conduite de l'avocat peut susciter une crainte raisonnable quant à l'existence d'un parti pris contre l'avocat ou son client. Il reste que les juges occupent une position privilégiée pour observer la conduite des avocats devant le tribunal. Les juges devraient demeurer attentifs au fait que les avocats ont une obligation déontologique et légale de représenter leur client avec vigueur et de se dévouer à sa cause. Lorsque des juges sont témoins de l'inconduite d'un avocat ou d'une incompétence qui porte gravement atteinte à l'intérêt de la justice, ils devraient prendre ou faire prendre les mesures qui s'imposent conformément aux protocoles en vigueur dans leur cour s'il en est. Avant de prendre de telles mesures, les juges devraient déterminer si l'intérêt de la justice commande d'attendre la fin de l'audience ou si des circonstances spéciales justifient une action immédiate.

L'accès à la justice et les parties non représentées[2]

2.D.1 Les juges ont la responsabilité de promouvoir et de favoriser l'accès à la justice. Ce rôle impose aux juges d'être sensibles aux différents processus qui permettent une résolution juste et efficace des différends.

2 *Canadian Judicial Council Statement of Principles on Self-represented Litigants and Accused Persons (2006)*

2 *Conseil canadien de la magistrature, Énoncé de principes concernant les plaideurs et les accusés non représentés par un avocat (2006)*

2.D.2 Passive neutrality and treating everyone in the same manner may not always be appropriate. Parties often appear before the court as self-represented litigants. Judges should provide information and reasonable assistance, proactively where appropriate, on procedural and evidentiary rules, while being alert not to compromise judicial impartiality and the fairness of the proceeding.

Conduct Towards Others

2.E.1 The conduct of judges towards others is an important aspect of their commitment to integrity and respect. Judges should be attentive to the ways in which offensive remarks, or conduct, or inappropriate behaviour may adversely affect or intimidate others, particularly those in subordinate positions to the judge. A judge's conduct in this respect affects their individual reputation and that of the judiciary as a whole.

2.E.2 A common concern in the modern workplace is the possibility that authority may be used in inappropriate ways. The workplace of the judiciary is no exception. Judges refrain from any form of harassment in the workplace. It is also important for judges to avoid relationships with others with whom they work or associate that could be reasonably perceived as the judge taking advantage of their position or authority.

2.D.2 Il se pourrait que la neutralité passive et le traitement identique de toutes les parties ne soit pas toujours approprié. Il arrive souvent que des parties agissent devant les tribunaux sans être représentées. Les juges devraient informer les parties non représentées et leur fournir une aide raisonnable, de manière proactive lorsque les circonstances s'y prêtent, en ce qui concerne les règles de preuve et de procédure, tout en se gardant de compromettre leur impartialité et l'équité des procédures.

Comportement à l'égard d'autrui

2.E.1 La conduite des juges à l'égard d'autrui est un aspect important de leur engagement envers l'intégrité et le respect. Les juges devraient se montrer sensibles aux propos désobligeants et aux comportements offensants ou inappropriés qui pourraient atteindre ou intimider les personnes qu'ils côtoient, en particulier celles sur lesquelles s'exerce leur autorité. La conduite des juges à cet égard est susceptible d'affecter tant leur réputation individuelle que celle de la magistrature dans son ensemble.

2.E.2 La possibilité que l'autorité soit utilisée à des fins inappropriées est souvent source de préoccupation dans les milieux de travail contemporains. Le milieu de travail où exercent les juges ne fait pas exception. Les juges s'abstiennent de toute forme de harcèlement au travail. Il est également important que les juges évitent les relations avec les personnes avec lesquelles ils travaillent ou qu'ils côtoient, lorsqu'une telle relation pourrait être raisonnablement perçue comme un abus de fonction ou d'autorité.

Use of Status or Authority

2.F.1 Judges should not use their status or authority, or the status of their office, to seek, for themselves or others, an advantage or benefit to which they would not otherwise be entitled.

Fundraising

2.F.2 Judges should not allow the prestige of judicial office to be used in aid of fundraising for particular causes, however worthy. They should not solicit funds (except from judicial colleagues or from family members) or lend the prestige of their judicial office to such solicitations.

Letters of Reference

2.F.3 Judges may be called upon to provide letters of reference. It is important that the prestige of judicial office not be used to advance another person's private interests or create an impression that certain persons stand in a particular position of influence or favour with the judge. Factors for the judge to consider include whether: (i) providing the reference will not compromise the integrity of judicial office; (ii) it is the judge's personal knowledge of the individual that is called for; and (iii) the judge has an important perspective about the individual to contribute such that it would be unfair to the individual were the judge to refuse. Judges should keep in mind that letters of reference may be made public. Such letters may also be rendered inappropriate or inaccurate by a subsequent change in circumstances, thereby having the potential to reflect adversely on the judge or the judiciary. Judges may assist judicial appointment advisory committees on a confidential basis.

Statut et pouvoir judiciaire

2.F.1 Les juges ne devraient pas utiliser leur statut ou leur pouvoir, ou le prestige de leur fonction, pour rechercher un avantage ou un bénéfice, pour eux-mêmes ou pour autrui, qui ne pourrait être obtenu autrement.

Collecte de fonds

2.F.2 Les juges ne devraient pas permettre que le prestige de la fonction judiciaire contribue à la collecte de fonds pour des causes particulières, si méritoires soient-elles. Ils ne devraient pas recueillir de dons (sauf auprès de collègues juges ou auprès de membres de leur famille), ni associer le prestige de leur fonction à de telles collectes.

Lettres de recommandation

2.F.3 On demande parfois aux juges de fournir des lettres de recommandation. Il est important que le prestige de la fonction judiciaire ne serve pas à promouvoir les intérêts privés d'un tiers ou à donner l'impression que certaines personnes jouissent auprès d'eux d'une influence ou de faveurs particulières. Les facteurs que les juges devraient prendre en considération comprennent, notamment, les suivants : (i) le fait de fournir la recommandation ne mettra pas en péril l'intégrité de la fonction judiciaire; (ii) c'est à leur connaissance de la personne concernée que l'on fait appel; et (iii) lorsqu'ils ont un point de vue important à exprimer sur la personne concernée, un refus de leur part ne serait pas équitable envers cette personne. Les juges devraient garder à l'esprit que les lettres de recommandation peuvent être rendues publiques, que leur contenu peut devenir mal adapté ou inexact par suite d'un changement de circonstances et qu'elles sont donc susceptibles de nuire à leur image ou à celle de la magistrature. Les juges peuvent aider les comités consultatifs sur la nomination des juges de manière confidentielle.

Collegial Support

2.G.1 Judges should encourage and support their judicial colleagues' observance of ethical principles. Judges may become aware of circumstances that indicate a strong likelihood of unethical conduct by a judicial colleague. In such instances, judges should act in a manner that best ensures that action is taken to preserve public confidence in the administration of justice. Depending on the circumstances, such action may include communication with the Chief Justice of the court.

Soutien collégial

2.G.1 Les juges devraient encourager leurs collègues de la magistrature à respecter les principes de déontologie et les appuyer dans cette démarche. Il peut arriver que des juges soient informés de circonstances signalant une forte probabilité que la conduite d'un juge comporte des lacunes d'ordre déontologique. Dans ces cas, les juges devraient agir de manière à s'assurer que des mesures sont prises pour préserver la confiance du public dans l'administration de la justice. Selon la situation, de telles mesures pourraient inclure la divulgation du problème au juge en chef de la cour.

III. Diligence and Competence

Statement

Judges perform their duties with diligence and competence.

Principles

A. Judges devote themselves to their judicial duties, broadly defined, which include presiding in court and making decisions, as well as those duties essential to court operations and to the administration of justice. Judges do not engage in activities incompatible with the diligent discharge of judicial duties.

B. Judges perform all judicial duties, including the delivery of reserved judgments, with punctuality and reasonable promptness, having due regard to the urgency of the matter and other special circumstances.

C. Judges maintain and enhance their knowledge, skills, sensitivity to social context and the personal qualities necessary to perform their judicial duties.

D. Judges strive to maintain their wellness to optimize the performance of judicial duties.

III. Diligence et compétence

Énoncé

Les juges exercent leurs fonctions avec diligence et compétence.

Principes

A. Les juges se consacrent à leurs fonctions judiciaires, entendues au sens large, lesquelles englobent le fait de présider les audiences et de rendre des décisions, ainsi que celles qui sont essentielles au bon fonctionnement de leur tribunal et de l'administration de la justice. Les juges s'abstiennent de toute activité incompatible avec l'exercice diligent de leurs fonctions judiciaires.

B. Les juges exercent toutes leurs fonctions judiciaires, et rendent les jugements mis en délibéré, de façon ponctuelle et avec une célérité raisonnable, compte tenu des circonstances propres à chaque affaire, y compris leur caractère urgent.

C. Les juges maintiennent et améliorent les connaissances, les compétences, la sensibilité au contexte social et les qualités personnelles qui sont nécessaires à l'exercice de leurs fonctions judiciaires.

D. Les juges s'efforcent de se maintenir en bonne santé afin d'exercer leurs fonctions judiciaires de manière optimale.

Commentary

General

3.A.1 Diligence is concerned with the performance of judicial duties in a skillful, careful, attentive and timely way.

3.A.2 Judges should exhibit diligence and competence in the performance of all their judicial duties, including adjudication, case management, pre-trial or settlement conferences and participation in court administration.

3.A.3 Section 55 of the *Judges Act*[3] provides that: "No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties". Subject to the limitations imposed by the *Judges Act* and guided by these *Ethical Principles*, judges may participate in other activities that do not detract from the performance of judicial duties or compromise their independence or impartiality.

3.A.4 Upon appointment, judges should withdraw expeditiously from professional, commercial and business activities.

3.A.5 Generally speaking, a judge is entitled to have 'passive' investments that do not constitute 'carrying on business', provided that little active management is required and there is no interference with the diligent performance of judicial duties. For these reasons, judges should undertake a careful examination of their investments.

3 *Judges Act*, RSC 1985, c J-1

Commentaires

Général

3.A.1 On entend par diligence le fait d'exercer ses fonctions judiciaires de manière compétente, prudente et attentive, de même qu'avec une célérité raisonnable.

3.A.2 Les juges devraient faire preuve de diligence et de compétence dans l'exercice de toutes leurs fonctions judiciaires, y compris les fonctions décisionnelles, la gestion d'instance, les conférences préparatoires ou de règlement et la participation à l'administration de la justice.

3.A.3 L'article 55 de la *Loi sur les juges*[3] prévoit que « Les juges se consacrent à leurs fonctions judiciaires à l'exclusion de toute autre activité, qu'elle soit exercée directement ou indirectement, pour leur compte ou celui d'autrui ». Sous réserve des restrictions imposées par la *Loi sur les juges* et des recommandations formulées dans les *Principes de déontologie*, les juges peuvent participer à d'autres activités qui ne nuisent pas à l'exercice de leurs fonctions judiciaires ou mettent en péril leur indépendance ou impartialité.

3.A.4 Après leur nomination, les juges devraient se retirer rapidement de leurs activités commerciales et professionnelles, ainsi que de leur intérêts d'affaires.

3.A.5 De manière générale, les juges peuvent avoir des placements « passifs » qui ne constituent pas la « poursuite d'une entreprise », exigent peu de gestion active et ne les empêchent pas d'exercer leurs fonctions judiciaires avec diligence. Pour cette raison, les juges devraient effectuer une analyse serrée de leurs placements.

3 *Loi sur les juges*, L.R.C. (1985), ch. J-1

3.A.6 On occasion, judges are asked by governments to serve on commissions, inquiries or in other public roles. In considering such a request, in addition to the limitations imposed by the *Judges Act* and the guidance provided by *Ethical Principles*, judges should consider all implications and discuss the matter with their Chief Justice to ensure that acceptance of an appointment will not unduly interfere with the effective functioning of the court. The terms of reference and other conditions such as time and resources should be examined carefully so as to assess their compatibility with the judicial function.[4]

3.A.7 Judges are uniquely placed to make a variety of contributions to the administration of justice. Subject to the limitations imposed by judicial office, judges are encouraged, for example, to take part in legal education programs for students, lawyers and judges, and in activities to make the law and the legal process more understandable and accessible to the public, such as giving lectures, participating in moot courts or through legal writing.

Timeliness

3.B.1 Judges should perform all assigned judicial duties in a timely manner.

3.A.6 Il arrive que les gouvernements demandent à des juges d'exercer des fonctions publiques, notamment au sein d'une commission ou à l'occasion d'une enquête. Avant de répondre à une telle demande, outre les restrictions imposées par la *Loi sur les juges* et les recommandations formulées dans les *Principes de déontologie*, les juges devraient prendre en considération l'ensemble des conséquences et en discuter avec leur juge en chef afin de s'assurer que l'acceptation de la charge proposée ne nuira pas indûment au bon fonctionnement du tribunal. Le mandat et d'autres facteurs tels que la durée et les ressources devraient entrer en ligne de compte lorsqu'il s'agit d'évaluer la compatibilité de la charge proposée avec les fonctions judiciaires.[4]

3.A.7 Les juges sont particulièrement bien placés pour contribuer de diverses manières à l'administration de la justice. Sous réserve des restrictions qui leur sont imposées par leur charge, les juges sont encouragés, par exemple, à prendre part à des programmes de formation juridique à l'intention des étudiants, des avocats et des juges, et à participer à des activités destinées à mieux faire comprendre le droit et la procédure judiciaire au grand public, notamment en donnant des conférences, en participant à un tribunal-école ou en rédigeant des articles ou des livres de droit.

Célérité

3.B.1 Les juges devraient exercer toutes les fonctions judiciaires qui leur sont assignées avec une célérité raisonnable.

4 Canadian Judicial Council Protocol on the Appointment of Judges to Commissions of Inquiry (2010)

4 *Conseil canadien de la magistrature, Protocole sur la nomination de juges à des commissions d'enquête (2010)*

3.B.2 The preparation of judgments is frequently difficult and time consuming. Judges are expected to produce their decisions and reasons for judgment as soon as reasonably possible, having regard to the urgency of the matter and the length or complexity of the case. In this respect, the CJC has resolved that reserved judgments should be delivered within a maximum of six months after hearings, except in special circumstances.[5] Judges must also comply with legal requirements associated with timeliness of judgments applicable in their jurisdiction.

3.B.3 While judges strive to be diligent in the performance of their judicial duties, their ability to do so may be affected by various factors, including illness, exceptionally heavy burdens of work or the inadequacy of resources supporting their work.

Professional Development[6]

3.C.1 A well-educated and informed judiciary that adheres to high standards of competence is essential to preserving public confidence.

3.C.2 Judges should have and maintain knowledge of the law. Knowledge extends not only to substantive and procedural law but also to an understanding of the impact of the law on those it affects.

3.B.2 L'élaboration d'un jugement est souvent longue et ardue. Les juges sont censés prononcer leurs jugements et les motifs qui les accompagnent dès qu'il est raisonnablement possible de le faire, compte tenu de l'urgence de l'affaire, de sa longueur ou de sa complexité. En cette matière, le Conseil a, par voie de résolution, exprimé l'avis que, sauf s'il existe des circonstances particulières, les juges qui ont mis une affaire en délibéré devraient rendre leur jugement dans les six mois qui suivent l'audience.[5] Les juges doivent aussi respecter les délais imposés par la loi dans leur juridiction, le cas échéant.

3.B.3 Bien que les juges s'efforcent d'agir avec diligence dans l'exercice de leurs fonctions judiciaires, il peut leur être difficile de le faire en raison de différents facteurs, comme la maladie, une charge de travail exceptionnellement lourde ou l'insuffisance des ressources qui appuient leur travail.

Perfectionnement professionnel[6]

3.C.1 Afin de préserver la confiance du public à l'endroit de la magistrature, il est essentiel que les juges adhèrent à des normes élevées en matière de formation et de compétence.

3.C.2 Les juges devraient connaître le droit et se tenir à jour à cet égard. Cette connaissance s'étend non seulement aux règles de fond et de procédure, mais également à leur compréhension de l'impact qu'elles ont sur les personnes touchées.

5 *Canadian Judicial Council Resolution on Reserved Judgments (1985)*
6 *Canadian Judicial Council Professional Development Policies and Guidelines (2018)*

5 *Résolution du Conseil canadien de la magistrature sur les jugements pris en délibéré (1985)*
6 *Conseil canadien de la magistrature, Politiques et lignes directrices sur le perfectionnement professionnel (2018)*

3.C.3 Judges are responsible for maintaining and enhancing their knowledge, skills and personal qualities necessary for effective judging. This important element of judicial diligence and competence involves participation in continuing professional development.

3.C.4 Professional development describes formal and informal learning activities that include education, training and private study. It also covers education on social context issues affecting the administration of justice. Social context encompasses knowledge and understanding of the realities of the lives of those who appear in court. This includes the history, heritage and laws related to Indigenous peoples, as well as matters of gender, race, ethnicity, religion, culture, sexual orientation, gender identity or expression, differing mental or physical abilities, age and socio-economic background.

3.C.5 Judges should develop and maintain proficiency with technology relevant to the nature and performance of their judicial duties.

3.C.6 As part of a judge's commitment to continuing professional development, judges should engage in self-assessment and self-development, taking responsibility for their standard of knowledge, skill and the development of personal qualities related to judicial duties.

3.C.3 Il incombe aux juges de maintenir et d'accroître les connaissances, les compétences et les qualités personnelles qui leur sont nécessaires pour bien juger. Cet important volet de la diligence et de la compétence des juges implique la participation à des programmes de perfectionnement professionnel continu.

3.C.4 Le perfectionnement professionnel s'entend des activités d'apprentissage, formelles ou informelles, qui visent l'amélioration des connaissances et des compétences et les études personnelles. Il s'étend aussi à la formation touchant le contexte social pertinent à l'administration de la justice, ce qui comprend la connaissance et la compréhension de la réalité vécue par les personnes qui comparaissent devant le tribunal, y compris l'histoire et le patrimoine des peuples autochtones, le droit relatif aux peuples autochtones, ainsi que les questions liées au genre, à la race, à l'origine ethnique, à la religion, à la culture, à l'orientation sexuelle, à l'identité ou à l'expression de genre, aux différences de capacités physiques ou mentales, à l'âge et à l'origine socio-économique.

3.C.5 Les juges devraient développer et maintenir les habiletés technologiques qui ont rapport à la nature et à l'exercice de leurs fonctions judiciaires.

3.C.6 En lien avec leur engagement envers le perfectionnement professionnel continu, les juges devraient évaluer leur niveau de connaissances et de compétences et les qualités individuelles qui leur permettent de s'acquitter de leurs fonctions judiciaires et s'engager dans un processus continu de perfectionnement professionnel.

3.C.7 To support judges' commitments to their continuing professional development, the CJC and National Judicial Institute, as well as other organizations, have developed relevant, comprehensive, quality educational programs. Judges should participate in these programs in their continuing commitment to acquire, maintain and strengthen their judicial knowledge and skills.

3.C.8 Consistent with their judicial duties, judges are encouraged to take advantage of opportunities to engage with and learn from the wider public, including communities with which the judge has little or no life experience.

Wellness

3.D.1 While judges should exhibit diligence in the performance of their judicial duties, the importance of judges' responsibilities to their families is also recognized.

3.D.2 Judges should set aside sufficient time and make a commitment to the maintenance of physical and mental wellness, and take advantage of judicial assistance programs as appropriate.[7]

3.C.7 Pour soutenir les juges dans cette démarche de perfectionnement professionnel continu, le Conseil et l'Institut national de la magistrature, de même que d'autres organismes, ont élaboré des programmes de formation pertinents, exhaustifs et de qualité. Les juges devraient participer à ces programmes afin de maintenir et d'améliorer leurs connaissances et leurs compétences judiciaires et d'en acquérir de nouvelles.

3.C.8 Lorsque cela est compatible avec leurs fonctions judiciaires, les juges sont encouragés à profiter des occasions de s'intéresser à la collectivité, notamment d'apprendre à mieux connaître les personnes issues de communautés dont l'expérience diffère de la leur.

Bien-être

3.D.1 Bien que les juges soient tenus de faire preuve de diligence dans l'exercice de leurs fonctions judiciaires, l'on reconnaît par ailleurs l'importance des responsabilités familiales des membres de la magistrature.

3.D.2 Les juges devraient réserver suffisamment de temps au maintien de leur bonne santé physique et mentale et se prévaloir, au besoin, des programmes d'aide qui leur sont offerts.[7]

7 *Judges Counselling Program – Confidential Assistance for Judges and their Families*

7 *Programme de counselling destiné aux juges – Soutien confidentiel aux juges et à leurs familles*

IV. Equality

Statement

Judges conduct themselves and the proceedings before them to ensure equality according to law.

Principles

A. Judges carry out their duties with respect for all persons, including parties, counsel, witnesses, court personnel and judicial colleagues, without discrimination or prejudice.

B. Judges refrain from discriminatory behaviour. They disassociate themselves from and disapprove of offensive or discriminatory comments or conduct by court staff, counsel or any other person involved in judicial proceedings.

C. Judges are sensitive to and are not influenced by attitudes based on stereotype, myth or prejudice. They make meaningful efforts to recognize and dissociate themselves from such attitudes.

D. Judges do not belong to any organization that engages in or countenances any form of discrimination that contravenes the law.

IV. Égalité

Énoncé

Les juges adoptent une conduite propre à assurer à tous un traitement égal conformément à la loi et ils conduisent les instances dont ils sont saisis dans ce même esprit.

Principes

A. Les juges exercent leurs fonctions en faisant preuve de respect à l'endroit de toutes les personnes, sans discrimination ni préjugés, qu'il s'agisse des parties, des avocats, des témoins, de membres du personnel de la cour ou d'autres juges.

B. Les juges s'abstiennent de comportements discriminatoires. Ils se dissocient de la conduite ou des propos offensants ou discriminatoires que pourraient avoir les membres du personnel de la cour, les avocats ou les autres personnes participant à une instance judiciaire et expriment leur désapprobation à cet égard.

C. Les juges sont sensibles aux attitudes fondées sur des stéréotypes, des mythes ou des préjugés et ne se laissent pas influencer par celles-ci. Les juges font des efforts concrets pour reconnaître ces attitudes et s'en dissocier.

D. Les juges n'adhérent à aucun organisme qui pratique ou approuve une forme quelconque de discrimination prohibée par la loi.

Commentary

General

4.A.1 The Constitution and a variety of statutes guarantee equality before and under the law and equal protection and benefit of the law without discrimination. The law's commitment to substantive equality seeks to protect members of the community from both direct discrimination and from the impact of laws and policies that, though neutral on their face, produce adverse effects, or adverse impact, discrimination. This approach to equality seeks to acknowledge the equal worth and dignity of all persons and to ensure that discrimination is prevented and rectified as it affects individuals or groups experiencing disadvantage in our society, often on a systemic or structural basis. The law's strong societal commitment places concern for equality at the core of justice according to law.

4.A.2 Equality, according to law, is fundamental to justice and is strongly linked to judicial impartiality and to public confidence in the administration of justice. Accordingly, judges should ensure that their commitment to equality is unwavering and that their conduct is such that any reasonable and informed member of the public would have confidence in the judge's respect for and commitment to equality.

Commentaires

Général

4.A.1 La Constitution et de nombreuses lois garantissent l'égalité devant la loi et sous le régime de la loi, de même que l'égalité en matière de protection et de bénéfice de la loi, sans discrimination. Cet engagement du législateur envers l'égalité réelle vise à protéger les membres de la collectivité contre la discrimination directe et contre les lois et les politiques qui, en apparence neutres, entraînent de la discrimination par suite d'un effet préjudiciable. Cette approche vise à reconnaître une même valeur à tous les êtres humains et la dignité de toutes les personnes, de manière à prévenir la discrimination, souvent systémique ou structurelle, dont sont victimes les personnes ou les groupes défavorisés de notre société et à y remédier. Cet engagement ferme pris par le législateur au nom de la société place l'égalité au cœur de la justice sous le régime de la loi.

4.A.2 Fondamentale pour la justice, l'égalité sous le régime de la loi est aussi étroitement liée à l'impartialité judiciaire et à la confiance du public dans l'administration de la justice. Par conséquent, les juges devraient être inébranlables dans leur engagement envers l'égalité et s'assurer que leur conduite est telle qu'une personne raisonnable et bien renseignée y verrait la manifestation de leur respect pour le principe d'égalité et leur engagement à l'égard de celui-ci.

Equality in Proceedings

4.B.1 Judges should avoid comments, expressions, gestures or behaviour that may reasonably be interpreted as showing insensitivity to or disrespect for anyone. Examples include inappropriate comments based on stereotypes linked to gender, race, ethnicity, religion, culture, sexual orientation, gender identity or expression, differing mental or physical abilities, age and socio-economic background, or other conduct that may create the impression that persons before the court will not be afforded equal consideration and respect. Inappropriate statements by judges, in or out of court, have the potential to call into question their commitment to equality and their ability to be impartial.

4.B.2 Judges should avoid engaging in activities on social media that could reasonably reflect negatively on their commitment to equality.

4.B.3 In proceedings before them, judges should intervene when confronted with discriminatory comments or behaviour. The principle of equality does not, however, require that proper advocacy or admissible testimony be curtailed where, for example, matters of gender, race or other similar factors are properly before the court. The adversarial system gives the parties and their counsel considerable leeway, and the relevance and importance of evidence may be difficult to assess accurately as it is being presented. Judges are expected to listen impartially, but, when necessary, should assert control over the proceeding and act with appropriate firmness to maintain an atmosphere of dignity, equality and order in the courtroom. Judges should be alive to the issues before the court and, where appropriate, seek clarification and provide balanced rulings on the relevance of a given line of questioning.

L'égalité dans le processus judiciaire

4.B.1 Les juges devraient éviter les observations, les expressions, les gestes ou les comportements qui pourraient être raisonnablement interprétés comme un manque de sensibilité ou de respect à l'égard d'une autre personne. En sont des exemples les remarques inappropriées fondées sur des stéréotypes liés au genre, à la race, à l'origine ethnique, à la religion, à la culture, à l'orientation sexuelle, à l'identité ou à l'expression de genre, aux différences de capacités physiques ou mentales, à l'âge, et à l'origine socio-économique, et toute autre conduite qui pourrait laisser entendre que des personnes comparaissant devant le tribunal ne seront pas traitées de façon égale et respectueuse. Les commentaires inappropriés formulés par les juges, en salle d'audience ou ailleurs, peuvent soulever un doute quant à leur engagement envers l'égalité, ou quant à leur impartialité.

4.B.2 Les juges devraient éviter d'avoir, sur les réseaux sociaux, des activités qui sont raisonnablement susceptibles de discréditer leur engagement envers le principe d'égalité.

4.B.3 Dans le cadre des affaires dont ils sont saisis, les juges devraient intervenir lorsqu'ils font face à des propos ou à une conduite discriminatoires. Le principe d'égalité n'implique pas, cependant, que l'on doive interdire la défense légitime d'idées, ou empêcher la présentation de témoignages par ailleurs admissibles, lorsque, par exemple, des questions de genre, de race ou d'autres facteurs semblables sont légitimement soulevés devant la cour. Le système contradictoire donne beaucoup de latitude aux parties et à leurs avocats, et il peut être difficile d'évaluer avec justesse la pertinence et l'importance de la preuve au moment de sa présentation. Les juges sont censés écouter le débat en toute impartialité, mais devraient, si nécessaire, le contrôler fermement et faire preuve de toute la rigueur voulue pour maintenir un climat de dignité, d'égalité et d'ordre dans la salle d'audience. Les juges devraient être sensibles aux questions qui sont devant le tribunal et, lorsque cela est utile, obtenir des précisions sur la pertinence des questions posées par les avocats et rendre des décisions équilibrées sur celles-ci.

4.B.4 Judges should not permit court staff or others subject to their authority or control to engage in conduct that may: show disrespect toward others; constitute discrimination; or reasonably reflect negatively on their commitment to equality.

Avoidance of Stereotypes

4.C.1 Judges do not make assumptions based on general characterizations or attach labels to people that invite stereotypical assumptions about their behaviour or characteristics. Stereotypes are simplistic mental short cuts that generate misleading perceptions and cause mistakes and errors in fact and in law.

4.C.2 Reliance on stereotypes may arise for different reasons, often unintentionally. Judges may not properly appreciate that their reasoning is linked to stereotypical thinking. A judge may be unfamiliar with cultural traditions that would, if known, provide a greater understanding of a party's or a witness's appearance, mannerisms or behaviour.

4.C.3 Judges should educate themselves on the extent to which assumptions rest on stereotypical thinking and should become and remain informed about changing attitudes and values. They should take up opportunities to engage with cultures and communities that are different from their own life experiences to expand their knowledge and understanding. In doing this, judges should take care that these efforts enhance and do not detract from their independence and impartiality. In addition, judges should take advantage of educational opportunities and self-study that will assist them in this regard.

4.B.4 Les juges ne devraient pas laisser le personnel de la cour ou d'autres personnes agissant sous leur autorité ou leur contrôle manquer de respect à autrui, ou adopter des comportements qui peuvent constituer de la discrimination ou qui sont raisonnablement susceptibles de discréditer leur engagement envers le principe d'égalité.

La prévention des stéréotypes

4.C.1 Les juges s'abstiennent de formuler des hypothèses fondées sur des caractérisations générales et d'accoler des étiquettes susceptibles d'encourager la formulation d'hypothèses stéréotypées au sujet du comportement ou des caractéristiques de certaines personnes. Les stéréotypes sont des raccourcis dans le raisonnement qui nourrissent des perceptions trompeuses et conduisent à des erreurs de fait ou de droit.

4.C.2 Le recours aux stéréotypes peut résulter d'un ensemble de causes et n'est souvent pas intentionnel. Il est possible que des juges ne soient pas conscients que leur raisonnement est relié à un stéréotype. Il peut aussi arriver que des juges ne connaissent pas certaines traditions culturelles qui, s'ils les connaissaient, leur permettraient de mieux comprendre la façon de se présenter, d'agir et de se comporter d'une partie ou d'un témoin.

4.C.3 Les juges devraient être sensibilisés au fait que les hypothèses peuvent reposer sur des stéréotypes et prendre les moyens appropriés pour demeurer au fait des changements d'attitudes et de valeurs. Ils devraient s'intéresser aux cultures et aux communautés qui diffèrent de celles qu'ils côtoient de par leur expérience de vie, afin d'élargir leurs connaissances et leur compréhension. Toutefois, les juges devraient s'assurer que les efforts déployés en ce sens renforcent leur indépendance et leur impartialité plutôt que de leur nuire. De plus, les juges devraient profiter des activités de formation et des lectures qui permettent d'en apprendre plus sur ces questions.

Association with Discriminatory Organizations

4.D.1 Judges should conduct their personal lives honourably and in ways that would not reasonably be perceived as an endorsement of any invidious form of discrimination. Judges should avoid associations with organizations that engage in or countenance discrimination contrary to law. A judge's membership in such an organization has the potential to call into question the judge's commitment to equality and may erode public confidence in the judiciary. Judges should also be sensitive to the fact that some organizations' activities, policies and public positions, though not unlawful, may still be offensive to legitimate expectations of equality.

4.D.2 Neither the practice of religion nor membership in a religious organization is inconsistent with *Ethical Principles*.

Association avec des organismes ayant des pratiques discriminatoires

4.D.1 Les juges devraient se conduire de manière honorable dans leur vie personnelle et faire en sorte que leur comportement ne puisse donner à raisonnablement penser qu'ils appuient une quelconque forme de discrimination préjudiciable. Par conséquent, les juges devraient éviter toute association avec un organisme qui pratique ou approuve une forme de discrimination prohibée par la loi. L'adhésion à un tel organisme est susceptible de remettre en cause l'engagement des juges envers le principe d'égalité et de miner la confiance du public à l'endroit de la magistrature. Les juges devraient aussi être sensibles au fait que l'activité et les politiques de certains organismes ainsi que les opinions qu'ils expriment, quoique licites, peuvent porter atteinte aux attentes légitimes en matière d'égalité.

4.D.2 Ni la pratique d'une religion, ni l'appartenance à un organisme religieux ne sont incompatibles avec les *Principes de déontologie*.

V. Impartiality

Statement

Judges are impartial and appear to be impartial in the performance of their judicial duties.

Principles

A. Judges ensure that their conduct at all times maintains and enhances confidence in their impartiality and that of the judiciary.

B. Judges avoid conduct which could reasonably cause others to question their impartiality.

C. Judges conduct their affairs so as to avoid real or apparent conflicts of interest between their private interests and their judicial duties.

D. While preserving their impartiality, judges make meaningful efforts to inform and educate the public and the legal profession regarding the law, judicial independence, and the role of judges and the courts in the administration of justice.

E. Judges contemplating retirement and former judges avoid conduct that is likely to bring the judicial office into disrepute or put at risk public expectations of judicial independence, integrity and impartiality.

V. Impartialité

Énoncé

Les juges sont impartiaux et donnent l'apparence d'impartialité dans l'exercice de leurs fonctions judiciaires.

Principes

A. Les juges veillent en toutes circonstances à ce que leur conduite entretienne et accroisse la confiance dans leur impartialité et celle de la magistrature en général.

B. Les juges évitent les comportements pouvant raisonnablement amener autrui à mettre en doute leur impartialité.

C. Les juges mènent leurs affaires de manière à éviter tout conflit réel ou apparent entre leurs intérêts personnels et leurs fonctions judiciaires.

D. Tout en veillant à préserver leur impartialité, les juges s'efforcent d'éduquer le public et la profession juridique et de les informer sur le droit, l'indépendance judiciaire et le rôle des juges et des tribunaux dans l'administration de la justice.

E. Les juges qui songent à quitter ou qui ont quitté la magistrature évitent toute conduite susceptible de jeter le discrédit sur la fonction judiciaire ou de miner les attentes du public quant à l'indépendance, à l'intégrité et à l'impartialité de la magistrature.

Commentary

General

5.A.1 For centuries, adjudication by impartial and independent judges has been recognized as fundamental to the rule of law. Impartiality is a fundamental qualification of a judge and a core attribute of the judiciary.

5.A.2 Impartiality requires not only the absence of bias and prejudgment, but also the absence of any appearance of partiality. This dual aspect of impartiality is captured in the oft-repeated words that justice must not only be done, but manifestly be seen to be done. The test is whether a reasonable and informed person with knowledge of all relevant circumstances, viewing the matter realistically and practically, would apprehend a lack of impartiality in the judge.

5.A.3 While there is a close association between the judge's ethical and legal duties of impartiality, *Ethical Principles* is not intended to deal with the law relating to judicial disqualification or recusal.

Judicial Duties

5.A.4 Judges have a fundamental obligation to be and to appear to be impartial. This obligation of impartiality does not presuppose that judges are free of life experiences, sympathies or opinions. Rather, it requires judges to be sensitive to their own biases and to consider different points of view with an open mind. Judges should interact with all parties fairly and even-handedly.

Commentaires

Général

5.A.1 Depuis des siècles, on reconnaît que la décision des litiges par des juges impartiaux et indépendants est essentielle à la primauté du droit. L'impartialité est l'une des qualités fondamentales des juges et un attribut central de la fonction judiciaire.

5.A.2 L'impartialité requiert non seulement l'absence de préjugés et de partis pris, mais également l'absence d'apparence de partialité. Ces deux volets de l'impartialité sont bien résumés dans la maxime selon laquelle non seulement justice doit être rendue, mais encore elle doit paraître avoir été rendue. Le critère applicable consiste à se demander si une personne raisonnable et bien renseignée, qui serait au courant de toutes les circonstances pertinentes et étudierait la question de façon réaliste et pratique, craindrait que le juge ne soit pas impartial.

5.A.3 Bien qu'il existe des liens étroits entre les devoirs éthiques et juridiques des juges en matière d'impartialité, les *Principes de déontologie* ne sont pas destinés à traiter du droit relatif à la récusation des juges.

Fonctions judiciaires

5.A.4 Les juges ont l'obligation fondamentale d'être et de paraître impartiaux. L'obligation d'impartialité ne présuppose pas que les juges n'ont aucune expérience personnelle, sympathie ou opinion. Elle exige plutôt que les juges soient conscients de leurs propres préjugés et accueillent différents points de vue en gardant un esprit ouvert. Les juges devraient traiter toutes les parties avec équité et sur un pied d'égalité.

5.A.5 Judges should avoid using words or conduct, in and out of court, that might give rise to a reasonable perception of bias. The expectations of litigants are high. Disappointed litigants will sometimes perceive bias when neither actual bias nor a reasonable apprehension of bias exists. A judge's remarks or tone may diminish the judge's perceived impartiality. An unjustified reprimand of counsel, an improper remark about a litigant or a witness or a statement evidencing prejudgment or intemperate and impatient behaviour may undermine the appearance of impartiality. Casual conversations or familiarity with counsel or participants in the proceedings may be perceived by others as a form of exclusion. Therefore, judges should ensure that their comments or conduct do not provide reasonable grounds for a perception of bias.

5.A.6 While judges may wish to signal support for causes or viewpoints through words or in the wearing or display of symbols of support, even if they seem innocuous, such communications may be interpreted as reflecting a lack of impartiality or the use of the position of the judge to make a political or other statement. For these reasons, judges should avoid statements or visible symbols of support, particularly in the context of court proceedings.

5.A.7 Judges should ensure that proceedings are conducted in an orderly and efficient manner and that the court process is not abused. An appropriate measure of firmness may be necessary to achieve this end. In the presence of challenging or vexatious litigants, judges should be firm, decisive and at the same time respectful to ensure that litigants' rights are protected.

5.A.5 Les juges devraient éviter de s'exprimer ou de se comporter, en salle d'audience ou ailleurs, de manière à susciter une perception raisonnable de partialité. Les attentes des parties sont élevées. Il peut arriver qu'une partie déçue perçoive l'existence d'un préjugé malgré l'absence de partialité réelle ou de crainte raisonnable de partialité. Des remarques formulées par les juges ou le ton employé pour exprimer celles-ci peuvent miner la perception d'impartialité des juges. Les remontrances injustifiées faites aux avocats, les remarques déplacées au sujet des parties ou des témoins, les déclarations manifestant un parti pris et les comportements immodérés et impatients peuvent saper l'apparence d'impartialité. Les conversations ou comportements empreints de familiarité avec les avocats ou les participants à l'instance peuvent être perçus par d'autres comme une forme d'exclusion. Par conséquent, les juges devraient s'assurer que leurs commentaires ou leur conduite ne donnent pas prise à une perception raisonnable de partialité.

5.A.6 Bien que des juges puissent vouloir exprimer leur appui pour certaines causes ou points de vue, les paroles ou le port d'insignes marquant cet appui, même lorsqu'ils semblent inoffensifs, peuvent être interprétés comme un manque d'impartialité ou être vus comme un moyen d'utiliser la fonction judiciaire pour faire une déclaration politique ou autre. Pour cette raison, les juges devraient éviter de tenir des propos ou de porter des insignes visibles marquant leur appui, en particulier dans le cadre du processus judiciaire.

5.A.7 Les juges devraient veiller à ce que l'instance se déroule de manière ordonnée et efficace, tout en prévenant les abus de procédure. Une certaine fermeté peut s'imposer selon les circonstances. En présence d'une partie difficile ou quérulente, les juges devraient se comporter de manière ferme et décisive, sans renoncer au respect requis pour assurer la protection des droits des parties.

5.A.8 Judges have a responsibility to promote opportunities for all persons to understand the judicial process and to meaningfully present their case, whether or not they have legal representation. Self-represented persons may sometime be uninformed about their rights and about the consequences of the options they choose. Judges should take appropriate and reasonable measures to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.[8] Such measures are consistent with impartiality provided that they are fair to other parties.

5.A.9 Judges should be particularly attuned to the perception of bias that might arise in circumstances where one or more parties are self-represented. Appropriate assistance to a self-represented litigant may be perceived by the opposing, represented party as manifesting bias. Accommodations extended to self-represented litigants should not extend to the point where they become unfair to the other party. Clear and transparent communication with all parties is necessary to avoid unwarranted apprehension of bias.

5.A.8 Les juges ont la responsabilité de s'assurer que toute personne, qu'elle soit représentée ou non représentée, ait la possibilité de comprendre le processus judiciaire et de faire valoir sa position. Les personnes non représentées peuvent parfois être mal informées de leurs droits et des conséquences de leurs choix. Les juges devraient prendre des moyens appropriés et raisonnables afin d'établir un processus équitable et impartial et d'empêcher que les personnes non représentées ne soient pas injustement désavantagées.[8] De tels moyens se concilient avec l'impartialité pour autant qu'ils soient équitables envers toutes les parties.

5.A.9 Les juges devraient être particulièrement sensibles à la possibilité d'une perception de partialité dans les situations où l'une des parties ou plusieurs d'entre elles ne sont pas représentées. L'assistance congruente que les juges apportent à une partie non représentée peut être perçue par la partie adverse représentée par avocat comme la manifestation d'un parti pris. Les accommodements accordés aux parties non représentées ne devraient pas rendre le processus injuste pour les parties représentées. Il est nécessaire de communiquer de façon claire et transparente avec toutes les parties afin de dissiper les craintes injustifiées de partialité.

8 *Canadian Judicial Council Statement of Principles on Self-represented Litigants and Accused Persons (2006)*

8 *Conseil canadien de la magistrature, Énoncé de principes concernant les plaideurs et les accusés non représentés par un avocat (2006)*

5.A.10 An expanding aspect of judicial responsibility for judges is their work in settlement conferences and the judicial mediation of disputes. Direct engagement with litigants and counsel in these non-adjudicative settings often takes judges outside the confines of their traditional roles and presents additional challenges in relation to impartiality. Given the variety of settings in which this work takes place, it is not possible to articulate bright line rules to provide guidance in every situation. However, there are values and boundaries which judges should respect in these settings. When engaging in non-adjudicative dispute resolution, judges should ensure that: (i) the process and outcomes are acceptable to the parties themselves; (ii) the outcomes are the subject of informed decision-making by the parties; (iii) the process is transparent to the parties; (iv) the outcomes are not coercive, unconscionable, or illegal; and (v) the legitimate interests of known non-involved third parties are considered. Transparency in this context means openness in the broadest sense and is not intended to discourage caucusing in appropriate circumstances.

Restraints

5.B.1 On appointment, judges do not surrender all of the rights and freedoms enjoyed by everyone else in Canada. Nevertheless, the office of the judge imposes restraints that are necessary to maintain public confidence in the impartiality and independence of the judiciary. In defining the appropriate degree of public involvement by a judge there are two fundamental considerations. The first is whether the involvement could reasonably undermine confidence in the judge's impartiality. The second is whether such involvement may expose the judge to criticism or be inconsistent with the dignity and integrity of judicial office.

5.A.10 Les responsabilités des juges s'étendent de plus en plus aux modes alternatifs de règlement des litiges et à la médiation judiciaire. Les interactions directes entre juges, parties et avocats inhérentes à ces processus non juridictionnels s'inscrivent souvent en dehors des cadres traditionnels de l'activité judiciaire et soulèvent des enjeux additionnels en matière d'impartialité. Comme ces cadres de travail varient grandement, il n'est pas possible d'établir des règles claires et précises susceptibles d'apporter des solutions à toutes les éventualités. Néanmoins, les juges devraient respecter certaines valeurs et limites dans ces situations et notamment s'assurer de ce qui suit : (i) le processus et les résultats qui en découleront sont acceptables pour les parties elles-mêmes; (ii) les parties ont consenti en toute connaissance de cause aux résultats; (iii) le processus est transparent pour les parties; (iv) les résultats ne sont pas coercitifs, iniques ou contraires à la loi; et (v) les intérêts légitimes des tiers connus qui ne sont pas parties au litige sont pris en compte. Dans ce contexte, la transparence s'entend d'une ouverture, au sens large, et n'est pas incompatible avec la possibilité de rencontres individuelles, le cas échéant.

Restrictions

5.B.1 Les juges ne renoncent pas, du fait de leur nomination, à l'ensemble des droits et libertés dont jouit chaque personne au Canada. Cependant, la charge de juge impose des contraintes qui sont nécessaires au maintien de la confiance du public dans l'impartialité et l'indépendance de la magistrature. Deux questions fondamentales entrent en ligne de compte lorsqu'il s'agit de déterminer le niveau d'intervention publique qui convient à un membre de la magistrature. La première consiste à savoir si l'intervention pourrait raisonnablement saper la confiance dans l'impartialité du juge et la deuxième, si cette intervention est susceptible d'exposer le juge aux critiques ou est par ailleurs incompatible avec la dignité et l'intégrité de la fonction judiciaire.

Political Activity

5.B.2 Judges must cease all partisan political activity upon the assumption of judicial office. Moreover, judges refrain from conduct that, in the mind of a reasonable and informed person, could give rise to the appearance that the judge is engaged in political activity. For this reason, judges must refrain from: (i) membership in political parties and political fundraising; (ii) attendance at political gatherings and political fundraising events; (iii) contributing financially or otherwise to political parties or campaigns; (iv) signing petitions to influence a political decision; and (v) taking part publicly in controversial political discussions, except in respect of matters directly affecting the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice.

5.B.3 Like partisan political activity, out of court statements by a judge concerning issues of public controversy may undermine impartiality. They are also likely to lead to public confusion about the nature of the relationship between the judiciary on the one hand and the executive and legislative branches of government on the other. Partisan actions and political statements by definition involve publicly choosing one side of a debate over another. In order to preserve their impartiality, judges should refrain from any political action or involvement. The perception of partiality will be reinforced if the judge's activities attract criticism and/or rebuttal. This in turn tends to undermine public confidence in the judiciary. Judges should not use the privileged platform of judicial office to enter the public arena because it puts at risk public confidence in the impartiality and the independence of the judiciary.

Activités politiques

5.B.2 Les juges doivent se retirer de toute activité politique de nature partisane dès leur entrée en fonction. De plus, les juges évitent toute conduite susceptible de donner à une personne raisonnable et bien renseignée l'impression qu'ils s'adonnent à une activité politique. Pour cette raison, les juges doivent éviter de faire ce qui suit : (i) adhérer à des partis politiques et à des campagnes de financement politique; (ii) participer à des rassemblements politiques ou à des activités de financement politique; (iii) verser des contributions financières à des partis ou à des campagnes politiques ou y contribuer d'autres manières; (iv) signer des pétitions visant à influencer une décision politique; et (v) intervenir publiquement dans des débats politiques, sauf sur des questions concernant directement le fonctionnement des tribunaux, l'indépendance de la magistrature ou des éléments fondamentaux de l'administration de la justice.

5.B.3 Tout comme les activités politiques de nature partisane, les propos hors du cadre judiciaire sur des questions soulevant une controverse publique peuvent miner l'image d'impartialité du juge. En outre, ils risquent de créer de la confusion auprès du public en ce qui concerne les rapports entre le pouvoir judiciaire, d'une part, et les pouvoirs exécutif et législatif, d'autre part. Par définition, les activités partisanes et les déclarations politiques impliquent une prise de position publique à l'égard d'une question particulière. Afin de préserver leur impartialité, les juges devraient éviter toute activité ou participation politique. La perception de partialité sera plus aiguë si les activités auxquelles s'adonnent les juges font l'objet de critiques ou de contestations. Ces réactions, à leur tour, tendront à miner la confiance du public à l'endroit de la magistrature. Les juges ne devraient pas utiliser le prestige associé à la fonction judiciaire comme levier dans l'arène publique, car, ce faisant, ils mettent en péril la confiance du public dans l'impartialité et l'indépendance de la magistrature.

5.B.4 Chief Justices and other judges with administrative responsibilities will necessarily have contact and interaction with the executive branch of government, including attorneys general, deputy attorneys general and court services officials. These engagements are appropriate provided that the interactions are not partisan in nature.

5.B.5 If a member of a judge's family is politically active, the judge should recognize that such activities of close family members may adversely affect the public perception of the judge's impartiality. In cases where such public perceptions may arise, a judge should consider whether recusal is the appropriate remedy in a given case.

Public Statements

5.B.6 There are limited circumstances in which judges may properly speak out, though with restraint, about a matter that is publicly controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice. Chief Justices have particular responsibilities in this regard. Judges should follow any protocol established by their Court on these matters.

5.B.7 If their personal integrity has been called into question in a public context, judges should seek guidance from their Chief Justice and, if appropriate, other trusted advisors.

5.B.4 Les juges en chef et les autres juges qui exercent des responsabilités administratives sont appelés à communiquer et à interagir avec des membres du pouvoir exécutif, dont les procureurs généraux, les sous-ministres ou sous-procureurs généraux et les administrateurs des tribunaux. Ces interactions sont appropriées, en autant qu'elles n'ont pas de dimension partisane.

5.B.5 Les juges devraient être conscients que les activités politiques d'un membre de leur famille immédiate peuvent compromettre leur image d'impartialité auprès du public. Dans les cas où la perception du public pourrait être compromise dans une affaire particulière dont ils sont saisis, les juges devraient considérer s'il y a lieu de se récuser.

Déclarations publiques

5.B.6 Il existe des circonstances où les juges, quoique avec retenue, peuvent exprimer publiquement leur avis sur un sujet controversé, notamment lorsque ce dernier concerne directement le fonctionnement des tribunaux, l'indépendance de la magistrature ou des aspects fondamentaux de l'administration de la justice. Les juges en chef ont une responsabilité particulière à cet égard. Les juges devraient se conformer aux protocoles établis par leur propre cour, le cas échéant.

5.B.7 Dans le cas où leur intégrité personnelle serait publiquement mise en doute, les juges devraient obtenir l'avis de leur juge en chef et, au besoin, d'autres conseillers dignes de confiance.

Judicial Promotion and Opportunities

5.B.8 Leadership positions in courts, opportunities for elevation to a higher court and other opportunities for judges arise from time to time. These decisions are ultimately made by the executive branch of government. Judges are entitled to seek these positions and advance their qualifications, but should exercise reserve in their communication of interest, or the communication of interest by others on their behalf, so as to avoid any conduct that would compromise their impartiality or undermine the integrity of the appointment process.

Public Engagement, Civic and Charitable Activity

5.B.9 Many judges wish to become or continue to be active in various forms of public service to their communities. This involvement benefits the community and judges but also carries risks.

5.B.10 On one hand, there are likely to be beneficial aspects of the judge being active in appropriate forms of public service. Judges administer the law on behalf of the community and are appointed to serve the public. Therefore, unnecessary isolation from the community does not promote wise or just judgments. In order to undertake their work with competence and diligence, and in ways that are consistent with judicial duties, judges are encouraged to take up opportunities to engage with and learn from the wider public, including communities with which they have little or no life experience.

Promotion et autres opportunités pour les juges

5.B.8 Il arrive que des juges soient pressentis pour des fonctions de leadership au sein d'une cour ou en vue de leur accession à une cour de juridiction supérieure, ou que d'autres occasions se présentent à eux. Les décisions finales en cette matière relèvent du pouvoir exécutif. Les juges sont en droit de soumettre leur candidature à ces postes et de faire valoir leurs compétences, mais devraient faire preuve de réserve lorsqu'il s'agit d'exprimer leur intérêt soit directement, soit par l'entremise d'une autre personne, afin d'éviter toute conduite qui mettrait en péril leur impartialité ou minerait l'intégrité du processus de nomination.

Participation à la vie publique et activités sociales ou communautaires

5.B.9 Nombre de juges souhaitent s'impliquer dans des activités sociales ou communautaires ou maintenir leur engagement à cet égard. Cet engagement est bénéfique tant pour la société que pour les juges, mais comporte également des risques.

5.B.10 D'une part, la participation des juges à diverses activités sociales ou communautaires appropriées est sans doute avantageuse. Les juges appliquent la loi au nom de la société et sont nommés pour servir la population. Par conséquent, leur isolement excessif du reste de la collectivité est peu propice à des décisions justes et judicieuses. Afin qu'ils exercent leurs fonctions avec compétence et diligence, dans le respect des devoirs de leur charge, les juges sont encouragés à saisir les occasions qui leur permettent d'interagir avec le public et de mieux comprendre leur société, y compris les groupes qu'ils connaissent peu ou pas de par leur expérience personnelle.

5.B.11 On the other hand, the judge's civic involvement may, in some cases, jeopardize the perception of impartiality. Judges should exercise caution when considering their involvement in community activities and be attentive to the limits that judicial appointment places upon their freedom to undertake these activities. Community involvement on the part of the judge should be assessed in light of the form of public service under consideration, the activities and goals of the organization, the role to be played by the judge within it, the risk that the organization may become engaged in litigation and any other relevant factor.

5.B.12 Generally speaking, judges should refrain from membership in or association with groups or organizations or participation in public discussion which, in the mind of a reasonable and informed person, would undermine confidence in a judge's impartiality with respect to issues that could come before the courts. In service to their communities, judges must not give legal or investment advice, and should avoid involvement in causes or organizations that are likely to be engaged in litigation. Judges should use even greater caution in considering whether to become officers or directors of community organizations.

5.B.13 While, in the past, Canadian judges have served in leadership positions with organizations such as universities and religious bodies, this service is potentially problematic. The risk that such organizations will become involved in litigation or be the subject of public controversy creates the possibility that the judge will be placed in an awkward position, both in relation to public confidence in the judge's impartiality and in the judiciary as a whole. While judges may consider accepting such positions, they should reflect on issues of perceived or actual conflict before doing so, all with a view to determining whether the role can be structured in such a way so as to avoid conflicts and appearances of conflict.

5.B.11 D'autre part, l'engagement social et communautaire des juges peut parfois compromettre leur image d'impartialité. Les juges devraient faire preuve de prudence lorsqu'ils envisagent de participer à des activités sociales ou communautaires et être sensibles au fait que l'accession à la magistrature leur impose des limites à cet égard. L'opportunité d'une participation devrait être appréciée en fonction du type de service public envisagé, des activités et objectifs de l'organisme, du rôle que le juge serait appelé à y jouer, du risque que l'organisme soit partie à un litige et de tout autre facteur pertinent.

5.B.12 En général, les juges devraient s'abstenir d'adhérer ou de s'associer à un groupement ou à un organisme, ou de participer à un débat public, lorsque, du point de vue d'une personne raisonnable et bien renseignée, cette adhésion ou cette participation serait susceptible de miner la confiance dans l'impartialité des juges relativement à des questions susceptibles d'être soumises aux tribunaux. Dans le cadre de leurs activités sociales ou communautaires, les juges doivent s'abstenir de donner des conseils juridiques ou des conseils en matière de placements et devraient éviter de participer à des causes ou à des organisations susceptibles d'être impliquées dans un litige. Les juges ne devraient envisager d'occuper des postes de dirigeant ou d'administrateur d'un organisme social ou communautaire qu'avec la plus grande prudence.

5.B.13 Bien que certains juges du Canada aient dans le passé occupé des fonctions de leadership au sein d'entités telles que des universités ou des organisations religieuses, l'exercice de telles fonctions peut soulever des difficultés. Il existe un risque que ces entités soient parties à un litige, ou qu'elles fassent l'objet d'une controverse publique, ce qui pourrait placer le juge dans une situation délicate du point de vue de la confiance du public, tant à l'égard de son impartialité qu'à l'endroit de la magistrature dans son ensemble. Avant d'accepter de telles fonctions, les juges devraient considérer les risques de conflit réel ou perçu et s'il est possible d'établir une structure permettant d'éviter les conflits et les apparences de conflit.

5.B.14 Involvement with a community organization that at one time was appropriate may become inappropriate. Judges should re-evaluate these associations in light of changing circumstances.

Social Media

5.B.15 Social media activities are subject to the overarching principles that guide judicial behaviour. Judges should be aware of how their activities on social media may reflect on themselves and upon the judiciary and should be attentive to the potential implications for their ability to perform their judicial role. Judges should also be attentive to and may wish to inform family members of the ways in which their social media activities could reflect adversely on the judge.

5.B.16 Communication by social media is more public and more permanent than many other forms of communication. It enables messages to be re-transmitted beyond the originators' control and without their consent. Comments or images intended for a limited audience can be shared, almost instantaneously, with a vast audience and may create an adverse reaction far beyond what one may have considered possible. Social media can also create greater opportunities for inappropriate communications to judges from others.

5.B.14 La participation à un organisme social ou communautaire qui est jugée appropriée à un moment donné peut cesser de l'être par la suite. Les juges devraient réévaluer leurs associations en fonction des changements de circonstances.

Médias sociaux

5.B.15 Les communications dans les médias sociaux sont assujetties aux principes fondamentaux qui guident la conduite des juges. Les juges devraient être conscients du fait que ces communications peuvent ternir leur réputation et celle de la magistrature et se répercuter sur leur capacité d'exercer leurs fonctions judiciaires. Par ailleurs, les juges devraient être conscients que les communications des membres de leur famille pourraient également se répercuter défavorablement sur eux; il pourrait y avoir lieu de les en informer.

5.B.16 Les communications affichées dans les médias sociaux peuvent rarement être effacées et n'ont pas vraiment de caractère privé. Elles peuvent facilement être disséminées sans le consentement de leur auteur et échapper à son contrôle. Les commentaires et les images destinés à être partagés dans un cercle fermé peuvent être rediffusés, parfois instantanément, à un vaste auditoire et provoquer une réaction défavorable qui dépasse largement ce qu'on aurait imaginé. Les médias sociaux ouvrent aussi des avenues additionnelles permettant à un membre du public de transmettre des communications inappropriées à un membre de la magistrature.

5.B.17 Judges' communications and associations with others are commonly used as a basis for claims of lack of impartiality. Judges should be vigilant in minimizing reasonable apprehensions of bias arising from these communications and associations. This is all the more important, and difficult, in the age of social media. Judges who choose to use social media should exercise great caution in their communications and associations within these networks, including expressions of support or disapproval. This includes judges informing themselves about the functioning, and the application, of security and privacy settings appropriate to their use of social media.

5.B.18 In a digital world, out-of-court information is much more accessible and the acquisition of such information by a judge is more readily discoverable. Accordingly, judges should be vigilant to avoid inappropriately acquiring or receiving out-of-court information related to the parties, witnesses or issues under consideration in matters before them. Fairness issues may need to be considered by the judge should this happen.

Gifts and Remuneration

5.B.19 Judges must not accept gifts from litigants, lawyers, law firms or any other person in contexts that give rise to a reasonable apprehension of bias. This does not prevent judges from accepting gifts of nominal value in appreciation for having spoken at or contributed to events or conferences, or have their reasonable expenses reimbursed. Such gifts are acceptable, provided that they do not represent remuneration and their acceptance would not create, in the mind of a reasonable and informed person, a perception of partiality.

5.B.17 Les allégations touchant le manque d'impartialité sont souvent fondées sur des propos des juges ou sur le fait qu'ils entretiennent des rapports avec certaines personnes. Les juges devraient éviter que de telles communications ou de tels rapports donnent prise à une crainte raisonnable quant à leur impartialité. Les médias sociaux compliquent les choses à cet égard. Les juges qui choisissent d'y être présents devraient faire preuve d'une grande prudence dans leurs communications, y compris en ce qui concerne l'usage de symboles d'approbation ou de désaccord. Ils devraient également se renseigner sur le fonctionnement et l'application des paramètres de sécurité et de protection de la vie privée convenant à leur utilisation des médias sociaux.

5.B.18 À l'ère numérique, il est beaucoup plus facile d'accéder à des renseignements extrajudiciaires et de laisser des traces en le faisant. Par conséquent, les juges devraient veiller à éviter d'obtenir ou de recevoir de façon inappropriée des renseignements extrajudiciaires relatifs aux parties, aux témoins ou aux questions dont ils sont saisis. Une telle situation, si elle survenait, pourrait soulever des questions d'équité que le juge pourrait devoir prendre en considération.

Cadeaux et rémunération

5.B.19 Les juges ne doivent pas accepter de cadeaux de la part des parties à un litige, d'avocats ou de leur cabinet ou de toute autre personne lorsque cela est susceptible de susciter une crainte raisonnable de partialité. Cela ne signifie pas qu'il est interdit aux juges d'accepter des cadeaux de valeur symbolique pour leur contribution à la tenue d'événements ou de conférences ou d'obtenir le remboursement de frais raisonnables. De tels cadeaux sont acceptables, en autant qu'ils ne constituent pas une rémunération et que le fait de les accepter ne susciterait pas chez une personne raisonnable et bien renseignée une perception de partialité.

Speeches and Conferences

5.B.20 It is common for judges to be asked to speak in public. Judges' public engagement aimed at educating others is a benefit to the judiciary and the public they serve. Judges are encouraged to attend events as speakers, both to contribute their knowledge and to undertake their own professional development. However, speaking in public carries risks to the public perception of the judge's impartiality and must be approached with care. Judges should give careful consideration to a range of factors when deciding whether to accept a speaking invitation and, if so, what the judge may properly address in a speech. These include: (i) the organization inviting the judge to speak; (ii) the anticipated audience; (iii) the topic or general theme to be addressed in the speech; (iv) the degree to which the topic relates to matters concerning the judiciary or the courts; (v) whether the topic or the judge's remarks relates to a matter of public policy or public controversy; vi) the likelihood that the speech will be reported on, recorded or made available to a broader public; and (vii) the value of the judge's remarks in informing or educating the intended audience. If judges have any doubts regarding the appropriateness of accepting a speaking engagement they should seek the advice of their Chief Justice.

Attendance at Events

5.B.21 Judges may attend social or public events, or conferences provided that such attendance does not compromise their impartiality and the nature of the event, or host, does not raise other concerns related to *Ethical Principles*.

Discours et participation à des conférences

5.B.20 Il est fréquent que des juges soient invités à prendre la parole en public. La participation des juges à des programmes éducatifs est bénéfique, tant pour la magistrature que pour le public qu'elle sert. Il est souhaitable que les juges donnent des conférences et contribuent par ce moyen à l'avancement des connaissances et à leur propre perfectionnement professionnel. Cependant, la prise de parole en public peut nuire à la perception d'impartialité des juges et devrait être abordée prudemment. Avant d'accepter une invitation à prononcer une conférence, et d'en déterminer le contenu, les juges devraient analyser avec soin un certain nombre d'éléments, dont les suivants : (i) la provenance de l'invitation, (ii) l'auditoire envisagé, (iii) le sujet ou le thème à aborder, (iv) le rapport plus ou moins étroit entre le sujet à aborder et les questions qui touchent la magistrature ou les tribunaux, (v) le rapport entre le sujet à aborder ou l'allocution du juge et des questions de politique publique ou des enjeux controversés, (vi) la probabilité que le discours soit cité dans les médias, enregistré ou autrement mis à la disposition du public et (vii) l'intérêt des propos du juge du point de vue de l'information ou de l'éducation du public. En cas de doute quant à l'opportunité d'accepter une invitation, les juges devraient consulter leur juge en chef.

Présence à des événements

5.B.21 Les juges peuvent participer à des événements sociaux ou publics ou à des congrès ou colloques, pourvu que leur présence ne mette pas en péril leur impartialité, ou que la nature de l'événement ou l'identité de l'hôte ne soulève pas de crainte au regard des *Principes de déontologie*.

5.B.22 Judges may participate in social programs at conferences provided that they are generally available to attendees or speakers and the sponsorship, nature and extent of social programs would not create, in the view of a reasonable and informed person, a perception of lack of impartiality.

5.B.23 Attendance by a judge at conferences and social events sponsored by businesses or organizations is potentially problematic. Where invited, the judge should consider the organization hosting the event, whether the invitation has also been extended to community leaders, the purpose for which the judge was invited and the potential for adverse public perception as a result of the attendance.

5.B.24 When judges are invited to attend social events associated with the law or the legal profession, or hosted by law firms, they should consider the nature of the social event, its sponsorship, the other invitees and attendees at the event, the purpose for which the judge has been invited, the existence of a previous personal relationship with the host and attendees, as well as the benefit to the judge, the judiciary and the legal profession as a result of the judge's attendance. Judges should avoid attendance at such events if a purpose of the event is to advance a commercial interest, to showcase the host's relationship with the judge, or if clients are in attendance.

5.B.22 Les juges peuvent participer au volet social de congrès ou de colloques, en autant que ces activités soient normalement accessibles aux participants ou aux conférenciers et que le commanditaire, la nature et l'étendue de ces activités sociales soient tels qu'ils ne puissent susciter chez une personne raisonnable et bien renseignée la perception d'un manque d'impartialité.

5.B.23 La participation des juges à des congrès ou colloques ou à des activités sociales qui sont commandités par des entreprises ou des organismes peut soulever des difficultés. Lorsqu'ils sont invités, les juges devraient prendre en compte la nature de l'organisme hôte, le fait que d'autres personnes en vue au sein de la collectivité ont aussi été invitées, l'intention derrière l'invitation faite aux juges et la possibilité que le public perçoive défavorablement la présence de juges à un tel événement.

5.B.24 La participation des juges à des activités sociales liées au droit ou à la profession juridique ou organisées par un cabinet d'avocats devrait aussi être évaluée en fonction de la nature de l'événement, de l'identité des commanditaires, de l'identité des autres participants ou invités, de l'intention derrière l'invitation faite aux juges, de l'existence de liens personnels antérieurs entre le juge et les hôtes ou autres invités, et du bénéfice qui résulterait de la présence du juge d'un point de vue personnel, du point de vue de la magistrature ou de celui de la profession juridique. Les juges devraient s'abstenir de participer à de telles activités si leur objet est lié à des fins commerciales, si l'événement vise à souligner l'existence d'une relation entre le juge et l'hôte ou si des clients de l'hôte sont présents.

Conflicts of Interest

5.C.1 The discussion of conflicts of interest in *Ethical Principles* is not intended to state the law relating to judicial disqualification or recusal. It is intended to provide guidance to judges as they identify and assess the circumstances in which their personal interests may be reasonably viewed by others as conflicting with their judicial duties. In assessing their ethical duties in this context, judges should remain conscious of the demands of the sound administration of justice and their duty to hear the cases assigned to them.

5.C.2 The potential for a conflict of interest arises when the personal interest of the judge (or of those close to the judge) conflicts with the judge's duty to adjudicate impartially. Judicial impartiality is concerned with impartiality in fact and in the perception of a reasonable and informed person. As a result, judges should be attentive to both actual conflicts between their self-interest and their duty of impartial adjudication, and to circumstances in which a reasonable and informed person would reasonably apprehend a conflict.

5.C.3 Conflicts of interest may arise from: a pecuniary or non-pecuniary interest in the outcome; a close family, personal or professional relationship with a litigant, counsel or witness; or the judge having expressed views evidencing bias regarding a litigant or an issue that is before the court.

Conflits d'intérêts

5.C.1 Les *Principes de déontologie* n'ont pas pour objet de traiter du droit relatif à la récusation des juges. Dans le présent document, la discussion des conflits d'intérêts vise à offrir aux juges des pistes de réflexion qui leur permettent d'identifier et d'évaluer les circonstances où leurs intérêts personnels pourraient raisonnablement être vus par d'autres comme entrant en conflit avec leurs fonctions judiciaires. Lorsqu'ils évaluent leurs obligations déontologiques dans ce cadre, les juges devraient garder à l'esprit les exigences d'une saine administration de la justice et leur devoir d'entendre les affaires qui leur sont confiées.

5.C.2 Il y a risque de conflit d'intérêts lorsque l'intérêt personnel du juge (ou de ses proches) s'oppose à son devoir de rendre la justice avec impartialité. L'impartialité judiciaire s'entend à la fois de l'impartialité réelle et de l'impartialité apparente, selon la perception d'une personne raisonnable et bien renseignée. Par conséquent, les juges doivent être sensibles non seulement aux conflits réels entre leur intérêt personnel et leur devoir de rendre la justice de manière impartiale, mais également aux situations dans lesquelles une personne raisonnable et bien renseignée éprouverait une crainte raisonnable de conflit d'intérêts.

5.C.3 Un conflit d'intérêts peut survenir lorsque les juges ont un intérêt patrimonial ou extrapatrimonial dans l'issue d'un procès; une relation de parenté, une amitié proche ou une relation professionnelle avec une partie, un avocat ou un témoin; ou lorsque les juges expriment des opinions manifestant de la partialité à l'égard d'une partie ou d'un enjeu débattu devant le tribunal.

5.C.4 Upon appointment, judges must immediately cease practicing law, and should divest themselves and remain divested of their interests in commercial and business activities. Severance of all association with the judge's legal practice should be done as quickly as possible, ideally in an immediate and final way.

5.C.5 Generally speaking, judges are entitled to manage 'passive' investments that do not constitute 'carrying on business', provided that the investment is truly passive with little active management required. Nevertheless, judges should not participate in a case in which they have a financial, property or other interest that could be affected by its outcome or in which their interest would give rise to a potential apprehension of lack of impartiality by a reasonable and informed person. This is true whether the interest is itself the subject matter of the controversy or where the outcome of the case could materially affect the value of any interest or property owned by the judge, the judge's family or close associates. There is no conflict where the judge's financial or property interest is limited to one shared by citizens generally. Owning an insurance policy, having a bank account, using a credit card or owning securities in a widely held enterprise would not, in normal circumstances, constitute a conflict of interest, unless the outcome of the proceedings before the judge could substantially affect such holdings.

5.C.4 Dès leur nomination, les juges doivent immédiatement cesser de pratiquer le droit et devraient se départir, de façon définitive, de leurs intérêts dans toute activité commerciale ou d'affaires. Les liens existant avec leur cabinet devraient être rompus aussi rapidement que possible, idéalement de manière immédiate et définitive.

5.C.5 De manière générale, les juges peuvent détenir des placements « passifs » qui ne constituent pas « la poursuite d'une entreprise », en autant qu'il s'agisse de placements véritablement passifs exigeant peu ou pas de gestion active. Néanmoins, les juges ne devraient pas présider de procès qui mettent en jeu leur propre intérêt pécuniaire ou autre ou leur patrimoine ou dans lesquels leur intérêt pourrait susciter chez une personne raisonnable et bien renseignée la crainte qu'ils pourraient ne pas juger de façon impartiale. Ce principe s'applique aussi bien dans le cas où l'intérêt lui-même est l'objet du litige que dans celui où l'issue du procès pourrait avoir une incidence importante sur la valeur de tout intérêt ou bien appartenant au juge, à sa famille ou à des proches. Il n'y a généralement pas de conflit d'intérêts lorsque l'intérêt financier ou patrimonial du juge est équivalent à celui de la population en général. Ainsi, dans des circonstances normales, ne constituerait pas un conflit d'intérêts le fait de détenir une police d'assurance, d'avoir un compte bancaire, d'utiliser une carte de crédit ou de détenir des titres d'une société inscrite en bourse, à moins que le résultat du litige devant le juge ne puisse affecter substantiellement la valeur de ces intérêts.

Acting as Executors

5.C.6 Judges should not normally act as an executor or fiduciary, unless it concerns the affairs of a close friend or relative and is unlikely to become contentious. Even in that case, judges should not be remunerated for that role and should not act if the executorship may interfere with the performance of judicial duties.

Judges' Former Legal Practice

5.C.7 Judges should be sensitive to the existence of relationships which, to a reasonable and informed person, would give rise to reasonable apprehension of lack of impartiality. In particular, judges will face this issue in relation to cases involving former clients, members of the judge's former law firm or lawyers from the government department or legal aid office in which the judge practiced before appointment. Each case is unique and the apprehension of bias should be assessed in light of all the circumstances. The following general guidelines may be helpful: (i) judges who were involved in private practice should not sit on any case in which the judge or, to their knowledge, the judge's former firm was directly involved in any capacity before the judge was appointed to office; (ii) judges who practised law in government service or legal aid should not sit on cases in which they had any involvement prior to their appointment; (iii) judges should not sit on a matter in which the judge's former law firm is involved until after a 'cooling off period', often established by local law or tradition, of between two and five years; and, (iv) judges should not sit on a matter in which the judge's former law firm is involved for at least as long as there continues to be a financial relationship between the judge and the law firm.

Agir comme liquidateur

5.C.6 De manière générale, les juges ne devraient pas agir comme liquidateur d'une succession ou comme fiduciaire ou fondé de pouvoir, si ce n'est pour le bénéfice d'un ami proche ou d'un membre de leur famille, et à la condition qu'il soit peu probable que la situation devienne litigieuse. Même dans ce cas, les juges ne devraient pas être rémunérés pour cette tâche, laquelle ne devrait pas être acceptée si elle est susceptible de nuire à l'exercice des fonctions judiciaires.

Activités professionnelles antérieures

5.C.7 Les juges devraient être sensibles à l'existence de relations susceptibles de susciter, chez une personne raisonnable et bien renseignée, une crainte raisonnable quant à leur impartialité. Les juges devront parfois se demander s'il convient d'entendre des affaires qui impliquent d'anciens clients, des membres de leur ancien cabinet ou des avocats du ministère ou du bureau d'aide juridique dans lequel ils ont exercé avant leur accession à la magistrature. Chaque cas est unique et la crainte de partialité devrait être appréciée en fonction de toutes les circonstances. Les recommandations suivantes pourraient s'avérer utiles : (i) les juges qui exerçaient en pratique privée ne devraient pas entendre les litiges dans lesquels ils agissaient ou, à leur connaissance, leur ancien cabinet agissait à quelque titre que ce soit, avant leur accession à la magistrature; (ii) les juges qui exerçaient au sein de la fonction publique ou à l'aide juridique ne devraient pas entendre les litiges dans lesquels ils agissaient à quelque titre que ce soit avant leur accession à la magistrature; (iii) les juges ne devraient pas entendre les autres dossiers menés par leur ancien cabinet avant l'expiration d'une certaine période, souvent établie par la loi ou les usages locaux, de deux à cinq ans à compter de leur nomination, et (iv) les juges ne devraient pas entendre les dossiers menés par leur ancien cabinet au moins aussi longtemps que perdurent leurs relations financières avec celui-ci.

Personal Relationships

5.C.8 Frequently judges are faced with situations where the lawyer appearing before the judge is from a law firm where a close friend or member of the judge's immediate family is a partner, associate or employee. It would be inappropriate for a judge to hear a case involving a close friend or family member. Generally speaking, it would not be problematic for a judge to sit on a case involving a lawyer from a firm in which the close friend or family member is a member or employee, provided that the friend or family member has not been involved in the matter. However, there may be circumstances where it would be inappropriate for a judge to hear such a case. For example, where the law firm is very small (such that there is a greater risk of the perception of lack of impartiality) or where the law firm stands to gain or lose significantly by the outcome, such that the judge's decision would result in a monetary or reputational gain or loss to the close family member or friend or former colleague.

Judges in Financial Difficulty

5.C.9 Judges who are in financial difficulty should be particularly vigilant for conflicts of interest, both actual and perceived. Problems arise where judges in these circumstances preside over matters involving their creditors. Serious questions arise if any aspect of the judge's financial difficulties becomes contentious and the possibility of the judge appearing before a judicial colleague as a party or a witness could arise. The actual day-to-day impact of the financial difficulties on the judge's ability to perform the job will obviously vary considerably depending on the circumstances.

Relations personnelles

5.C.8 Il arrive fréquemment que les juges entendent des affaires où l'une des parties est représentée par un cabinet au sein duquel un ami proche ou un membre de leur famille immédiate pratique le droit ou est employé. Il serait inapproprié que des juges entendent des affaires impliquant des membres de leur famille immédiate ou des amis proches. De manière générale, il n'est pas inapproprié qu'un juge entende une affaire où l'une des parties est représentée par un avocat appartenant au même cabinet qu'un ami proche ou un membre de leur famille, pour autant que cette personne n'ait pas participé au dossier. Néanmoins, cette situation pourrait devenir problématique dans certaines circonstances, comme lorsque le cabinet est très petit (accroissant le risque que le juge soit perçu comme manquant d'impartialité) ou lorsque l'enjeu du litige est susceptible de profiter ou de nuire grandement au cabinet, de telle sorte que la décision du juge puisse entraîner un gain ou une perte pécuniaire pour le membre de la famille immédiate, l'ami ou l'ancien collègue ou être favorable ou défavorable à sa réputation.

Les juges en difficulté financière

5.C.9 Les juges qui éprouvent des difficultés financières devraient prendre particulièrement garde aux conflits d'intérêts, tant réels qu'apparents. Des problèmes surviennent lorsque des juges, dans de telles circonstances, président des procès dont l'objet concerne un de leurs créanciers. De graves questions se poseront si un aspect ou un autre des difficultés financières du juge devient litigieux et qu'il est possible que le juge soit forcé de comparaître devant un collègue à titre de partie ou de témoin. Il est difficile de systématiser les conséquences réelles des difficultés financières des juges sur leur capacité d'accomplir quotidiennement leur tâche; ces conséquences varieront selon les circonstances.

Disclosure and Consent

5.C.10 In certain situations, it may be appropriate for a judge to make disclosure of a potential conflict and invite submissions from the parties. However, judges, not the parties or their counsel, bear the burden of ensuring respect for the principle of judicial impartiality. Neither disclosure of a conflict of interest nor the consent of the parties necessarily justifies judges ignoring circumstances which reasonably call into question their ability to hear a case and decide impartially.

Extraordinary Circumstances: Interests of Justice

5.C.11 Extraordinary or urgent circumstances may require judges to weigh the requirements of judicial impartiality against the risk of injustice.

5.C.12 Circumstances which might cause only minor inconvenience to a large court might nonetheless have a significant practical impact on a smaller court. Judges should organize their private affairs to minimize the potential for such conflicts.

Divulgation et consentement

5.C.10 Il peut être approprié pour un juge de divulguer l'existence d'une situation de conflit d'intérêts potentiel et d'inviter les parties à faire des représentations à ce sujet. C'est effectivement aux juges, plutôt qu'aux parties ou à leurs avocats, qu'il incombe de faire respecter le principe d'impartialité. Ni la divulgation du conflit d'intérêts ni le consentement des parties ne permettent forcément aux juges d'ignorer les circonstances dans lesquelles une personne raisonnable pourrait craindre que l'affaire ne puisse être entendue ou jugée de manière impartiale.

Circonstances extraordinaires : intérêt de la justice

5.C.11 Des circonstances extraordinaires ou urgentes peuvent exiger que les juges cherchent un équilibre entre le principe l'impartialité judiciaire et la nécessité d'éviter une injustice.

5.C.12 Les circonstances qui pourraient n'entraîner que de légers inconvénients pour une juridiction de grande taille pourraient avoir de graves répercussions pour un tribunal de moindre envergure. Les juges devraient organiser leurs affaires personnelles de manière à atténuer le risque que surviennent de tels conflits.

Public Education Activities

5.D.1 Judges possess significant knowledge of the law and the legal system. For this reason, they should make reasonable efforts to become engaged in informing and educating the public regarding the rule of law and the role of judges and courts in the administration of justice. Chief Justices have particular responsibilities and opportunities in relation to such public engagement, including public communications on behalf of their courts.

5.D.2 Subject to the limitations imposed by s. 55 of the *Judges Act* and these *Ethical Principles*, judicial participation in law reform or other scholarly or educational activities are not discouraged, provided that such involvement does not include participation in campaigns in support of, or the championing of, law reform initiatives.

Éducation du public

5.D.1 Les juges connaissent à fond le droit et le système de justice. Pour cette raison, ils devraient s'efforcer dans la mesure du possible d'informer et de renseigner le public sur la primauté du droit et le rôle des juges et des tribunaux dans l'administration de la justice. À cet égard, les juges en chef ont une responsabilité accrue, y compris pour ce qui concerne les communications qui émanent de leur cour.

5.D.2 Sous réserve des restrictions imposées par l'article 55 de la *Loi sur les juges* et par les *Principes de déontologie*, la participation des juges à des travaux de réforme du droit et à d'autres activités de recherche ou d'éducation n'est pas découragée, pour autant qu'elle n'inclue pas la contribution à des campagnes de soutien à des initiatives de réforme du droit ou la promotion de telles initiatives.

Post-Judicial Careers[9]

5.E.1 Judges may choose to move on to another career after leaving the bench. This raises several ethical considerations. One issue relates to the situation of judges prior to departure from judicial office. There may well be circumstances in which planning for one's post-judicial career undermines the perception of impartiality a judge should maintain. Discussions, negotiations or proposals of employment with a law firm, a prospective employer who is a litigant before the judge or a party in a case where the judge has delivered a judgment, may create the impression of a conflict of interest. The same concern exists where a judge is soliciting such opportunities. Whether the overture comes from the judge or the prospective employer, there is a risk that the judge's self-interest and duty would appear to conflict in the eyes of a reasonable and informed person. Accordingly, judges should refrain from engaging in such conversations before their judicial term has come to an end.

9 *Canadian Judicial Council Position on Former Judges Returning to Practice (2017)*

Carrière post-judiciaire[9]

5.E.1 Il est possible que des juges amorcent une nouvelle carrière après avoir quitté la magistrature. Cette situation soulève plusieurs enjeux éthiques. Un premier type de préoccupation concerne la situation des juges pendant la période qui précède leur départ de la magistrature. Les gestes posés par les juges dans la planification de leur carrière post-judiciaire peuvent, dans certaines circonstances, porter atteinte à l'apparence d'impartialité qu'ils devraient maintenir. Les discussions ou négociations relatives à un emploi avec un cabinet d'avocats ou un autre employeur éventuel qui est partie à une affaire en cours ou à un litige tranché par le juge pourraient susciter une apparence de conflit d'intérêts. La même inquiétude s'attache aux expressions d'intérêt ou propositions qui pourraient être faites par les juges auprès d'employeurs éventuels. Que les invitations discrètes émanent des juges ou de l'employeur éventuel, une personne raisonnable et bien renseignée pourrait y voir un conflit entre l'intérêt personnel du juge et son devoir. Par conséquent, les juges devraient éviter de participer à de telles conversations avant que leurs fonctions judiciaires n'aient pris fin.

9 *Conseil canadien de la magistrature, Position sur les anciens juges qui reprennent l'exercice du droit après avoir quitté la magistrature (2017)*

5.E.2 The situation of the judge upon leaving judicial office also introduces ethical considerations. Where former judges are professionally active, their conduct can have an impact on the public's perception of the judiciary as a whole. Accordingly, former judges should be attentive to the ways in which their post-judicial actions or activities could undermine public confidence in the judiciary. Former judges are able to return to the legal profession, but there are limits to the types of activities in which they can engage, consistent with the preservation of the principle of impartiality. A former judge could act as an arbitrator, mediator or commissioner. However, former judges should not appear as counsel before a court or tribunal in Canada. Appearance as counsel is broader than physical appearance. While it is appropriate for former judges to review or draft legal arguments and pleadings, to provide advice to counsel and parties, a former judge should not stand, speak or appear as counsel in court or before a tribunal or sign legal documents that are or may be the subject of proceedings before a court or tribunal. This constraint may be subject to exceptions where a judge has left the judiciary after a very short time.

5.E.3 Former judges should exercise appropriate caution in accepting retainers and providing legal advice in high profile or politically contentious matters where it can be anticipated that a client may make use of the judge's former status to advance the client's interests.

5.E.4 Former judges should not disclose the confidential discussions among judges – for example, the deliberations of an appellate court – or discuss anything that gives the appearance of relying on confidential information or judicial confidences.

5.E.2 La situation des juges qui quittent la magistrature soulève également des considérations éthiques. La conduite des juges qui retournent à la vie professionnelle peut affecter la perception qu'a le public de la magistrature dans son ensemble. Les anciens juges devraient être sensibles au fait que leurs activités ou actions pourraient miner la confiance du public à l'endroit de la magistrature. Les juges peuvent réintégrer la profession juridique à l'issue de leur carrière judiciaire, mais certaines restrictions s'appliquent aux types d'activités qui s'ouvrent à eux afin que soit préservé le principe d'impartialité. Les anciens juges peuvent exercer des fonctions d'arbitre, de médiateur ou de commissaire. Néanmoins, ils ne devraient pas comparaître en tant qu'avocat devant une cour ou un tribunal au Canada. La comparution en tant qu'avocat va au-delà de la comparution en personne. Bien qu'il soit approprié pour un ancien juge de rédiger ou de réviser des documents juridiques ou des actes de procédure, ou de donner des conseils aux avocats et aux parties, ils ne devraient pas plaider devant une cour de justice ou un tribunal, ni apposer leur signature sur un document juridique dont l'objet est ou pourrait être lié à une instance. Il est possible que des exceptions à ce principe soient admises à l'égard de juges qui ont quitté la magistrature très peu de temps après leur nomination.

5.E.3 Les anciens juges devraient faire preuve de la prudence requise avant d'accepter un mandat et de donner des conseils juridiques lorsque le client est susceptible d'utiliser l'ancien statut du juge comme levier pour faire avancer ses intérêts dans un dossier controversé sur le terrain politique ou une affaire qui attire beaucoup d'attention sur la scène publique.

5.E.4 D'autre part, les anciens juges ne devraient pas révéler la teneur des discussions confidentielles auxquelles ils ont participé – en tant que membre d'une formation d'une cour d'appel, par exemple – ou révéler quoi que ce soit qui puisse donner à croire qu'ils s'appuient sur des informations confidentielles ou liées au secret judiciaire.

INDEX

B

C

INDEX

A

B

C

I

LA PRESSE

JUSTICE ET FAITS DIVERS

Entrevue avec la juge en chef de la Cour supérieure

« Tout tient avec du duct tape »

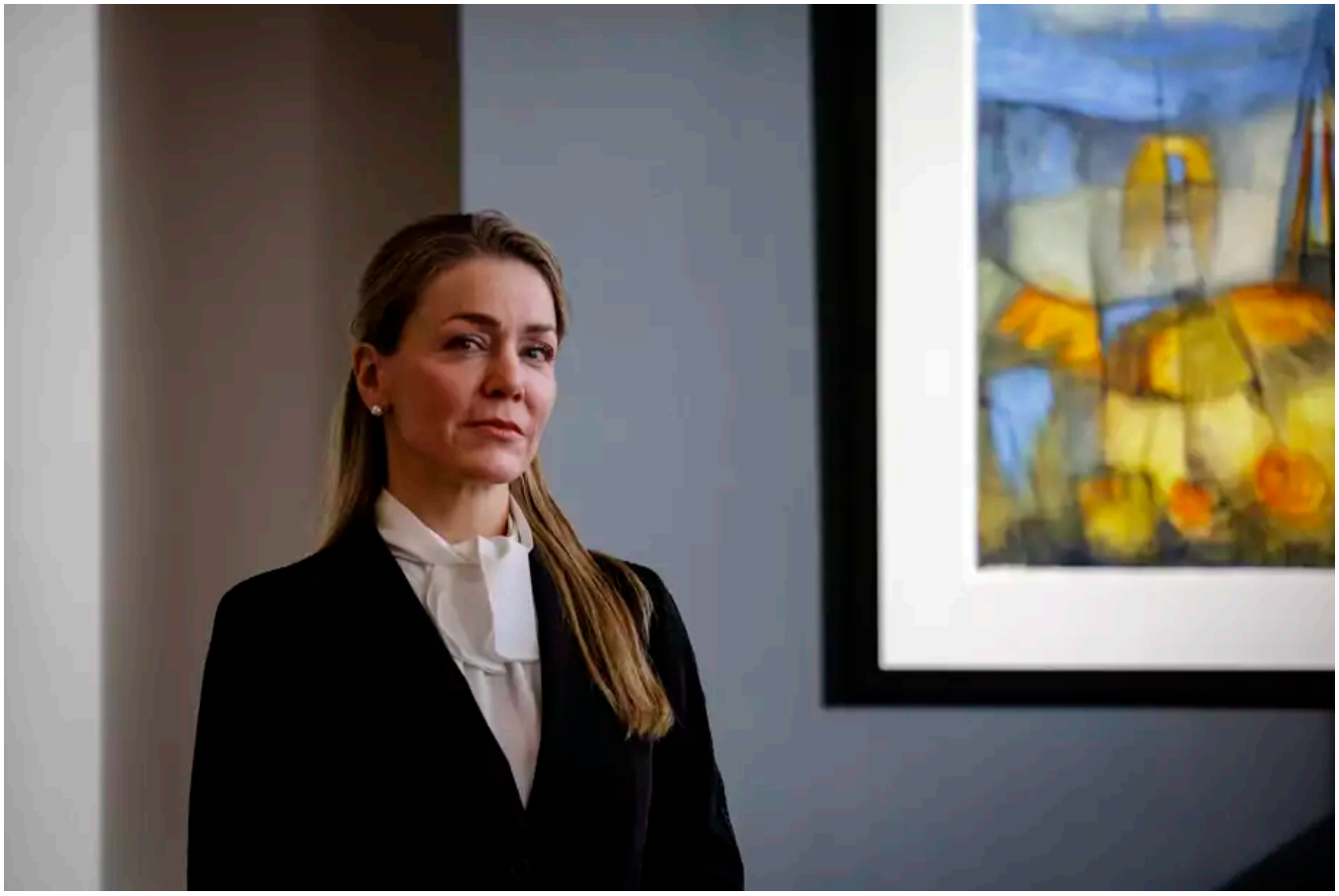


PHOTO OLIVIER JEAN, LA PRESSE

Marie-Anne Paquette, juge en chef de la Cour supérieure du Québec

« On a l'intime sentiment que tout tient avec du duct tape. Ça prend au moins un miracle par jour pour réussir à fonctionner. »

C’est l’implacable diagnostic du système judiciaire que fait Marie-Anne Paquette, nouvelle juge en chef de la Cour supérieure du Québec, dans sa première grande entrevue. Pendant que des procès sont régulièrement reportés par manque de juges, Ottawa tarde à pourvoir les 12 postes vacants et à créer la dizaine de nouveaux postes réclamés par la juge en chef.

Publié le 6 déc. 2022

LOUIS-SAMUEL PERRON
La Presse

Son immense bureau trône au sommet du palais de justice de Montréal. La vue sur le Vieux-Port y est imprenable. La juge en chef s’excuse d’emblée pour ses étagères toujours vides, où elle expose fièrement le portrait de ses trois filles. C’est que la nouvelle patronne de la Cour supérieure avait d’autres priorités depuis son entrée en poste en juin dernier : moderniser la justice et la magistrature. Un défi titanesque qui n’effraie pas cette femme élevée sur une ferme, et que rien ne destinait au droit.

La juge en chef brosse un portrait sombre, mais lucide de notre système judiciaire actuel, qui tient grâce à des « miracles » quotidiens et où la « futurologie » règne en l’absence de données fiables. « On veut améliorer les délais, mais on est obligés de faire des choses à l’aveugle. Il nous manque tellement de données sur l’activité judiciaire ! », s’exaspère la juge en chef.

Mais surtout, elle décrit un système qui ne respecte pas ses promesses envers la population. En juin dernier, un procès sur quatre au civil a dû être remis pour

« encombrement » à la Cour supérieure, car plusieurs procès étaient fixés au même moment.

« C'est dramatique », lâche la juge en chef, en se montrant empathique envers ces citoyens qui n'ont « pas dormi de la nuit » et qui ont « investi un temps fou » dans leur dossier. « On leur fait faux bond », se désole-t-elle. Le taux d'encombrement est ensuite descendu à 7 %, puis à 4,7 % pendant l'automne. Mais pour la juge en chef, ce n'est pas une « amélioration » : le seul taux « acceptable » est de 0 %.

« On ne peut pas faire ça à la population ! », s'exclame-t-elle.

La cause « directe » est le retard d'Ottawa pour pourvoir les 12 postes de juges vacants à la Cour supérieure, explique Marie-Anne Paquette. Diplomate, elle s'abstient de critiquer Ottawa et assure que le fédéral met « les bouchées doubles » pour « corriger » la situation.

En plus des 12 postes vacants, la juge en chef demande au gouvernement Trudeau de créer 9 nouveaux postes pour « bien servir la population ». Une demande déjà approuvée « intégralement » par Québec, se réjouit-elle. La balle est maintenant dans le camp d'Ottawa.

« Bris de service »

Avec un déficit de 21 juges, les impacts sont réels pour le public. Dans un district en périphérie de Montréal, aucun juge n'a pu se libérer pour siéger les deux seules journées prévues dans le mois, illustre Marie-Anne Paquette.

La Cour supérieure a relevé pas moins de 29 « bris de service » pour manque de juge en septembre et octobre derniers, et 13 en raison du manque de personnel ou d'un dossier incomplet. La situation est certainement pire puisque ces données sont « imparfaites », nuance la juge en chef.

PHOTO OLIVIER JEAN, LA PRESSE

La juge en chef de la Cour supérieure du Québec, Marie-Anne Paquette, déplore notamment l'absence de données fiables sur le système judiciaire.

« Ça n'a pas lieu d'être ! Il y a n'a pas de taux acceptable de bris de service », insiste-t-elle, en montrant du doigt les salaires non compétitifs des employés du greffe et du soutien à la magistrature. Les adjointes des juges quittent ainsi la Cour supérieure pour travailler à la cour municipale ou au privé. Résultat : le tiers des magistrats n'a pas l'aide requise.

Un problème qui pèse lourd sur les épaules des juges, obligés de se consacrer à ces tâches administratives « extrêmement importantes ». « Je dois vous confier que cette surcharge, occasionnée par la pénurie de main-d'œuvre, entre parfois en concurrence avec la sérénité qui est nécessaire à l'exercice de nos fonctions », avoue la juge en chef.

> **« On a brûlé vraiment beaucoup de carburant quand on arrive sur le banc après avoir fait toutes sortes de tâches qui devraient être confiées à d'autres gens. [...] Ce n'est pas une question de snobisme. »**
>
> — Marie-Anne Paquette, juge en chef de la Cour supérieure du Québec

Comme à l'égard d'Ottawa, la juge en chef refuse de jeter le blâme sur Québec pour cette crise. Elle assure que le Conseil du trésor fournit « énormément » d'efforts pour corriger la situation.

De la ferme au palais

La juge en chef a un parcours hors du commun, ayant grandi sur une ferme laitière à Mirabel. « Je ne viens pas d'un milieu d'universitaires, mais d'un milieu agricole. Il n'y a pas grand-chose qui me destinait au droit », confie-t-elle. Ses parents ont été expropriés à l'époque de la construction de l'aéroport. Un bouleversement qui l'a marquée à vie.

« Ça a appelé chez moi un désir de connaître ces règles. Est-ce qu'on doit systématiquement accepter les choses comme elles sont ? Je pense que c'est ça qui m'a amenée vers le droit », s'ouvre Marie-Anne Paquette. Dans un milieu où l'on est souvent avocat de père en fils, la fille de fermiers a vite intégré l'idée qu'elle n'aurait « pas de deuxième chance », poursuit-elle.

PHOTO MARCO CAMPANOZZI, ARCHIVES LA PRESSE

Marie-Anne Paquette, lors du rassemblement de la rentrée judiciaire au palais de justice de Montréal, le 8 septembre dernier

Nommée juge en 2010, puis juge coordonnatrice, elle atteint le prestigieux poste de juge en chef de la Cour supérieure en juin 2022. Néanmoins, pas question de se reposer sur ses lauriers.

Marie-Anne Paquette parle avec détermination de son cheval de bataille : le dossier numérique, prochaine révolution du système judiciaire.

Selon elle, le dossier numérique permettra notamment de mieux colliger les données sur les délais judiciaires – et donc de poser des actions pour les réduire.

« On ne peut plus continuer d'opérer avec un dossier papier », martèle la juge en chef. D'ailleurs, elle refuse d'envisager la possibilité que cette réforme menée par le ministère québécois de la Justice tombe à l'eau. « On n'a pas le choix », répète-

t-elle. La livraison est prévue en 2025. Des centaines de millions de dollars sont investis par Québec dans l'ambitieux programme Lexius.

Des choix difficiles à venir

Les délais judiciaires au criminel sont comparables à ceux d'il y a quatre ans, se réjouit la juge en chef. Un procès devant jury peut être fixé dans un délai de 10 à 13 mois.

« Il y a beaucoup de miracles derrière ça, beaucoup d'ingéniosité, puis beaucoup de duct tape », nuance-t-elle.

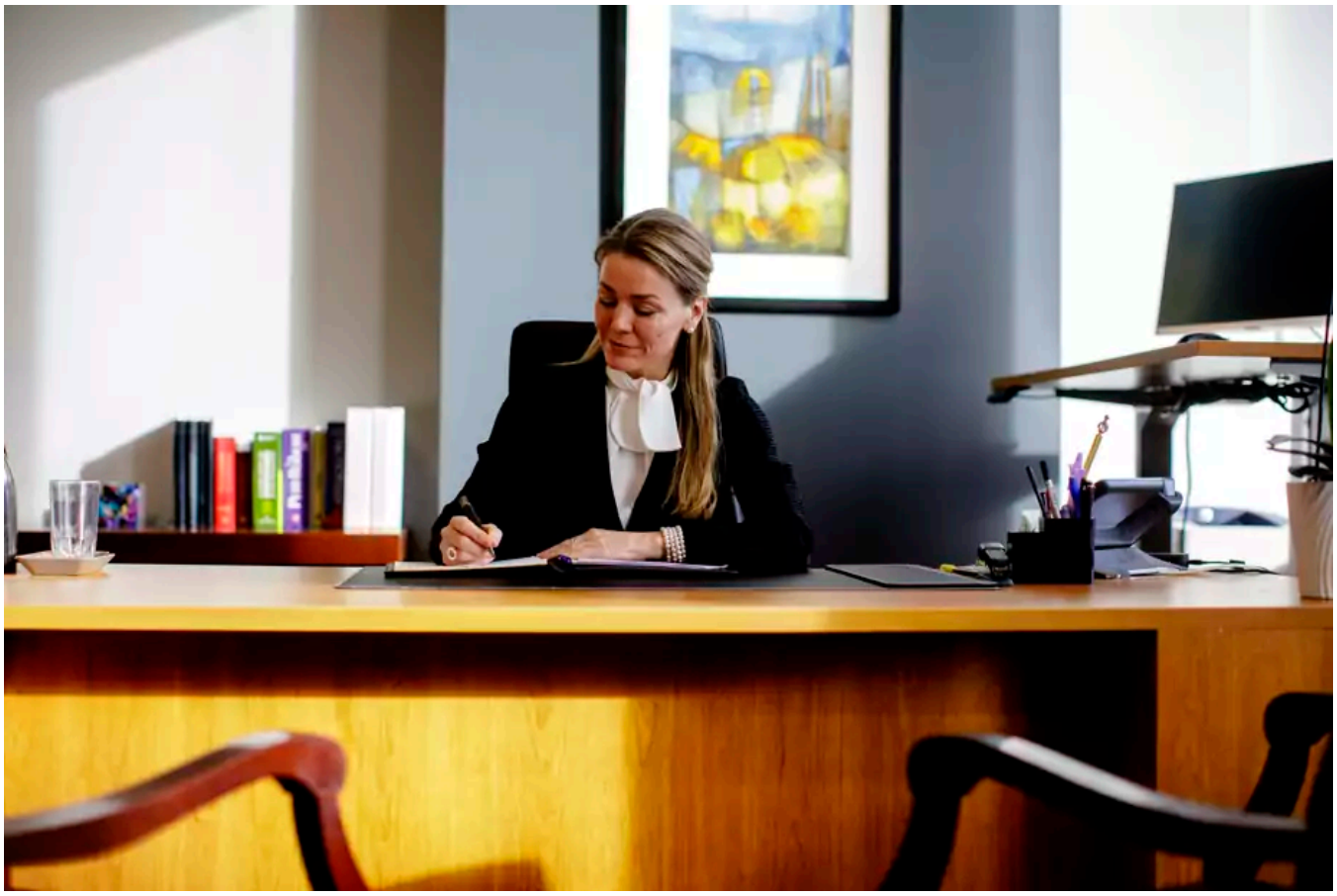


PHOTO OLIVIER JEAN, LA PRESSE

Marie-Anne Paquette a été nommée juge en chef de la Cour supérieure du Québec le 6 juin 2022.

Or, les délais qui explosent en Cour du Québec, en raison notamment de la réforme de l'horaire des juges, finissent par avoir un impact sur ceux de la Cour

supérieure. Les dossiers qui proviennent de la Cour du Québec sont « vieillissants », ce qui « réduit » sa marge de manœuvre, soutient Marie-Anne Paquette. Le plafond dicté par l'arrêt Jordan est de 30 mois en Cour supérieure.

> **« Encore une fois, si on était capable d'avoir accès à des statistiques, on pourrait dresser des tendances. On pourrait obtenir des extrapolations, puis dire quand sera le point de rupture. Mais on navigue à l'aveugle. »**
>
> — Marie-Anne Paquette, juge en chef de la Cour supérieure du Québec

Au civil, le délai pour la fixation d'un procès est stable à un an et trois mois. Or, un choix devra être fait si de nouveaux juges ne sont pas nommés, prévient la patronne de la Cour supérieure. « Nos délais vont rallonger, mais au moins, on va être sûr que la journée où les gens vont se présenter, on va être capable de les servir. Avec la pénurie d'effectifs, on fait face à ce dilemme », affirme-t-elle.

La Cour d'appel a révélé en mars dernier l'existence d'un « procès secret » qui s'est vraisemblablement déroulé en Cour du Québec contre un informateur de police. Une affaire qui a semé la consternation dans la classe politique et judiciaire.

Un tel « procès secret » pourrait-il se dérouler dans son propre tribunal ? La juge en chef Paquette répond avec fermeté : « Ce que je peux vous dire, c'est qu'il n'y en a pas à la Cour supérieure. »

Top judges decry Ottawa's appointment delays; application vetting defunct in B.C., Toronto, N.S.

By **Cristin Schmitz**

Law360 Canada (May 9, 2023, 5:01 PM EDT) -- As Canada's top judges again raise their voices about Ottawa's chronic and lengthy delays in appointing superior court judges — causing cancelled trials, judicial burnout and wasted time and expense for litigants — the Liberal government has allowed more than one-third of its judicial vetting committees to collapse.

As of May 1, 2023, the number of vacancies in the superior trial and appellate courts of the nation had climbed to nine per cent (88 of 995 full-time positions), according to the website of the Office of the Commissioner for Federal Judicial Affairs.

Some of those vacant judicial positions date back as much as 18 months, and most date back many months, according to information obtained by Law360 Canada from several major trial courts.

Meanwhile, a Law360 Canada review of the federal judicial affairs commissioner's website indicates six of the 17 federal Judicial Advisory Committees (JACs) have collapsed because the federal government has not appointed new members to take over from the incumbents, whose terms lapsed — a repeat problem that the Trudeau government has failed to rectify since the Liberals first formed government in 2015.

According to information provided by the commissioner's office to Law360 Canada, the JAC for Yukon expired more than a year ago (April 30, 2022), while the JACs for Nova Scotia and P.E.I expired more than seven months ago (Sept. 30, 2022).

Notably, on April 30, 2023 the JACs for Ontario's Greater Toronto Area and for British Columbia — which screen applicants for two of Canada's biggest, busiest and

backlogged superior trial courts — became defunct — as did the specialized JAC for the Tax Court of Canada.

The inordinately high number of current judicial vacancies last month prompted the Canadian Judicial Council, comprising the 44 chief- and associate chief justices of the country's superior trial and appellate courts, to publicly decry the crisis in the administration of justice — for the third time in seven months — via a public communique in which judicial leaders "reiterated their concerns about the need for more timely judicial appointments and the impact that vacancies have on court operations."

In a blunt follow-up letter May 3 from the CJC's chair to Prime Minister Justin Trudeau, Supreme Court of Canada Chief Justice Richard Wagner pointed out that some courts routinely operate with vacancy rates of 10 to 15 per cent, with appointments taking many months.

"The situation could undermine Canadians' confidence in the justice system and in all democratic institutions, because a growing number of criminal and civil cases are at risk of falling apart," the chief justice warned, as reported by the CBC May 9. "The current situation is untenable and I am worried that it will create a crisis in our justice system, which is already facing multiple challenges," the chief justice wrote in the letter obtained by CBC. "Access to justice and the health of our democratic institutions are at risk."

The chief justice said that federal Justice Minister David Lametti has been trying his best to address the shortage of judges.

"It is imperative for the Prime Minister's Office to give this issue the importance it deserves and for appointments to be made in a timely manner," the chief justice of Canada emphasized. "The government's inertia regarding vacancies and the absence of satisfactory explanations for these delays are disconcerting."

Chief Justice of British Columbia Robert Bauman

Chief Justice of British Columbia Robert Bauman told Law360 Canada in Ottawa after the CJC's spring meeting in late April, that the federal judiciary's "plea coincides with a particularly difficult time for a number of the courts across the country" with respect to judicial appointments.

The fallout from so many vacancies includes last-minute trial cancellations, consequent wasted time, energy and expense for litigants, long delays for court hearings and increased pressure on the short-staffed benches, Chief Justice Bauman explained. "The problem seems to be more acute today than it has been historically," he remarked. "There's always going to be a certain number of vacancies in any court, retirements and resignations being what they are. But now we seem to be particularly vexed by more vacancies than we can easily manage, that has then attendant pressures on other judges and on court schedulers, etc.," he said. "We know the stress of judicial proceedings is intense, and [a high judicial vacancy rate] exacerbates it, and we also know that that results in ... the [litigants'] costs of preparation that are thrown away, but have to be repeated. So it's a serious problem."

The problem is certainly serious in British Columbia's Supreme Court which was contending with 12 vacancies on a court with 95 full-time posts — a 13-per-cent vacancy rate (as of May 1).

The two oldest vacancies (in Abbotsford, B.C.) date back to November 2021 and January 2022, according to B.C. Supreme Court information provided to Law360 Canada.

Eight more full-time B.C. Supreme Court vacancies (including three unfilled full-time positions that were added to the judicial complement) also arose last year, beginning in

June 2022.

Half of the B.C. vacancies arose as a result of judges electing supernumerary (part-time) status, meaning the federal government knew well in advance that they would be leaving full-time work.

"All of the justices provided five to six months' notice of the date on which they elected to become a supernumerary judge," B.C. Superior Courts' spokesperson Bruce Cohen told Law360 Canada.

Cohen said the delay from a vacancy to appointment "generally ranges from a low of three months to a high of nine months; however, there are currently significant outliers."

He noted the three additions to the Supreme Court's complement, which were added in order to address workload pressures, "have gone unfilled for well over a year."

In Ontario's Superior Court of Justice, judges provide, by convention, six months' notice of their departure from full-time work.

Yet the delays in appointments to Canada's largest superior trial court are also substantial. Two-thirds of its vacancies have languished in the range of, at a minimum more than four months, up to 18 months and counting, according to information provided by the court to Law360 Canada.

As of May 1, there was a nine -per-cent vacancy rate in the Ontario Superior Court of Justice — 21 of 224 full-time posts (not including family court) were vacant. The three earliest superior court vacancies date back to November and December 2021. Thirteen vacancies date back to 2022.

The vacancy problems are likely to worsen since, as of May 1, the judicial advisory committees for the Greater Toronto Area and for British Columbia also became moribund, leaving the superior trial courts which rely on them to vet and create a sufficient pool of candidates for the bench desperately awaiting appointments.

"I don't know why it takes so long in some cases to appoint [JACs] after terms expire," Chief Justice Bauman told Law360 Canada. "But the lack of a timely-appointed JAC

obviously delays the appointment process because eligible candidates for appointment must first get through the responsible JAC and only such eligible candidates make up the pool of candidates available for appointment."

Kerry Simmons, CBA British Columbia

The executive director of the British Columbia branch of the Canadian Bar Association, Kerry Simmons, told Law360 Canada that the CBA-B.C supplied its nominee for the now-defunct B.C. JAC to the federal government last March.

"We need to have the JACs working," Simmons stressed. "Any delay in appointing them means that no review of applications can happen, so it will then further delay [judicial] appointments if the JACs are not operational."

Simmons noted it is possible to design a more timely and efficient judicial appointment process, pointing to the example of the appointment system for British Columbia's Provincial Court. "Our province has a timely process right now," she remarked.

The hiatus in the operations of many non-partisan JACs as they await the justice minister's appointment of new members — a recurrent phenomenon — is only one possible contributor to the decades-old problem of untimely federal judicial appointments.

However, the federal government declines to explain just what causes its persistent delays in appointing judges. Politics and consultation are said to play a role as cabinet members, MPs and others weigh in on candidates for the various vacancies. There may also be a bottleneck within the Prime Minister's Office, where a handful of officials vet federal

appointments.

Asked why the persistent federal delays in appointing judges, Lametti told a scrum on Parliament Hill May 9 “we try to appoint judges at the necessary speed.”

Justice Minister David Lametti

Lametti noted the Liberal government has created more than 100 new judicial positions, while he has appointed almost 400 since his appointment as minister of justice in 2019. “Our government has appointed more than 600,” he said, since the Liberals took office in 2015. “So we’re working hard. We had two [federal] elections in between.”

Lametti acknowledged the serious consequences that lengthy vacancies can have on court operations, and for the fair trial Charter rights of accused, who the Supreme Court of Canada has said must generally be tried within 30 months in superior court.

“It’s a serious problem, and we’re attacking the problem,” Lametti said, without providing any details on how he is doing so. “I understand the problem. I’m working very hard with people across the country to make this system work.”

The justice minister noted that “there are different blockages from time to time at different points in the system.”

In some regions, for example, there may be too few applicants in the approved pool of judicial candidates to fit the requirements for the vacant posts, notwithstanding that Lametti and the judiciary of a number of courts have been reaching out to encourage applications from qualified lawyers.

“We are pushing to get people to apply in certain parts of the country more than others,”

Lametti said.

His director of communications, David Taylor, told Law360 Canada the defunct JACs "will be reconstituted in due course. Going forward, we are considering extending the [two-year] terms of the JAC, as well as the assessment period of applications from two to three years. In the meantime, we are fortunate to have a good list of screened applications in most jurisdictions."

With respect to the vacancies in both Ontario and British Columbia, Taylor said the federal justice minister "has spoken with members of the judiciary as well as the bar to encourage more people to apply for the bench."

"Our government continues to make appointments at a steady rate, and we expect the number of vacancies will continue to decline," Taylor said by email. "We will ensure our appointment process remains open, transparent and merit based."

Both the bench and bar have long decried what then-Supreme Court of Canada Chief Justice Beverley McLachlin publicly denounced in 2016 as the "perpetual crisis" in filling superior court vacancies typical of federal governments of both political stripes. She told the Canadian Bar Association "there is something deeply wrong with a hiring scheme that repeatedly proves itself incapable of foreseeing, preparing for and filling vacancies as they arise."

Judicial appointment delays are "eminently fixable," she told Law360 Canada at the time, particularly as judicial retirements are usually known, or anticipated, months in advance by the government. "If you were running a corporation you'd figure out who you need in place in advance, and that would be filled," she said. "Otherwise you would be suffering detrimental effects, and you'd be losing money. In this case we're suffering detrimental effects, but the impact is on the people who are not getting their cases heard."

Chief Justice of Canada Richard Wagner

Chief Justice Wagner highlighted the problem again last February in a speech to the Canadian Bar Association where he urged the federal government to move on filling the unusually high number of judicial vacancies across the country (echoing a CJC plea in September 2022). The Canadian Bar Association also wrote federal Lametti last January, underscoring the need for timely appoints to the federal benches and the JACs.

Chief Justice Bauman said there are presently relatively "fewer willing applicants" for the B.C. Supreme Court's vacancies.

"We're not sure why that's so, but it is so," the chief justice of British Columbia said, noting that Lametti, B.C. Supreme Court Chief Justice Christopher Hinkson and the B.C. bar association and law society are "all concerned, and are all reaching out to bring home that fact to the bar in British Columbia to encourage qualified applicants."

Ottawa's chronic delays in appointing federal judges has had dire consequences on the ground, as detailed by the B.C. Supreme Court in its annual report for the 2022 calendar year.

"The court continues to have to bump a large number of long chambers applications and trials compared to historical averages, which has been a trend since 2019," the superior trial court reported this year. "The main cause of bumping continues to be the shortage of judges available to hear matters, as the court does not have enough judges to meet the demand for hearings and trials. ... In 2022, 10.9 per cent of all long chambers applications in British Columbia were bumped, which was slightly lower than the bumping rates in 2019 through 2021, but well above the average in the years preceding that," the court said. "In Vancouver specifically, the bumping rate for long chambers applications in 2022

was slightly lower than in 2021, but higher than in 2020 and the years leading up to 2019. More trials were bumped in 2022 than in 2021 in British Columbia, with 16.3 per cent bumped in 2022 compared to 13.5 per cent the year before."

Photo of British Columbia Chief Justice Robert Bauman by Cristin Schmitz
Photo of Chief Justice of Canada Richard Wagner by Roy Grogan

If you have any information, story ideas or news tips for Law360 Canada, please contact Cristin Schmitz at cristin.schmitz@lexisnexis.ca or call 613-820-2794.

RELATED SECTIONS

- Access to Justice
- Banking, Bankruptcy & Insolvency
- Business
- Civil Litigation
- Criminal
- Family
- Immigration
- Intellectual Property
- Labour & Employment
- Natural Resources
- Personal Injury
- Tax
- Wills, Trusts & Estates

La Cour supérieure dépend de « miracles » au quotidien pour gérer la pénurie de juges

La juge en chef rappelle que les citoyens qui dépendent des tribunaux pour régler des causes civiles souffrent aussi du manque de juges à l'échelle nationale.

L'extérieur du palais de justice de Gatineau et de l'édifice Jos-Montferrand

PHOTO : RADIO-CANADA / CHRISTIAN MILETTE

Daniel Leblanc

Publié le 10 mai 2023 à 4 h 52 HNE

Le manque de juges cause une série de drames « inacceptables » pour les familles qui se retrouvent devant les tribunaux à des moments particulièrement troublants ou traumatisants de leur vie, affirme la juge en chef de la Cour supérieure du Québec, Marie-Anne Paquette.

En entrevue à Radio-Canada, elle raconte qu'une famille en pleine séparation acrimonieuse a appris qu'elle devra attendre 19 mois avant que les questions d'autorité parentale et de pension alimentaire soient entendues par la Cour supérieure.

« L'enfant a quatre ans aujourd'hui. Il va en avoir six quand on va le revoir pour déterminer comment papa et maman auraient dû gérer leur coparentalité », dénonce-t-elle. « C'est 19 mois de situation intenable pour les parents et pour les enfants. »

La juge en chef de la Cour supérieure du Québec, Marie-Anne Paquette
PHOTO : COUR SUPÉRIEURE DU QUÉBEC

Ces problèmes sont la conséquence directe de la pénurie de juges au sein des tribunaux du pays, une situation que vient de dénoncer le juge en chef du Canada, Richard Wagner, dans une lettre adressée au premier ministre Justin Trudeau.

À l'échelle nationale, il y a 85 postes de juge vacants sur environ 1200 au sein des différentes juridictions de compétence fédérale.

« Je suis très heureuse de cette initiative que le juge en chef a prise. Mais je suis malheureuse que cette initiative soit nécessaire », affirme la juge en chef Paquette.

Environ 90 % des causes entendues par la Cour supérieure du Québec sont de nature civile, souvent dans des situations de séparation ou de divorce, de perte d'emploi ou de conflits commerciaux, rappelle la magistrate.

Le juge en chef de la Cour suprême, Richard Wagner, s'inquiète de voir fléchir la confiance du public envers la justice en raison de cette pénurie.

PHOTO : LA PRESSE CANADIENNE / JUSTIN TANG

Une autre conséquence négative de la pénurie de juges est le risque d'une multiplication des arrêts de procédures dans des dossiers criminels.

En raison de l'arrêt Jordan prononcé par la Cour suprême du Canada en 2016, les dossiers de nature pénale doivent être réglés dans un délai maximal de 30 mois, à moins de circonstances exceptionnelles.

> « Pour l'instant, les choses sont sous contrôle, mais ça tient à des miracles. »
>
> — Marie-Anne Paquette, juge en chef de la Cour supérieure

« On manœuvre avec les moyens du bord et avec le proverbial *duct tape*. »

Délai sans précédent

La juge en chef Paquette note que le gouvernement fédéral n'a toujours pas pourvu le poste laissé vacant en mars 2022 par le décès de la juge en chef adjointe Eva Petra.

> « Ça semble être un record de délai à combler ce type de poste-là, mais ce n'est pas le genre de record qu'on aime détenir. »
>
> — Marie-Anne Paquette, juge en chef de la Cour supérieure

Il y a officiellement trois autres postes vacants au sein de la Cour supérieure du Québec, sans compter le fait que quatre juges devraient prendre leur retraite au cours des prochains mois.

De plus, la Cour supérieure a évalué qu'elle a besoin de neuf postes de juge supplémentaires pour s'acquitter de toutes ses obligations, un constat que partage le gouvernement du Québec.

En tout, dans ce contexte, la juge en chef Paquette voudrait qu'Ottawa nomme 17 nouveaux juges à court terme à la Cour supérieure du Québec.

Pourtant, le processus de nomination à la magistrature bloque à Ottawa. Par conséquent, la Cour doit faire des « prouesses » pour éviter que des causes au criminel tombent en raison de l'arrêt Jordan ou que les dossiers civils s'enlisent.

« Le rythme des nominations ne suit pas celui des départs », lance-t-elle.

Un gouvernement qui « néglige ses responsabilités »

De son côté, le Bloc québécois accuse le gouvernement de négliger encore une fois ses responsabilités de base.

« La responsabilité de nommer ces juges revient à Ottawa et à personne d'autre. Mais encore une fois, comme ce fut le cas pour les passeports, comme c'est le cas pour l'immigration et pour l'assurance-emploi, le fédéral manque à remplir ses fonctions les plus élémentaires », avance le député bloquiste Rhéal Fortin.

Le ministre fédéral de la Justice, David Lametti
PHOTO : LA PRESSE CANADIENNE / SPENCER COLBY

Le ministre fédéral de la Justice, David Lametti, a réagi en affirmant qu'il est d'accord avec les constats du juge en chef Wagner, qui souligne que la pénurie de juges pourrait miner la réputation de toutes les institutions démocratiques au Canada.

« Je suis tout à fait en accord. C'est un problème sérieux, on s'attaque au problème », a expliqué David Lametti.

Il a ajouté que son gouvernement a nommé plus de 600 juges depuis 2015 et qu'il a aussi créé une centaine de postes de juge supplémentaires qu'il travaille « avec acharnement » à pourvoir.

À lire aussi :

- Sélection des juges à Ottawa : « matière à scandale »
- Nominations à la magistrature : l'opposition interpelle le gouvernement

Daniel Leblanc

Politics

New justice minister appoints more than a dozen judges in effort to address vacancies

There will be 77 vacancies in federally appointed judicial positions across the country as of Sept. 1

Darren Major · CBC News · Posted: Aug 28, 2023 3:20 PM EDT | Last Updated: August 30, 2023

Minister of Justice and Attorney General of Canada Arif Virani speaks during a media availability after a cabinet swearing-in ceremony at Rideau Hall in Ottawa on July 26, 2023. (Justin Tang/The Canadian Press)

comments

Justice Minister Arif Virani announced the appointment of more than a dozen judges Monday to fill some of the many vacancies in Canada's judicial system.

Fourteen provincial and territorial judges have been appointed: five in Manitoba (four of which are promotions), four in Ontario and one each in Saskatchewan, B.C., Alberta, Nunavut, and Newfoundland and Labrador. Virani also appointed one Federal Court judge.

For months, Supreme Court Chief Justice Richard Wagner has been urging the government to speed up the appointment process.

- New justice minister arrives amid bail debate, vows fresh look at judicial vacancies
- Supreme Court chief justice slams Liberal government over slow judicial appointments process

Wagner wrote a letter to Prime Minister Justin Trudeau in May warning that a shortage of judges in the federal court system is putting criminal trials at risk.

"The current situation is untenable and I am worried that it will create a crisis in our justice system, which is already facing multiple challenges. Access to justice and the health of our democratic institutions are at risk," Wagner wrote.

The Supreme Court's 2016 R. v. Jordan decision dictated that trials should finish either 18 or 30 months after a person is charged, depending on the type of trial.

The court ruled that unreasonable delays must lead to proceedings being stayed, which effectively means a trial does not go forward.

Supreme Court of Canada Chief Justice Richard Wagner gestures as he responds to a reporter's question during a news conference in Ottawa on June 13, 2023. (Adrian Wyld/The Canadian Press)

Wagner said some accused are being allowed to walk away because a shortage of judges means cases aren't being heard in a timely manner.

Virani promised to speed up judicial appointments when he took on the justice portfolio in July's cabinet shuffle.

"We need to be doing things, not compromising on quality, but we need to be doing things expeditiously," he told the Canadian Press at the time.

Virani said one of the first briefings he received in his new job was on judicial vacancies. One of the issues the government is dealing with is a shortage of applicants, he said.

- **Chief justice warns Trudeau that judicial vacancies are putting criminal trials at risk**

- **Hundreds of appointed positions vacant after 8 years of Trudeau's government**

"That's a bit frustrating when we want to appoint judges [who are] also reflective of the diversity of Canada, which is important to me and important to the prime minister," he said.

The federal government appoints judges to the federal courts, the superior courts of the provinces and territories and the Supreme Court of Canada.

A spokesperson for Virani's office said that as of Sept. 1, there will be 77 vacancies out of roughly 1,200 federally appointed judicial spots. The spokesperson said that vacancies remain elevated due to a large number of retirements.

"Minister Virani will continue to make high quality diverse appointments and the number of vacancies will decline," the spokesperson said in a media statement. They added Virani has now appointed 18 judges since he was sworn in as justice minister.

With files from The Canadian Press and Daniel Leblanc

Popular Now in News

1 UPDATED
McGuinty and Erskine-Smith among those being named to Trudeau's cabinet in Friday shuffle: sources
666 reading now

2 **Trump starts a victory dance over Canada border moves**
320 reading now

3 **Gisèle Pelicot's ex-husband found guilty of rapes, sentenced to 20 years in prison in France**
269 reading now

4 **Det. John Park, father of 2, died of medical episode while on duty: Toronto police**
264 reading now

5 **B.C. police officer dies by suicide after being charged with sexual assault**
234 reading now

TIMES COLONIST

B.C. provincial court judges to receive 28.4% pay increase over four years

Louise Dickson
Dec 29, 2023 5:45 AM

B.C. Attorney General Niki Sharma pauses while responding to questions outside B.C. Supreme Court in Vancouver on Monday, Nov. 27, 2023. Sharma says the government agrees that the raises given to provincial court judges and Crown prosecutors "is too much." DARRYL DYCK, THE CANADIAN PRESS

Listen to this article
00:03:55

B.C.'s provincial court judges will receive a 28.4 per cent salary increase over the next four years.

The province's 131 full-time provincial court judges are now being paid $343,000, up from the $288,500 annual salary they had earned since April 1, 2022, the Ministry of the Attorney General confirmed this week.

The increase is retroactive to April 1, 2023, and the 131 full-time provincial court judges will also receive interest on that retroactive increase, the ministry said.

Although the province recommended smaller increases amounting to about 16 per cent over the next four years, the province did not challenge the 28.4 increase recommended by the 2022 Judicial Compensation Commission for the period April 1, 2023, to March 31, 2027. This means the recommendations from the final report of the commission, tabled in the legislature on Nov. 28, have come into force.

The government has rejected the commission's recommendations four times in the past — in 2010, 2013, 2016 and 2019 — resulting in legal action. The province is in court right now appealing the most recent court ruling setting out the limits on the province's ability to alter decisions made by the commission.

"We agree that it's too much. We made submissions to have lower increases that were rejected by the commission," Attorney General Niki Sharma said Thursday.

"Given the state of law on this issue, the province did not want to risk even more public money tied up in expensive lawsuits that were unlikely to succeed. This is an old process that has been in place for a long time. It's clearly not working for people. The province will be taking a look at the way judges' salaries are set in B.C. to ensure it meets people's expectations."

Crown counsel will also receive a 28.4 per cent increase over the next four years under their collective agreement. Senior Crown prosecutors are now making $291,000, an increase from $244,000 last year.

The commission also recommended that judicial justices receive a 37.7 per cent increase over the next four years. Judicial justices, who preside over search warrants, traffic and ticket violations and bail hearings outside court hours, now receive an annual salary of $172,000 which will increase to $187,000 in 2026-27.

In April, the B.C. General Employees' Union announced its members would received an increase of 6.75 per cent.

B.C. Supreme Court judges also receive $343,000 per year. However, they are appointed and paid for by the federal government and have a different process for compensation.

In its 100-page report, the 2022 Judicial Compensation Committee, found "a startling low level of interest" in the provincial court with fewer people applying to be provincial court judges.

"There is serious difficulty in filling judicial vacancies outside the Lower Mainland," the report said.

The commission described judges' salaries in B.C. as "unreasonably low," more than $25,000 below the national average.

For 2022-23, the average salary of federal and provincial judges across Canada, excluding B.C., was $314,204. The average salary of judges in Alberta, Saskatchewan and Ontario, excluding federal judges, is $343,238, the report said.

ldickson@timescolonist.com

Annual News Conference with the Chief Justice of Canada

Related Link

Archived video of the press conference

Remarks by the Right Honourable Richard Wagner, P.C.
Chief Justice of Canada

(Check against delivery)

Good morning, and thank you for coming. I am pleased to update you this morning on the work of the Supreme Court of Canada, and my responsibilities as Chief Justice of Canada. I always look forward to this opportunity to speak to the media.

It has been another noteworthy year for the Supreme Court. We heard cases on a wide range of issues, from Indigenous rights, to contract law, to Charter rights, and more.

For me, one of the highlights was welcoming a new colleague to the Court, the Honourable Mary T. Moreau. Justice Moreau brings with her a wealth of experience and valuable knowledge, having served for more than 30 years as both a trial judge and as a Chief Justice. Throughout her long career, Justice Moreau has been extensively involved in judicial education, administration and ethics, both in Canada and internationally. My colleagues and I are very happy that she has joined us.

With her appointment, the Supreme Court of Canada has a majority of women judges for the first time in its history.

Those of you who cover the Court regularly may have noticed a few changes, all in the interest of access to justice. The Courtroom is back to full capacity. It is so nice to see the public attending our hearings. It enables them to see how we work. It has also been great to see media attending our hearings, participating in lockups and in briefings. You can do so online or in person.

We found that hybrid hearings worked quite well, so we have continued this practice. Counsel for the parties always have the option to appear in person or online, while interveners must present their views by videoconference. Virtual appearances are efficient and cost-effective for all parties.

Some amendments to the *Rules of the Supreme Court of Canada* came into force this morning. I want to point out two important changes: First, filing fees have been eliminated. While nominal, the fees added an additional burden for all litigants, particularly those who are self-represented. Eliminating them removes one more barrier to justice.

Secondly, the new rules require using the Court's e-filing portal launched in January 2023. Since its inception, the portal has been a tremendous success. We receive more than 1,000 documents every month through the portal, safely and securely, reducing the administrative burden on parties and on our staff. This is just one example of how we are modernizing. Technology offers great potential to streamline administration and improve access to justice. I salute all those working at courts across the country to identify new solutions.

I want to take a few moments to update you on the work of the Canadian Judicial Council. I chair the CJC, which is the national body that brings together the 44 Chief Justices and Associate Chief Justices.

The CJC has experienced a significant turnover in its membership in recent years, which has allowed us to benefit from new perspectives and new ideas. We are counting on an excellent collaboration, and I am convinced that the CJC is well positioned to continue exercising leadership in the administration of justice.

The CJC is working forward on a number of important fronts, such as artificial intelligence. Our members are paying close attention to its potential effects on justice and the courts. The CJC continues to engage with experts in the field, and we are working on developing helpful guidance for the courts.

The CJC is also mindful of the health and well-being of judges. We will therefore be conducting a study on this subject in the very near future. This will allow us to better understand the challenges faced by members of the judiciary, and identify ways we can assist them further. This is important, since health and well-being is a matter for everyone, including judges.

At my press conference last year, I said the judicial conduct regime needed to change. I was very happy to see that soon after, Bill C-9 was finally adopted. The process for reviewing and sanctioning judicial conduct was amended. This was something me and my fellow council members had been calling for, over many years.

Since then, the CJC published new *Review Procedures* and a new *Policy on the Publication of Judicial Conduct Decisions*. These developments will promote procedural fairness and provide greater clarity and transparency, while building public trust in our judiciary.

Last year, I also spoke to you about judicial vacancies. This remains a key priority for the Council, and as its chair, I have expressed our concerns to the highest levels of government. I am pleased to see that the number of judicial vacancies has gone down in recent months and I am confident that the government will continue to make efforts to appoint judges in a timely fashion.

Let me share an update on the work of another organization that I chair – the National Judicial Institute.

The NJI has developed continuing education for Canadian judges for over 35 years. Last year, the NJI provided more than 70 national judicial education seminars. The NJI has also embraced digital education, developing a growing library of on-demand resources, available to judges of all courts.

Educational seminars and resources addressed critical topics for Canadian judges, such as sexual assault law, intimate partner violence, justice issues relevant to Indigenous peoples, and the impacts of artificial intelligence on the justice system. The NJI also increased educational programming designed specifically to meet the needs of French-speaking judges across Canada.

The NJI is increasingly solicited by other countries for its expertise in judicial education, and it continues to collaborate with them on capacity building, and judicial reform. A few of those countries include: Ukraine, Vietnam, Singapore, and most recently, Pakistan.

I want to now turn to the work of the Action Committee on Modernizing Court Operations, which I co-chair with the federal Minister of Justice. The Action Committee brings members of the executive and the judiciary together around the same table. It allows chief justices, attorneys general, and court administrators to address challenges from a big picture perspective.

Our legal system is facing several key questions:

> How do we ensure that it is meeting the needs of marginalized Canadians?
>
> How do we ensure adequate funding and resources?
>
> How can technology and collaboration improve access to justice?
>
> And how do we continue to protect the health and safety of litigants and staff going forward?

The Action Committee has been working to identify best practices and solutions that can help address some of these questions. For instance, we shared a case study showing how family courts in Manitoba tackle backlogs and delays. We developed a roadmap for piloting virtual bail hearings, based on the experience in B.C. We also published a set of best practices for mental health and wellness. I look forward to continuing to build on that progress.

Our court system must function efficiently and effectively, because Canadians rely on it every single day. Courts must have the resources to function effectively. From staffing to infrastructure, our courts need resources to ensure that justice continues to be served.

Governments at all levels must understand that funding for justice initiatives is required to sustain our democracy.

I have said this before, and I will say it again today: public confidence in our courts is essential to maintaining the rule of law and a strong democracy. The Supreme Court of Canada, like all courts across the country in fact, enjoys a great deal of public confidence.

But the judicial system is not immune to problems. In fact, today we are seeing attacks on our judges and our institutions, something we used to only see in other countries.

One of the ongoing challenges is countering disinformation. I would like to say a few words about this. First of all, this challenge is more prevalent than ever, in the era of social media and polarization seen within society, and especially south of the border. People are finding it increasingly difficult to distinguish fact from fiction. And this causes some people, otherwise of good faith, to lose trust in their institutions.

Of course, in a democracy, we accept and even hope that court decisions will be the subject of debate. But it is important for the debates to be respectful and above all, informed. People should at least read judgments before criticizing them.

We can see all kinds of harm caused when court decisions are reported inaccurately, or out of context, for reasons of “sensationalism”.

It is also troubling when the judge is more scrutinized than the judgment itself. It is one thing to express disagreement with a decision, but it is another thing altogether to criticize it because of who the judge is or how they were appointed. Comments like

this undermine public confidence in the justice system. We should be especially concerned when elected representatives say these things.

A judiciary that is independent and impartial — and perceived as such — is the pillar of our democracy. At times, it may be useful — even indispensable — for members of society as a whole to come together to denounce and condemn comments of this nature, to correct disinformation and set the record straight. Make no mistake: if we become complacent, we should not be surprised to see the very foundations of the rule of law and our democracy erode.

That is why we need you – the media – more than ever before. These narratives undermine democracies, but quality journalism strengthens trust in our institutions. I emphasized this at a recent conference in Quebec, the Festival international de journalisme de Carleton-sur-Mer. Your work is vital in making our institutions more visible and more accessible. That matters a great deal these days, when there is a lot of wrong and inaccurate information out there.

That is precisely why the Court goes to great lengths to explain our work. Because the public cannot have faith in something it does not understand. If you read our *Cases in Brief* – and I know many of you do – you will have noticed that we now issue them for oral judgments, in addition to written judgments. This adds to a long list of initiatives put in place in recent years to improve the transparency and accessibility of court hearings and decisions.

I often speak about communication and outreach with the international judicial community. Last month in Brazil, I was the first Canadian Chief Justice to participate in a J20 Summit. The J20 brought together the heads of supreme and constitutional courts of the G20 members, as well as the African Union and the European Union. I was pleased to lead a discussion on access to justice and how courts can better reflect the changing nature of society. This was a great opportunity to share the Canadian experience, as our country is a leader in tackling these issues. I also heard from my counterparts and learned how they are confronting other challenges, like AI and disinformation.

Engaging in this kind of dialogue with other courts around the world is a valuable experience for me and my colleagues. Over the past year, we welcomed delegations from the Supreme Court of the United States and the Constitutional Court of Slovenia for judicial exchanges. We also had our first exchange with the Constitutional Court of South Africa. And we welcomed many other international visitors to the Court – including from countries like Japan, Pakistan, Lithuania, Italy, and Vietnam.

These meetings are unique opportunities to discuss subjects like judicial independence or access to justice and to learn more about how other courts around the world deal with today’s challenges.

My colleagues and I have also, again this year, participated in many meetings with members of the legal community and members of the public across Canada. These meetings are important in creating a better understanding of the Court’s role, but also in getting to know more about the concerns of different stakeholders. They also allow us to learn about many inspiring initiatives.

There is a lot ahead for us this year. We have several initiatives planned to commemorate our 150th anniversary in 2025. I am really looking forward to our regional visits. Members of the Court will go to five different cities during the year. We will meet with students, the general public, the media, and the legal community and tell them about the work of our Court. We will also host a symposium for the legal community, and launch a more modern and accessible website. So, stay tuned!

For now, let me close by saying thank you again for being so interested in the Court and our justice system. I would be happy to answer some of your questions.

Remarks by the Right Honourable Richard Wagner, P.C.
Chief Justice of Canada
On the occasion of the Annual News Conference with the Parliamentary Press Gallery
Sir John A. Macdonald Building
Ottawa, Ontario
June 3, 2024

Date modified: 2024-06-26

Chief Justice Richard Wagner Provides Update on Work of Supreme Court

English | French | Original Language

EXPAND

HEADLINE POLITICS

Chief Justice Richard Wagner Provides Update on Work of Supreme Court

Chief Justice of Canada Richard Wagner holds a news conference in Ottawa to provide an update on the work of the Supreme Court of Canada. (June 3, 2024)

Share this page on X

LATEST EPISODES

HEADLINE POLITICS

B.C. Premier David Eby Makes a Film Industry Announcement

HEADLINE POLITICS

Premiers François Legault and Andrew Furey Announce Hydroelectric Power Deal

HEADLINE POLITICS

Alberta–U.S. Border Security: Premier Danielle Smith Announces New Measures

HEADLINE POLITICS

Ontario Premier Doug Ford Outlines Proposed Measures to Address Encampments

HEADLINE POLITICS

Inauguration Ceremony for the Memorial to the Victims of Communism

SEE ALL

Politics

Ottawa making progress on judicial appointments but threats to rule of law remain, says chief justice

'The court must have the resources to function effectively' — Chief Justice Robert Wagner

Peter Zimonjic · CBC News · Posted: Jun 03, 2024 4:39 PM EDT | Last Updated: June 3

Supreme Court of Canada Chief Justice Richard Wagner warned that underfunding the justice system and failing to appoint judges in a timely manner threatens the viability of Canada's justice system and could 'jeopardize our democracy and the rule of law.' (The Canadian Press/Adrian Wyld)

Despite some recent progress on appointing more federal judges, Canada's justice system is facing still challenges that threaten to undermine the rule of law, Supreme Court Chief Justice Richard Wagner warned Monday.

Last May, Wagner wrote to Prime Minister Justin Trudeau warning that a chronic shortage of judges was putting "democratic institutions" at risk.

During his annual press conference in Ottawa on Monday, Wagner said the pace of judicial appointments "remains a key priority" but significant progress has been made.

"Since last year, I saw an improvement and I'm confident that the government will follow [up] to try to appoint judges in a timely fashion," he said Monday.

There are 939 federally appointed judges in office, another 256 supernumeraries — retired justices who sit on the bench part time — and 57 vacancies, down from 90 last year.

Wagner said those remaining vacancies, coupled with underfunded provincial court systems and personal attacks on the integrity of judges, threaten both democracy and the rule of law.

- **Long delays and collapsed cases are eroding faith in the justice system, lawyers warn**
- **Justice minister says he's 'proud' of government's record on appointing judges**
- **Court says Trudeau, justice minister 'failed' Canadians by letting judicial vacancies build up**

"The justice system is not a service. It's a need, it's a human need," he said. "People need justice, and when they recognize that they will not have access to justice, that will jeopardize our democracy and the rule of law and we should not underestimate this possibility."

Wagner said that the federal government needs to ensure it appoints federal judges "within a reasonable delay" after a retirement. He would not say how long a reasonable delay should be.

WATCH: Judicial vacancies troubling but progress being made, chief justice says

Chief Justice of the Supreme Court Richard Wagner says he's confident the issue of judicial vacancies can be 'corrected' — though he noted there were still 57 unfilled judge positions across the country, down from almost 90 a year earlier.

The federal government appoints judges to the superior courts and courts of appeal in each province, the Federal Court, the Tax Court and the Supreme Court.

Justice Minister Arif Virani sent a letter to Wagner last week saying that he has appointed 113 federal judges since his elevation to the portfolio last July.

'One stay of proceedings is one too many'

In July 2016, the Supreme Court of Canada set out rules to decide how long is too long for a criminal trial. That decision in R. v. Jordan established that criminal cases that go beyond those time limits — 18 months for provincial courts and 30 months for superior courts — can be stayed for unreasonable delays.

"One stay of proceedings is one too many, let's be clear on that," Wagner said Monday. "The problem is that in some provinces there is not enough funding, there are not enough judges so that an accused cannot have his or her trial within a reasonable delay."

Wagner said the Jordan ruling is a consequence of a lack of funding for the justice system and those deadlines should not be extended to prevent stays in criminal trials. Instead, he said, the justice system should be supported properly.

"Jordan is the law and we should obey the law," he said. "I think it would be unreasonable to believe that, in a society like ours, that an accused should wait more than three years to have his trial."

More provincial funding needed: Wagner

Wagner said that because the administration of justice is mostly a provincial responsibility, governments across the country should properly fund their own systems.

"The court must have the resources to function effectively, from staffing to infrastructure. Our courts need resources to ensure that justice continues to to be served," he said.

Wagner said that in British Columbia and Ontario — where the cost of living is higher — it has been difficult to attract candidates to become judges because salaries and working conditions make the job unattractive.

- **In Quebec's north, criminal cases are being dropped because of a drastic lack of resources**
- **Number of cases tossed due to delays hits all-time high in N.S. courts**

"The conditions for the judge working on the bench these days is very difficult. In most provinces they don't have enough support in terms of assistants, in terms of technology," he said.

Wagner said it is widely known in some provinces that lawyers will refuse to apply to be a judge because of the lack of support.

"Those responsibilities come to the provincial governments, to make sure that they provide enough support, enough funding, enough technology," he said.

WATCH: Faith in justice system at risk if too many cases are stayed, chief justice says

Too many cases stayed due to delays could cause people to lose faith in the justice system — which could pose a major threat to democracy, says Supreme Court Chief Justice Richard Wagner.

Wagner said the public's trust in the justice system is essential to a "healthy democracy" and Canada is "not immune to all changes."

"Today we are witnessing attacks on our judges and our institutions, something that we used to only see abroad," he said.

Wagner said people in general are not reading judgments from the courts before criticizing them and judges themselves are often scrutinized more closely than their rulings.

- **Quebec government says new powers for justices of the peace will reduce court delays**
- **Double-booked courtroom, Crown delays lead to Ontario sex assault case being thrown out**

"It is one thing to disagree with a decision, but it is another thing altogether to criticize it because of who the judge is, or how they were appointed," he said.

"Comments like this undermine public confidence in the justice system. We should be especially concerned when elected representatives say these things."

Popular Now in News

1 **McGuinty and Erskine-Smith among those being named to Trudeau's cabinet in Friday shuffle: sources**
467 reading now

2 **'President Elon Musk'? Billionaire, Trump help scuttle U.S. funding deal negotiated in Congress**
384 reading now

3 **Gisèle Pelicot's ex-husband found guilty of rapes, sentenced to 20 years in prison in France**
243 reading now

4 **Det. John Park, father of 2, died of medical episode while on duty: Toronto police**
191 reading now

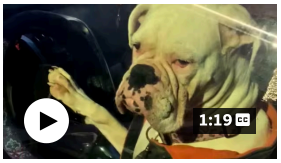
5 **Trump starts a victory dance over Canada border moves**
183 reading now

TRENDING VIDEOS

VIDEO

Trudeau's detractors grow as details of Freeland's exit emerge

The National



VIDEO

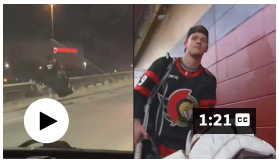
#TheMoment an impatient dog laid on the horn in a B.C. parking lot

The National

VIDEO

Why Chrystia Freeland just blew up Trudeau's cabinet | About That

Canada Tonight



VIDEO

#TheMoment an emergency backup goalie ran with his gear to an NHL game

The National

VIDE

Scoo says gene

Abou Chan

RECOMMENDED FOR YOU

McGuinty and Erskine-Smith among those being named to Trudeau's cabinet in Friday shuffle: sources

John Paul Tasker
Politics

Det. John Park, father of 2, died of medical episode while on duty: Toronto police

Canada - Toronto

B.C. police officer dies by suicide after being charged with sexual assault

Akshay Kulkarni
Canada - British Columbia

What we know about the 3 men in Scotland charged in killing of Owen Sound, Ont., restaurant owner

Kate Dubinski
Canada - London

RCM ASIR Alber

Stepl
Cana

The Fiscal Monitor

A Publication of the Department of Finance Canada

Highlights

January 2006: budgetary surplus of $1.7 billion

There was a budgetary surplus of $1.7 billion in January 2006, down $0.7 billion from January 2005. Total budgetary revenues rose $1.3 billion, reflecting solid growth in all major tax streams. Program expenses were up $2.2 billion, reflecting the impact of $0.8 billion in assistance for grain and oilseed producers and $0.6 billion related to the Energy Cost Benefit. Public debt charges were $0.2 billion lower.

April 2005 to January 2006: budgetary surplus of $9.0 billion

For the first 10 months of the 2005–06 fiscal year (April to January), the budgetary surplus is estimated at $9.0 billion, down $3.9 billion from the $12.9-billion surplus reported in the same period of 2004–05. Budgetary revenues were up $6.5 billion or 4.1 per cent. This gain is net of the $4.0-billion cost of the personal income tax reduction measures announced in the November 2005 *Economic and Fiscal Update* pertaining to the 2005 tax year. Program expenses were up $11.1 billion or 9.5 per cent, primarily due to higher transfers to the provinces and territories for health care and equalization/Territorial Formula Financing (TFF). Public debt charges were $0.7 billion lower.

January 2006

There was a budgetary surplus of $1.7 billion in January 2006, down $0.7 billion from January 2005.

Budgetary revenues rose $1.3 billion or 6.9 per cent to $20.2 billion.

- Personal income tax receipts were up $1.0 billion or 11.5 per cent, primarily due to stronger source deductions from employment income.
- Corporate income tax revenues rose $0.2 billion or 10.2 per cent, reflecting ongoing profitability in the corporate sector.
- Other income tax receipts—withholdings from non-residents—rose 14.7 per cent.
- Excise taxes and duties rose $0.2 billion or 5.3 per cent, largely due to a $0.2-billion or 7.1-per-cent increase in goods and services tax (GST) revenues. Customs import duties were up $52 million, while sales and excise taxes were down $49 million. Revenues from the Air Travellers Security Charge were down $6 million.
- Employment insurance (EI) premiums declined by 11.3 per cent, reflecting the decline in the premium rate from $1.95 to $1.87 per $100 of insurable earnings, effective January 1, 2006.

- Other revenues, consisting of revenues from Crown corporations, sales of goods and services and foreign exchange revenues, were down 3.0 per cent. Other revenues can be volatile on a monthly basis.

Program expenses in January 2006 were $15.8 billion, up $2.2 billion or 15.8 per cent from January 2005.

Transfer payments were up $1.5 billion or 18.1 per cent.

- Major transfers to persons, consisting of elderly and EI benefits, were up $84 million or 2.1 per cent. Elderly benefits increased 5.5 per cent due to both higher average benefits, which are indexed to Consumer Price Index inflation, and an increase in the number of individuals eligible for benefits. EI benefit payments decreased 2.8 per cent, reflecting a decline in regular benefits.
- Major transfers to other levels of government, consisting of federal transfers in support of health and other social programs (Canada Health Transfer and Canada Social Transfer), fiscal transfers, transfers to provinces on behalf of Canada's cities and communities, and Alternative Payments for Standing Programs, were up $0.5 billion or 20.6 per cent. The increase in federal transfers in support of health and other social programs and higher fiscal transfers largely reflect increased funding under the 2004 agreements on health care and equalization/TFF.
- Subsidies and other transfers increased by $0.9 billion or 46.7 per cent, largely reflecting transfers under the Grains and Oilseeds Payment Program (Agriculture and Agri-Food Canada) and the Energy Cost Benefit (Canada Revenue Agency and Human Resources and Social Development).

Other program expenses consist of transfers to Crown corporations, operating expenses for departments and agencies including National Defence, and the ongoing assessment of the Government's liabilities. These expenses increased by $0.6 billion or 12.0 per cent.

Public debt charges decreased by $0.2 billion or 6.3 per cent due to a decrease in the average effective interest rate on the debt.

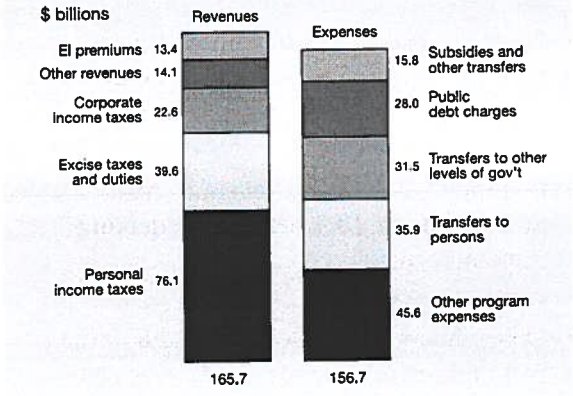
April 2005 to January 2006

In the first 10 months of the 2005–06 fiscal year, there was a budgetary surplus of $9.0 billion, $3.9 billion below the $12.9-billion surplus reported in the same period of 2004–05.

Budgetary revenues were up $6.5 billion or 4.1 per cent to $165.7 billion.

- Personal income tax revenues rose $3.0 billion or 4.1 per cent. This gain is net of the $4.0-billion cost of the personal income tax reduction measures announced in the November 2005 *Economic and Fiscal Update* pertaining to the 2005 tax year.
- Corporate income tax revenues were up $2.7 billion or 13.7 per cent, reflecting gains in corporate profitability in 2005.

Revenues and expenses
(April 2005-January 2006)



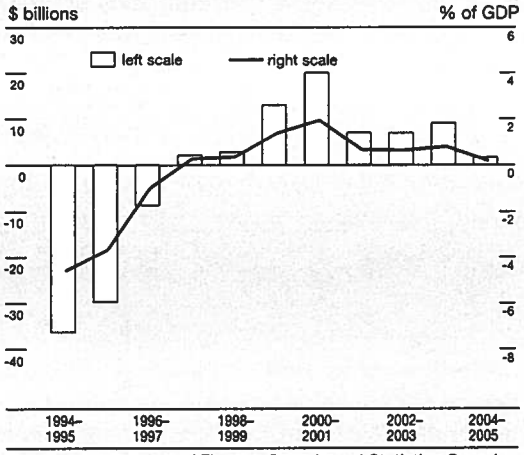
- Other income tax revenues increased by $1.0 billion or 34.9 per cent, reflecting increased dividend payments to non-residents.
- Excise taxes and duties rose $1.9 billion or 5.1 per cent. GST revenues increased $1.8 billion or 6.8 per cent, broadly consistent with the growth rate of retail sales of 6.6 per cent over the same period. Customs import duties were up 12.9 per cent. Sales and excise taxes were down 2.1 per cent, while the Air Travellers Security Charge was down 14.2 per cent, reflecting reductions in the charge effective April 1, 2005.
- EI premiums were down 1.6 per cent, as the impact of the reduction in the premium rate in January 2005 more than offset the impact of higher employment and wages and salaries.
- Other revenues were down $1.9 billion or 16.0 per cent, reflecting the impact of the one-time gain ($2.6 billion) from the sale of the Government's remaining shares in Petro-Canada in September 2004.

Program expenses in the April 2005 to January 2006 period were $128.7 billion, up $11.1 billion or 9.5 per cent over the same period of 2004–05, with most of the increase attributable to higher transfers to provinces and territories for health care and equalization/TFF. Public debt charges declined by $0.7 billion.

Transfer payments, which account for nearly two-thirds of total program expenses, increased by $8.7 billion or 11.7 per cent.

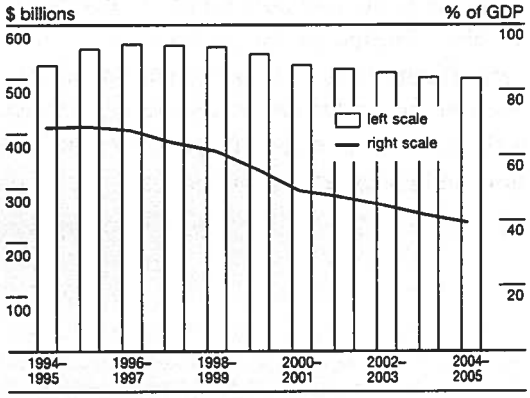
- Transfers to persons advanced by 2.1 per cent. Elderly benefits were up 4.3 per cent while EI benefits were down 2.2 per cent. The year-to-date decline in EI benefits is mainly attributable to a decline in regular benefits, which is in turn due to improved labour market conditions compared to the same period in 2004–05.
- Transfers to other levels of government were up $6.0 billion or 23.5 per cent, reflecting the impact of the 2004 agreement on health care and the new framework for equalization and TFF.

Budgetary balance



Sources: Department of Finance Canada and Statistics Canada.

Federal debt (accumulated deficit)



Sources: Department of Finance Canada and Statistics Canada.

- Subsidies and other transfers increased by 14.7 per cent, reflecting the impact of measures from recent budgets as well as transfers under the Grains and Oilseeds Payment Program and the Energy Cost Benefit.

Other program expenses increased by 5.6 per cent.

Public debt charges were down 2.5 per cent due to a decline in the stock of interest-bearing debt and a decline in the average effective interest rate on that debt.

Financial source of $3.8 billion for April 2005 to January 2006

The budgetary balance is presented on a full accrual basis of accounting, recording government assets and liabilities when they are receivable or incurred, regardless of when the cash is received or paid. In contrast, the financial source/requirement measures the difference between cash coming in to the Government and cash going out. This measure is affected not only by changes in the budgetary balance but also by the cash source/requirement resulting from the Government's investing activities through its acquisition of capital assets and its loans, financial investments and advances, as well as from other activities, including payment of accounts payable and collection of accounts receivable, foreign exchange activities, and the amortization of its tangible capital assets. The difference between the budgetary balance and financial source/requirement is recorded in non-budgetary transactions.

Non-budgetary transactions resulted in a net requirement of $5.2 billion in the April-to-January period, up $0.2 billion from the requirement in the same period of 2004–05.

With a budgetary surplus of $9.0 billion and a net requirement of $5.2 billion from non-budgetary transactions, there was a financial source of $3.8 billion in the first 10 months of 2005–06 compared to a financial source of $7.9 billion in the same period of 2004–05.

Net financing activities down $18.2 billion

The Government used this financial source of $3.8 billion and a reduction in its cash balances of $14.4 billion to reduce its market debt by $18.2 billion by the end of January 2006, largely through a reduction of marketable bonds and treasury bills. The level of cash balances varies from month to month based on a number of factors including periodic large debt maturities, which can be quite volatile on a monthly basis. Cash balances at the end of January stood at $2.7 billion.

Table 1
Summary statement of transactions

	January		April to January	
	2005	2006	2004–05	2005–06
	($ millions)			
Budgetary transactions				
Revenues	18,856	20,150	159,202	165,713
Expenses				
Program expenses	-13,638	-15,793	-117,587	-128,729
Public debt charges	-2,857	-2,676	-28,714	-27,986
Budgetary balance (deficit/surplus)	2,361	1,681	12,901	8,998
Non-budgetary transactions	-880	2,023	-5,014	-5,226
Financial source/requirement	1,481	3,704	7,887	3,772
Net change in financing activities	-2,027	-5,434	-21,657	-18,163
Net change in cash balances	-546	-1,730	-13,770	-14,391
Cash balance at end of period			3,480	2,730

Note: Positive numbers indicate net source of funds. Negative numbers indicate net requirement for funds.

Table 2
Budgetary revenues

	January			April to January		
	2005	2006	Change	2004–05	2005–06	Change
	($ millions)		(%)	($ millions)		(%)
Tax revenues						
Income taxes						
Personal income tax	8,677	9,673	11.5	73,101	76,108	4.1
Corporate income tax	2,358	2,599	10.2	19,854	22,573	13.7
Other income tax revenue	607	696	14.7	2,899	3,910	34.9
Total income tax	11,642	12,968	11.4	95,854	102,591	7.0
Excise taxes and duties						
Goods and services tax	3,125	3,346	7.1	26,679	28,502	6.8
Customs import duties	192	244	27.1	2,511	2,836	12.9
Sales and excise taxes	759	710	-6.5	8,154	7,983	-2.1
Air Travellers Security Charge	28	22	-21.4	325	279	-14.2
Total excise taxes and duties	4,104	4,322	5.3	37,669	39,600	5.1
Total tax revenues	15,746	17,290	9.8	133,523	142,191	6.5
Employment insurance premiums	1,891	1,677	-11.3	13,604	13,381	-1.6
Other revenues	1,219	1,183	-3.0	12,075	10,141	-16.0
Total budgetary revenues	18,856	20,150	6.9	159,202	165,713	4.1

Note: Totals may not sum due to rounding.

Table 3
Budgetary expenses

	January			April to January		
	2005	2006	Change	2004–05	2005–06	Change
	($ millions)		(%)	($ millions)		(%)
Transfer payments						
Transfers to persons						
Elderly benefits	2,362	2,491	5.5	23,194	24,184	4.3
Employment insurance benefits	1,615	1,570	-2.8	11,982	11,714	-2.2
Total	3,977	4,061	2.1	35,176	35,898	2.1
Transfers to other levels of government						
Support for health and other social programs						
Canada Health Transfer	1,054	1,583	50.2	10,542	15,833	50.2
Canada Social Transfer	652	685	5.1	6,521	6,854	5.1
Health Reform Transfer	125	0	n/a	1,250	0	n/a
Total	1,831	2,268	23.9	18,313	22,687	23.9
Fiscal transfers	933	1,059	13.5	9,387	10,597	12.9
Canada's cities and communities	0	14	n/a	0	670	n/a
Alternative Payments for Standing Programs	-210	-261	24.3	-2,203	-2,461	11.7
Total	2,554	3,080	20.6	25,497	31,493	23.5
Subsidies and other transfers						
Agriculture	146	777	432.2	826	1,693	105.0
Foreign Affairs	310	333	7.4	2,010	1,933	-3.8
Health	234	207	-11.5	1,494	1,547	3.5
Human Resources Development	264	232	-12.1	1,050	1,144	9.0
Indian and Northern Development	347	368	6.1	3,618	3,986	10.2
Industry and Regional Development	100	159	59.0	1,491	1,610	8.0
Other	593	850	43.4	3,269	3,871	18.4
Total	1,994	2,926	46.7	13,758	15,784	14.7
Total transfer payments	8,525	10,067	18.1	74,431	83,175	11.7
Other program expenses						
Crown corporation expenses						
Canadian Broadcasting Corporation	108	50	-53.7	972	1,028	5.8
Canada Mortgage and Housing Corporation	170	171	0.6	1,685	1,707	1.3
Other	200	161	-19.5	1,731	1,511	-12.7
Total	478	382	-20.1	4,388	4,246	-3.2
Defence	1,156	1,221	5.6	10,905	11,987	9.9
All other departments and agencies	3,479	4,123	18.5	27,863	29,321	5.2
Total other program expenses	5,113	5,726	12.0	43,156	45,554	5.6
Total program expenses	13,638	15,793	15.8	117,587	128,729	9.5
Public debt charges	2,857	2,676	-6.3	28,714	27,986	-2.5
Total budgetary expenses	16,495	18,469	12.0	146,301	156,715	7.1

Note: Totals may not sum due to rounding.

Table 4
Budgetary balance and financial source/requirement

	January		April to January	
	2005	2006	2004–05	2005–06
			($ millions)	
Budgetary balance (deficit/surplus)	2,361	1,681	12,901	8,998
Non-budgetary transactions				
Capital investing activities	-86	-300	-1,088	-1,815
Other investing activities	-531	316	-1,914	-2,460
Pension and other accounts	-565	206	-1,974	-103
Other activities				
Accounts payable, receivables, accruals and allowances	928	1,277	-5,699	-5,994
Foreign exchange activities	-868	284	3,091	2,597
Amortization of tangible capital assets	242	240	2,570	2,549
Total other activities	302	1,801	-38	-848
Total non-budgetary transactions	-880	2,023	-5,014	-5,226
Net financial source/requirement	1,481	3,704	7,887	3,772

Note: Totals may not sum due to rounding.

Table 5
Financial source/requirement and net financing activities

	January		April to January	
	2005	2006	2004–05	2005–06
			($ millions)	
Net financial source/requirement	1,481	3,704	7,887	3,772
Net increase (+)/decrease (-) in financing activities				
Unmatured debt transactions				
Canadian currency borrowings				
Marketable bonds	387	221	-15,523	-7,771
Treasury bills	-2,450	-5,100	1,200	-5,200
Canada Savings Bonds	-96	-103	-1,964	-1,471
Other	0	-19	-28	-223
Total	-2,159	-5,001	-16,315	-14,665
Foreign currency borrowings	69	-428	-5,473	-3,559
Total	-2,090	-5,429	-21,788	-18,224
Obligations related to capital leases	63	-5	131	61
Net change in financing activities	-2,027	-5,434	-21,657	-18,163
Change in cash balance	-546	-1,730	-13,770	-14,391

Note: Totals may not sum due to rounding.

Table 6

Condensed statement of assets and liabilities

	March 31, 2005	January 31, 2006	Change
		($ millions)	
Liabilities			
Accounts payable, accruals and allowances	90,473	84,573	-5,900
Interest-bearing debt			
Unmatured debt			
Payable in Canadian dollars			
Marketable bonds	266,570	258,799	-7,771
Treasury bills	127,199	121,999	-5,200
Canada Savings Bonds	19,080	17,609	-1,471
Other	3,393	3,170	-223
Subtotal	416,242	401,577	-14,665
Payable in foreign currencies	16,286	12,727	-3,559
Obligations related to capital leases	2,932	2,993	61
Total unmatured debt	435,460	417,297	-18,163
Pension and other accounts			
Public sector pensions	129,579	131,281	1,702
Other employee and veteran future benefits	41,549	42,848	1,299
Other pension and other accounts	8,680	5,576	-3,104
Total pension and other accounts	179,808	179,705	-103
Total interest-bearing debt	615,268	597,002	-18,266
Total liabilities	705,741	681,575	-24,166
Financial assets			
Cash and accounts receivable	76,281	61,984	-14,297
Foreign exchange accounts	40,871	38,274	-2,597
Loans, investments and advances (net of allowances)	33,860	36,320	2,460
Total financial assets	151,012	136,578	-14,434
Net debt	554,729	544,997	-9,732
Non-financial assets	54,866	54,132	-734
Federal debt (accumulated deficit)	499,863	490,865	-8,998

For additional copies or subscription inquiries, please contact the Distribution Centre at (613) 995-2855.
For other inquiries about this publication, contact Chris Forbes at (613) 995-6391.
Also available on the Internet (including advance tentative release dates) at www.fin.gc.ca.
March 2006

The Fiscal Monitor

A Publication of the Department of Finance Canada

Highlights

February 2006: budgetary surplus of $4.1 billion

There was a budgetary surplus of $4.1 billion in February 2006, down $1.7 billion from February 2005. Total budgetary revenues were $0.1 billion lower, primarily due to a $0.6-billion decline in corporate income tax revenues. This decline is primarily due to an increase in refunds to the non-energy manufacturing sector. Program expenses were up $1.6 billion, primarily reflecting higher transfer payments to the provinces and territories as specified under the 2004 agreements on health care and equalization/Territorial Formula Financing (TFF). Public debt charges were flat compared to the same month last year.

April 2005 to February 2006: budgetary surplus of $13.1 billion

For the first 11 months of the 2005–06 fiscal year (April to February), the budgetary surplus is estimated at $13.1 billion, down $5.6 billion from the $18.7-billion surplus reported in the same period of 2004–05. Budgetary revenues were up $6.4 billion or 3.6 per cent. This gain is net of the $4.7-billion cost of the personal income tax reduction measures pertaining to the 2005 tax year and the first two months of this year. Program expenses were up $12.7 billion or 9.9 per cent, primarily due to higher transfers to the provinces and territories for health care and equalization/TFF. Public debt charges were $0.7 billion lower. A full update of the fiscal projections for the year as a whole, including the year-end accrual adjustments, will be provided in the budget.

February 2006

There was a budgetary surplus of $4.1 billion in February 2006, down $1.7 billion from February 2005.

Budgetary revenues declined by $0.1 billion, or 0.5 per cent, to $19.7 billion.

- Personal income tax receipts were up $0.3 billion or 4.7 per cent.
- Corporate income tax revenues were down $0.6 billion or 9.6 per cent, largely due to an increase in refunds to the non-energy manufacturing sector, reflecting weak profitability in that sector in 2005. In addition, corporate year-end settlement payments were weaker than in February last year, due in part to lower settlement payments from the non-energy manufacturing sector.
- Other income tax receipts—withholdings from non-residents—rose $59 million or 16.8 per cent in February.
- Excise taxes and duties rose $0.2 billion or 5.0 per cent due to a $0.3-billion increase in goods and services tax (GST) revenues. Customs import duties were down $38 million, while sales and excise taxes were down $78 million. Revenues from the Air Travellers Security Charge were up $5 million.

- Employment insurance (EI) premiums declined by 4.8 per cent, reflecting the decline in the premium rate from $1.95 to $1.87 per $100 of insurable earnings, effective January 1, 2006.
- Other revenues, consisting of revenues from Crown corporations, sales of goods and services, return on investments, foreign exchange revenues and miscellaneous revenues, were down 3.7 per cent. Other revenues can be volatile on a monthly basis.

Program expenses in February 2006 were $12.9 billion, up $1.6 billion or 13.9 per cent from February 2005, primarily due to higher transfer payments.

Transfer payments were up $1.3 billion or 16.0 per cent.

- Transfers to persons, consisting of elderly and EI benefits, were up $61 million or 1.6 per cent. Elderly benefits increased 5.4 per cent due to both higher average benefits, which are indexed to Consumer Price Index inflation, and an increase in the number of individuals eligible for benefits. EI benefit payments decreased 4.8 per cent, reflecting a decline in regular benefits.
- Transfers to other levels of government, consisting of federal transfers in support of health and other social programs (Canada Health Transfer and Canada Social Transfer), fiscal transfers, transfers to provinces on behalf of Canada's cities and communities, and Alternative Payments for Standing Programs, were up $0.8 billion or 35.3 per cent. The increase in federal transfers in support of health and other social programs and higher fiscal transfers largely reflect increased funding under the 2004 agreements on health care and equalization/TFF.
- Subsidies and other transfers increased $0.4 billion or 21.9 per cent. This component is volatile on a monthly basis.

Other program expenses consist of transfers to Crown corporations and operating expenses for departments and agencies, including National Defence, and also reflect the ongoing assessment of the Government's liabilities. These expenses increased $0.3 billion or 9.4 per cent.

Public debt charges increased marginally, by $9 million.

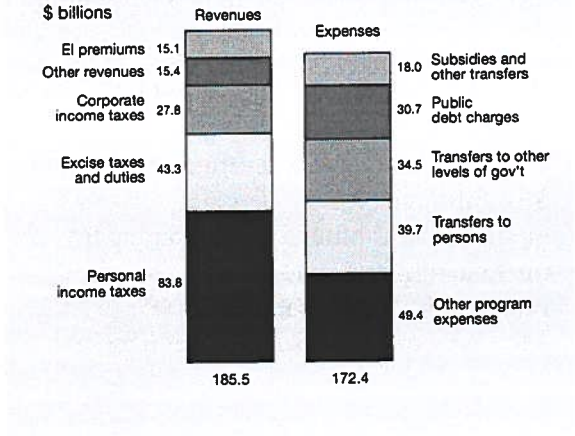
April 2005 to February 2006

In the first 11 months of the 2005–06 fiscal year, there was a budgetary surplus of $13.1 billion, $5.6 billion below the $18.7-billion surplus reported in the same period of 2004–05.

Budgetary revenues increased $6.4 billion or 3.6 per cent to $185.5 billion.

- Personal income tax revenues rose $3.4 billion or 4.2 per cent. This gain is net of the $4.7-billion cost of the personal income tax reduction measures pertaining to the 2005 tax year and the first two months of this year.
- Corporate income tax revenues were up $2.2 billion or 8.4 per cent, reflecting gains in corporate profitability in 2005.

Revenues and expenses
(April 2005-February 2006)



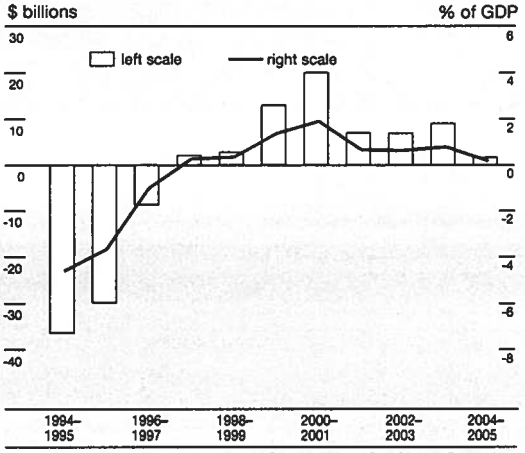
- Other income tax revenues increased $1.1 billion or 32.9 per cent, reflecting increased dividend payments to non-residents.
- Excise taxes and duties rose $2.1 billion or 5.1 per cent. GST revenues increased $2.1 billion or 7.2 per cent, broadly consistent with the growth rate of retail sales of 6.9 per cent over the same period. Customs import duties were up 10.3 per cent. Sales and excise taxes were down 2.8 per cent, while the Air Travellers Security Charge was down 11.2 per cent, reflecting reductions in the charge, effective April 1, 2005.
- EI premiums were down 2.0 per cent, as the impact of the reduction in the premium rate in January 2005 and January 2006 more than offset the impact of higher employment and wages and salaries.
- Other revenues were down $2.0 billion or 15.1 per cent, reflecting the impact of the one-time gain ($2.6 billion) from the sale of the Government's remaining shares in Petro-Canada in September 2004.

Program expenses in the April 2005 to February 2006 period were $141.7 billion, up $12.7 billion or 9.9 per cent from the same period of 2004–05, primarily due to higher transfers to the provinces and territories for health care and equalization/TFF. Public debt charges declined by $0.7 billion.

Transfer payments, which account for nearly two-thirds of total program expenses, increased $10.0 billion or 12.2 per cent.

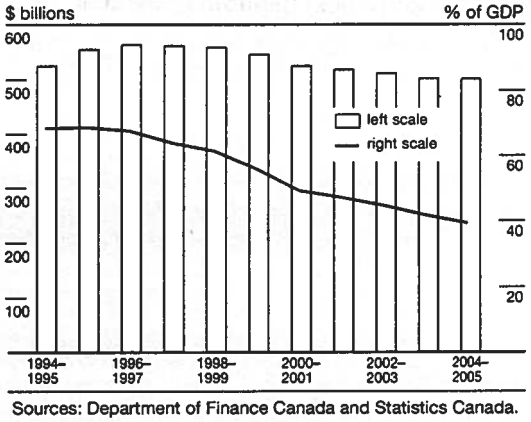
- Transfers to persons advanced by 2.0 per cent. Elderly benefits were up 4.4 per cent while EI benefits were down 2.5 per cent. The year-to-date decline in EI benefits is mainly attributable to a decline in regular benefits, which is in turn due to improved labour market conditions compared to the same period in 2004–05.
- Transfers to other levels of government were up $6.8 billion or 24.5 per cent, reflecting the impact of the 2004 agreements on health care and the new framework for equalization and TFF.

Budgetary balance



Sources: Department of Finance Canada and Statistics Canada.

Federal debt (accumulated deficit)



Sources: Department of Finance Canada and Statistics Canada.

- Subsidies and other transfers increased 15.6 per cent, reflecting the impact of measures from recent budgets as well as transfers under the Grains and Oilseeds Payment Program and the Energy Cost Benefit.

Other program expenses increased 5.8 per cent.

Public debt charges were down 2.3 per cent compared to the same period last year, due to a decline in the stock of interest-bearing debt and a decline in the average effective interest rate on that debt.

Financial source of $5.4 billion for April 2005 to February 2006

The budgetary balance is presented on a full accrual basis of accounting, recording government assets and liabilities when they are receivable or incurred, regardless of when the cash is received or paid. In contrast, the financial source/requirement measures the difference between cash coming in to the Government and cash going out. This measure is affected not only by changes in the budgetary balance but also by the cash source/requirement resulting from the Government's investing activities through its acquisition of capital assets and its loans, financial investments and advances, as well as from other activities, including payment of accounts payable and collection of accounts receivable, foreign exchange activities, and the amortization of its tangible capital assets. The difference between the budgetary balance and financial source/requirement is recorded in non-budgetary transactions.

Non-budgetary transactions resulted in a net requirement of $7.6 billion in the April-to-February period, down $2.6 billion from the requirement in the same period of 2004–05.

With a budgetary surplus of $13.1 billion and a net requirement of $7.6 billion from non-budgetary transactions, there was a financial source of $5.4 billion in the first 11 months of 2005–06 compared to a financial source of $8.5 billion in the same period of 2004–05.

Net financing activities down $18.5 billion

The Government used this financial source of $5.4 billion and a reduction in its cash balances of $13.1 billion to reduce its market debt by $18.5 billion by the end of February 2006, largely through a reduction of marketable bonds and treasury bills. The level of cash balances varies from month to month based on a number of factors including periodic large debt maturities, which can be quite volatile on a monthly basis. Cash balances at the end of February stood at $4.0 billion.

Table 1
Summary statement of transactions

	February		April to February	
	2005	2006	2004–05	2005–06
	($ millions)			
Budgetary transactions				
Revenues	19,840	19,743	179,044	185,456
Expenses				
Program expenses	-11,348	-12,928	-128,936	-141,658
Public debt charges	-2,722	-2,731	-31,436	-30,717
Budgetary balance (deficit/surplus)	5,770	4,084	18,672	13,081
Non-budgetary transactions	-5,198	-2,416	-10,212	-7,638
Financial source/requirement	572	1,668	8,460	5,443
Net change in financing activities	3,221	-348	-18,437	-18,513
Net change in cash balances	3,793	1,320	-9,977	-13,070
Cash balance at end of period			7,273	4,048

Note: Positive numbers indicate net source of funds. Negative numbers indicate net requirement for funds.

Table 2
Budgetary revenues

	February			April to February		
	2005	2006	Change	2004–05	2005–06	Change
	($ millions)		(%)	($ millions)		(%)
Tax revenues						
Income taxes						
Personal income tax	7,372	7,717	4.7	80,474	83,825	4.2
Corporate income tax	5,780	5,225	-9.6	25,635	27,799	8.4
Other income tax revenue	352	411	16.8	3,251	4,321	32.9
Total income tax	13,504	13,353	-1.1	109,360	115,945	6.0
Excise taxes and duties						
Goods and services tax	2,542	2,830	11.3	29,221	31,333	7.2
Customs import duties	275	237	-13.8	2,785	3,073	10.3
Sales and excise taxes	723	645	-10.8	8,878	8,626	-2.8
Air Travellers Security Charge	31	36	16.1	356	316	-11.2
Total excise taxes and duties	3,571	3,748	5.0	41,240	43,348	5.1
Total tax revenues	17,075	17,101	0.2	150,600	159,293	5.8
Employment insurance premiums	1,797	1,710	-4.8	15,401	15,091	-2.0
Other revenues	968	932	-3.7	13,043	11,072	-15.1
Total budgetary revenues	19,840	19,743	-0.5	179,044	185,456	3.6

Note: Totals may not sum due to rounding.

Table 3
Budgetary expenses

	February			April to February		
	2005	2006	Change	2004–05	2005–06	Change
	($ millions)		(%)	($ millions)		(%)
Transfer payments						
Transfers to persons						
Elderly benefits	2,367	2,496	5.4	25,561	26,680	4.4
Employment insurance benefits	1,423	1,355	-4.8	13,405	13,069	-2.5
Total	3,790	3,851	1.6	38,966	39,749	2.0
Transfers to other levels of government						
Support for health and other social programs						
Canada Health Transfer	1,054	1,583	50.2	11,596	17,417	50.2
Canada Social Transfer	652	685	5.1	7,173	7,540	5.1
Health Reform Transfer	125	0	n/a	1,375	0	n/a
Total	1,831	2,268	23.9	20,144	24,957	23.9
Fiscal transfers	634	1,045	64.8	10,020	11,641	16.2
Canada's cities and communities	0	0	n/a	0	670	n/a
Alternative Payments for Standing Programs	-210	-261	24.3	-2,413	-2,722	12.8
Total	2,255	3,052	35.3	27,751	34,546	24.5
Subsidies and other transfers						
Agriculture	780	720	-7.7	1,606	2,414	50.3
Foreign Affairs	200	238	19.0	2,210	2,171	-1.8
Health	124	86	-30.6	1,618	1,633	0.9
Human Resources Development	104	124	19.2	1,154	1,268	9.9
Indian and Northern Development	285	278	-2.5	3,903	4,263	9.2
Industry and Regional Development	-16	168	n/a	1,475	1,778	20.5
Other	313	568	81.5	3,582	4,439	23.9
Total	1,790	2,182	21.9	15,548	17,966	15.6
Total transfer payments	7,835	9,085	16.0	82,265	92,261	12.2
Other program expenses						
Crown corporation expenses						
Canadian Broadcasting Corporation	65	69	6.2	1,037	1,098	5.9
Canada Mortgage and Housing Corporation	170	150	-11.8	1,855	1,857	0.1
Other	107	188	75.7	1,838	1,698	-7.6
Total	342	407	19.0	4,730	4,653	-1.6
Defence	1,024	1,183	15.5	11,929	13,170	10.4
All other departments and agencies	2,147	2,253	4.9	30,012	31,574	5.2
Total other program expenses	3,513	3,843	9.4	46,671	49,397	5.8
Total program expenses	11,348	12,928	13.9	128,936	141,658	9.9
Public debt charges	2,722	2,731	0.3	31,436	30,717	-2.3
Total budgetary expenses	14,070	15,659	11.3	160,372	172,375	7.5

Note: Totals may not sum due to rounding.

Table 4

Budgetary balance and financial source/requirement

	February		April to February	
	2005	2006	2004–05	2005–06
			($ millions)	
Budgetary balance (deficit/surplus)	5,770	4,084	18,672	13,081
Non-budgetary transactions				
Capital investing activities	-313	-294	-1,402	-2,108
Other investing activities	-101	-670	-2,015	-3,129
Pension and other accounts	-934	-262	-2,907	-363
Other activities				
Accounts payable, receivables, accruals and allowances	-2,930	-1,404	-8,629	-7,397
Foreign exchange activities	-1,166	15	1,925	2,611
Amortization of tangible capital assets	246	199	2,816	2,748
Total other activities	-3,850	-1,190	-3,888	-2,038
Total non-budgetary transactions	-5,198	-2,416	-10,212	-7,638
Net financial source/requirement	572	1,668	8,460	5,443

Note: Totals may not sum due to rounding.

Table 5

Financial source/requirement and net financing activities

	February		April to February	
	2005	2006	2004–05	2005–06
			($ millions)	
Net financial source/requirement	572	1,668	8,460	5,443
Net increase (+)/decrease (-) in financing activities				
Unmatured debt transactions				
Canadian currency borrowings				
Marketable bonds	1,887	2,245	-13,636	-5,526
Treasury bills	1,100	-2,100	2,300	-7,300
Canada Savings Bonds	-196	-137	-2,161	-1,609
Other	-1	0	-29	-223
Total	2,790	8	-13,526	-14,658
Foreign currency borrowings	397	-361	-5,076	-3,920
Total	3,187	-353	-18,602	-18,578
Obligations related to capital leases	34	5	165	65
Net change in financing activities	3,221	-348	-18,437	-18,513
Change in cash balance	3,793	1,320	-9,977	-13,070

Note: Totals may not sum due to rounding.

Table 6

Condensed statement of assets and liabilities

	March 31, 2005	February 28, 2006	Change
		($ millions)	
Liabilities			
Accounts payable, accruals and allowances	90,473	89,251	-1,222
Interest-bearing debt			
Unmatured debt			
Payable in Canadian dollars			
Marketable bonds	266,570	261,044	-5,526
Treasury bills	127,199	119,899	-7,300
Canada Savings Bonds	19,080	17,471	-1,609
Other	3,393	3,170	-223
Subtotal	416,242	401,584	-14,658
Payable in foreign currencies	16,286	12,366	-3,920
Obligations related to capital leases	2,932	2,997	65
Total unmatured debt	435,460	416,947	-18,513
Pension and other accounts			
Public sector pensions	129,579	131,407	1,828
Other employee and veteran future benefits	41,549	42,982	1,433
Other pension and other accounts	8,680	5,056	-3,624
Total pension and other accounts	179,808	179,445	-363
Total interest-bearing debt	615,268	596,392	-18,876
Total liabilities	705,741	685,643	-20,098
Financial assets			
Cash and accounts receivable	76,281	69,386	-6,895
Foreign exchange accounts	40,871	38,260	-2,611
Loans, investments and advances (net of allowances)	33,860	36,989	3,129
Total financial assets	151,012	144,635	-6,377
Net debt	554,729	541,008	-13,721
Non-financial assets	54,866	54,226	-640
Federal debt (accumulated deficit)	499,863	486,782	-13,081

For additional copies or subscription inquiries, please contact the Distribution Centre at (613) 995-2855.
For other inquiries about this publication, contact Chris Forbes at (613) 995-6391.
Also available on the Internet (including advance tentative release dates) at www.fin.gc.ca.
April 2006

The Fiscal Monitor

A Publication of the Department of Finance Canada

Highlights

March 2006: budgetary deficit of $1.1 billion

There was a budgetary deficit of $1.1 billion in March 2006, down from the $9.9-billion deficit recorded in March 2005. The improvement is almost entirely due to lower program expenses resulting from lower transfer payments, reflecting $7.2 billion in one-time transfers and adjustments recorded in March 2005 related to the federal-provincial-territorial agreements on health care and Equalization/Territorial Formula Financing (TFF). Program expenses were down $8.4 billion in March. Budgetary revenues were $0.8 billion higher, reflecting solid growth in personal income tax revenues and an increase in non-tax revenues, partially offset by declines in corporate income tax and goods and services tax (GST) revenues. Public debt charges were up $0.3 billion compared to the same month last year.

April 2005 to March 2006: budgetary surplus of $8.4 billion, net of anticipated costs related to Bill C-48

For the April 2005 to March 2006 period, the budgetary surplus is estimated at $12.0 billion, up $3.3 billion from the $8.8-billion surplus reported in the same period of 2004–05. Budgetary revenues were up $7.2 billion, or 3.6 per cent. This gain is net of the $5.0-billion cost of the personal income tax reduction measures pertaining to the 2005 tax year and the first quarter of 2006. Program expenses were up $4.3 billion, or 2.8 per cent, primarily due to higher operating expenses for National Defence and other departments and agencies. Public debt charges were $0.4 billion lower.

The April 2005 to March 2006 monthly results are not the final results for the year as a whole. They do not account for $3.6 billion in costs related to anticipated payments made under Bill C-48 for 2005–06. After adjusting for these payments, the April to March surplus is $8.4 billion. Nor do the results reflect the regular end-of-year accounting adjustments, which include final tax accrual adjustments as well as final estimates of the cost of liabilities incurred during the fiscal year.

A discussion of the impact of the March results on the budget forecast for 2005–06 is provided later in this document.

Note to Readers:
Budget 2006 was presented on a gross reporting basis, whereas The Fiscal Monitor *for March 2006 is presented on a net basis. Beginning with the April 2006 monthly financial results,* The Fiscal Monitor *will also report the monthly financial results on a gross basis. A reconciliation table is provided later in this document showing the monthly results for the April 2005 to March 2006 period on a gross reporting basis, consistent with the Budget 2006 presentation.*

The Fiscal Monitor

March 2006

There was a budgetary deficit of $1.1 billion in March 2006, down $8.9 billion from the $9.9-billion deficit recorded in March 2005.

Budgetary revenues rose $0.8 billion, or 4.3 per cent, to $18.6 billion.

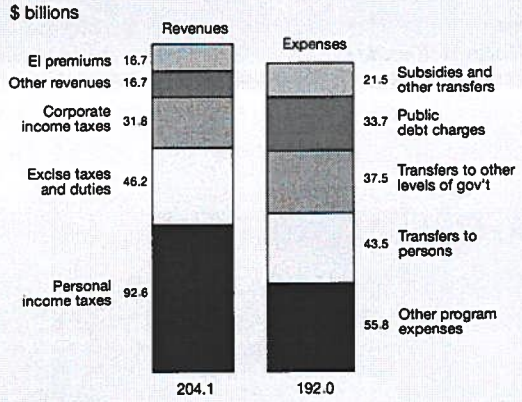
- Personal income tax revenues were up $0.5 billion, or 6.3 per cent.
- Corporate income tax revenues were down $0.2 billion, or 4.6 per cent, reflecting weaker corporate year-end settlement payments from the refining and non-energy manufacturing sectors.
- Other income tax revenues—withholdings from non-residents—rose $34 million, or 10.8 per cent.
- Excise taxes and duties were down $0.1 billion, or 4.1 per cent, due to a $0.2-billion decline in GST revenues. Customs import duties were up $87 million, sales and excise taxes rose $35 million and revenues from the Air Travellers Security Charge were up $2 million.
- Employment insurance (EI) premiums declined by 6.3 per cent, reflecting the decline in the premium rate from $1.95 to $1.87 per $100 of insurable earnings, effective January 1, 2006.
- Other revenues consist of net profits from enterprise Crown corporations, sales of goods and services, returns on investments, foreign exchange revenues and miscellaneous revenues. Other revenues, which are volatile on a monthly basis, were up $0.6 billion.

Program expenses in March 2006 were $16.7 billion, down $8.4 billion, or 33.6 per cent, from March 2005, primarily reflecting lower transfer payments.

Transfer payments were down $8.3 billion, or 44.8 per cent.

- Transfers to persons, consisting of elderly and EI benefits, were up $103 million, or 2.8 per cent. Elderly benefits increased 6.2 per cent due to both higher average benefits, which are indexed to Consumer Price Index inflation, and an increase in the number of individuals eligible for benefits. EI benefit payments decreased 3.3 per cent, reflecting a decline in regular benefits.
- Transfers to other levels of government, consisting of federal transfers in support of health and other social programs (Canada Health Transfer and Canada Social Transfer), fiscal transfers, transfers to provinces on behalf of Canada's cities and communities, and Alternative Payments for Standing Programs, were down $7.2 billion, or 70.2 per cent. The decrease in federal transfers in support of health and other social programs and lower fiscal transfers reflect one-time transfers and adjustments under the 2004 agreements on health care and Equalization/TFF recorded in March 2005.

Revenues and expenses
(April 2005-March 2006)



- Subsidies and other transfers decreased by $1.3 billion, or 26.9 per cent. This component is volatile on a monthly basis.

Other program expenses consist of transfers to Crown corporations and operating expenses for departments and agencies, including National Defence, and also reflect the ongoing assessment of the Government's liabilities. Consistent with the announcement in Budget 2006, this category now also includes the net expenses of foundations. On a year-over-year basis, other program expenses decreased $0.1 billion, or 1.3 per cent.

Public debt charges increased $0.3 billion, or 11.8 per cent, due to an increase in the average effective interest rate on the debt.

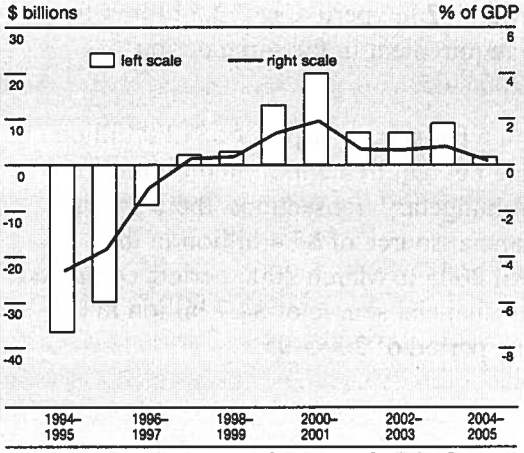
April 2005 to March 2006

For the April 2005 to March 2006 period, there was a budgetary surplus of $12.0 billion, $3.3 billion higher than the $8.8-billion surplus reported in the same period of 2004–05.

Budgetary revenues rose $7.2 billion, or 3.6 per cent, to $204.1 billion.

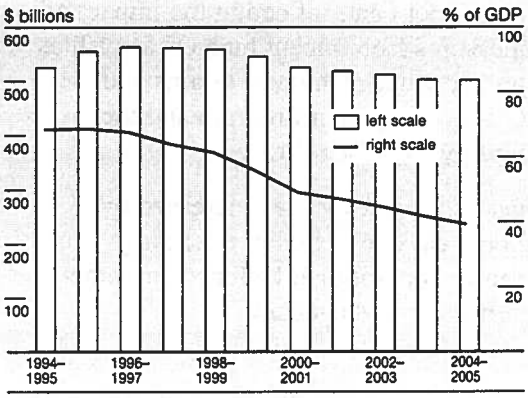
- Personal income tax revenues rose $3.9 billion, or 4.4 per cent. This gain is net of the $5.0-billion cost of the personal income tax reduction measures pertaining to the 2005 tax year and the first quarter of 2006.
- Corporate income tax revenues were up $2.0 billion, or 6.6 per cent, reflecting gains in corporate profitability in 2005.
- Other income tax revenues increased by $1.1 billion, or 31.0 per cent, reflecting increased dividend payments to non-residents.
- Excise taxes and duties rose $2.0 billion, or 4.5 per cent. GST revenues increased $1.9 billion, or 6.0 per cent, broadly consistent with growth in retail sales of 6.7 per cent over the comparable period. Customs import duties were up 12.4 per cent. Sales and excise taxes were down 2.2 per cent, while the Air Travellers Security Charge was down 9.8 per cent, reflecting reductions in the charge, effective April 1, 2005.

Budgetary balance



Sources: Department of Finance Canada and Statistics Canada.

Federal debt (accumulated deficit)



Sources: Department of Finance Canada and Statistics Canada.

- EI premiums were down 2.5 per cent, as the impact of the reductions in premium rates in January 2005 and January 2006 more than offset the impact of higher employment and wages and salaries.
- Other revenues were down $1.3 billion, or 10.0 per cent, reflecting the impact of the one-time gain ($2.6 billion) from the sale of the Government's remaining shares in Petro-Canada in September 2004.

Program expenses in the April 2005 to March 2006 period were $158.3 billion, up $4.3 billion, or 2.8 per cent, over the same period of 2004–05. Public debt charges declined by $0.4 billion. Transfer payments, which account for over half of program expenses, increased by $1.7 billion, or 1.6 per cent.

- Transfers to persons advanced by 2.1 per cent. Elderly benefits were up 4.5 per cent while EI benefits were down 2.6 per cent. The year-to-date decline in EI benefits is mainly attributable to a decline in regular benefits, which is in turn due to improved labour market conditions compared to the same period in 2004–05.
- Transfers to other levels of government were down $0.5 billion, or 1.3 per cent.
- Subsidies and other transfers increased by 6.2 per cent, reflecting the impact of measures from recent budgets as well as transfers under the new Grains and Oilseeds Payment Program and the Energy Cost Benefit.

Other program expenses increased by 5.0 per cent due to higher operating expenses for National Defence and other departments and agencies.

Public debt charges were down 1.2 per cent due to a decline in the stock of interest-bearing debt and a decline in the average effective interest rate on that debt.

Financial source of $5.4 billion for April 2005 to March 2006

The budgetary balance is presented on a full accrual basis of accounting, recording government assets and liabilities when they are receivable or incurred, regardless of when the cash is received or paid. In contrast, the financial source/requirement measures the difference between cash coming in to the Government and cash going out. This measure is affected not only by changes in the budgetary balance but also by the cash source/requirement resulting from the Government's investing activities through its acquisition of capital assets and its loans, financial investments and advances, as well as from other activities, including payment of accounts payable and collection of accounts receivable, foreign exchange activities, and the amortization of its tangible capital assets. The difference between the budgetary balance and financial source/requirement is recorded in non-budgetary transactions.

Non-budgetary transactions resulted in a net requirement of $6.6 billion in the April 2005 to March 2006 period, up $2.5 billion from the requirement in the same period of 2004–05.

With a budgetary surplus of $12.0 billion and a net requirement of $6.6 billion from non-budgetary transactions, there was a financial source of $5.4 billion in the April 2005 to March 2006 period, compared to a financial source of $4.7 billion in the same period of 2004–05.

Net financing activities down $4.6 billion

The Government used this financial source of $5.4 billion to increase its cash balances by $0.8 billion and to reduce its market debt by $4.6 billion by the end of March 2006, largely through a reduction of marketable bonds. The level of cash balances varies from month to month based on a number of factors including periodic large debt maturities, which can be quite volatile on a monthly basis. Cash balances at the end of March stood at $17.9 billion.

The Fiscal Monitor

Quarterly update of the fiscal outlook for 2005–06: estimated outcome for 2005–06 unchanged from budget, with a projected budgetary surplus of $8.0 billion

The monthly results for the 12-month period ended March 2006 are consistent with the forecast presented in the 2006 budget, which was prepared based on monthly financial information through February 2006. However, March data show that both corporate income tax revenues and direct program expenses came in lower than expected.

Corporate income tax revenues in March 2006 were weaker than expected due to lower than anticipated settlement payments from the energy sector. Corporations make monthly tax instalment payments based on either their previous year's actual tax liability or their current year's estimated liability, with any differences made up within 60 days of the close of their taxation year. As roughly three-quarters of Canadian corporations have corporate year-ends in September through December, most corporate settlement payments are received in January through March. As such, the magnitude of corporate receipts in March is very volatile. However, the final result for corporate income tax receipts for 2005–06 will likely be higher than reported in the April to March period. Positive year-end accrual adjustments are generally recorded in the corporate tax stream. This reflects the fact that no adjustments are made to the monthly corporate data for payables and receivables due to a lack of reliable information on which to base such adjustments.

The shortfall in corporate income tax revenues was offset by lower than projected direct program expenses, as it appears that the dissolution of Parliament in November lowered program expenses by more than anticipated in the budget forecast.

All told, the year-to-date results are consistent with the budget forecast of a surplus of $8.0 billion for 2005–06.

The above results are not the final results for the year as a whole.

- The April 2005 to March 2006 monthly results do not account for $3.6 billion in costs related to anticipated payments made under Bill C-48 for 2005–06, yielding a surplus estimate of $8.4 billion.
- Nor do the results reflect the regular end-of-year accounting adjustments, which include final tax accrual adjustments as well as final estimates of the cost of liabilities incurred during the fiscal year.
- While the monthly results include estimates of tax accruals, the final accruals can vary significantly from the monthly estimates due to factors such as the magnitude of registered retirement savings plan contributions and variations in capital gains and losses reported at tax filing. Final accrual estimates will be determined based on assessments of tax files as at May 31.
- Similarly, while the monthly results attempt to reflect the most up-to-date information on the Government's legal and environmental liabilities, provisions for guarantees, and allowances for valuation of loans, investments and advances, these are ultimately determined when the books are closed for the year, generally in September.

Differences between net and gross reporting

The revenues and expenses in Tables 1–6 are presented on a "net" basis, with certain expenses netted against budgetary revenues and certain revenues netted against expenses: the Canada Child Tax Benefit is netted against personal income tax revenues; departmental revenues that are levied for specific purposes, such as the contract costs of policing services in provinces, are netted against expenses; and revenues of consolidated Crown corporations and other entities are netted against their total expenses. This classification has the effect of reducing both revenues and expenses but has no impact on the budgetary balance. The following table shows the impact of "grossing up" budgetary revenues and expenses for these adjustments. Beginning with the April 2006 monthly financial results, *The Fiscal Monitor* will be presented on a gross basis, consistent with the presentation in Budget 2006.

Differences between net and gross reporting

	March		April to March	
	2005	2006	2004–05	2005–06
	($ millions)			
Net revenues	17,844	18,607	196,889	204,061
Add: Adjustments				
Canada Child Tax Benefit (personal income tax)	752	809	8,745	9,278
Revenues netted against program expenses (other revenues)	481	515	2,493	2,837
Revenues of consolidated Crown corporations and foundations (other revenues)	386	361	1,761	1,718
Net adjustment	1,619	1,685	12,999	13,833
Gross revenues	19,463	20,292	209,888	217,894
Net program expenses	25,076	16,654	154,015	158,311
Add: Adjustments				
Canada Child Tax Benefit (transfers to persons)	752	809	8,745	9,278
Revenues netted against program expenses (other program expenses)	481	515	2,493	2,837
Revenues of consolidated Crown corporations and foundations (other program expenses)	386	361	1,761	1,718
Net adjustment	1,619	1,685	12,999	13,833
Gross program expenses	26,695	18,339	167,014	172,144

Table 1
Summary statement of transactions

	March		April to March	
	2005	2006	2004–05	2005–06
	($ millions)			
Budgetary transactions				
Revenues	17,844	18,607	196,889	204,061
Expenses				
Program expenses	-25,076	-16,654	-154,015	-158,311
Public debt charges	-2,687	-3,004	-34,122	-33,722
Budgetary balance (deficit/surplus)	-9,919	-1,051	8,752	12,028
Non-budgetary transactions	6,120	1,046	-4,091	-6,593
Financial source/requirement	-3,799	-5	4,661	5,435
Net change in financing activities	13,647	13,886	-4,790	-4,626
Net change in cash balances	9,848	13,881	-129	809
Cash balance at end of period			17,122	17,931

Note: Positive numbers indicate net source of funds. Negative numbers indicate net requirement for funds.

Table 2
Budgetary revenues

	March			April to March		
	2005	2006	Change	2004–05	2005–06	Change
	($ millions)		(%)	($ millions)		(%)
Tax revenues						
Income taxes						
Personal income tax	8,213	8,732	6.3	88,686	92,558	4.4
Corporate income tax	4,238	4,043	-4.6	29,872	31,842	6.6
Other income tax revenue	316	350	10.8	3,567	4,671	31.0
Total income tax	12,767	13,125	2.8	122,125	129,071	5.7
Excise taxes and duties						
Goods and services tax	1,939	1,694	-12.6	31,161	33,027	6.0
Customs import duties	249	336	34.9	3,034	3,409	12.4
Sales and excise taxes	728	763	4.8	9,606	9,390	-2.2
Air Travellers Security Charge	33	35	6.1	389	351	-9.8
Total excise taxes and duties	2,949	2,828	-4.1	44,190	46,177	4.5
Total tax revenues	15,716	15,953	1.5	166,315	175,248	5.4
Employment insurance premiums	1,768	1,657	-6.3	17,169	16,748	-2.5
Other revenues	360	997	176.9	13,405	12,065	-10.0
Total budgetary revenues	17,844	18,607	4.3	196,889	204,061	3.6

Note: Totals may not sum due to rounding.

Table 3
Budgetary expenses

	March			April to March		
	2005	2006	Change	2004–05	2005–06	Change
	($ millions)		(%)	($ millions)		(%)
Transfer payments						
Transfers to persons						
Elderly benefits	2,365	2,512	6.2	27,926	29,192	4.5
Employment insurance benefits	1,328	1,284	-3.3	14,734	14,352	-2.6
Total	3,693	3,796	2.8	42,660	43,544	2.1
Transfers to other levels of government						
Support for health and other social programs						
Canada Health Transfer	6,835	1,583	-76.8	18,431	19,000	3.1
Canada Social Transfer	727	685	-5.8	7,900	8,225	4.1
Health Reform Transfer	125	0	n/a	1,500	0	n/a
Total	7,687	2,268	-70.5	27,831	27,225	-2.2
Fiscal transfers	2,882	796	-72.4	12,902	12,437	-3.6
Canada's cities and communities	0	0	n/a	0	580	n/a
Alternative Payments for Standing Programs	-333	-10	-97.0	-2,746	-2,732	-0.5
Total	10,236	3,054	-70.2	37,987	37,510	-1.3
Subsidies and other transfers						
Agriculture	1,044	244	-76.6	2,650	2,658	0.3
Foreign Affairs	1,182	887	-25.0	3,391	3,058	-9.8
Health	246	287	16.7	1,864	1,920	3.0
Human Resources Development	49	148	202.0	1,203	1,416	17.7
Indian and Northern Development	452	544	20.4	4,354	4,807	10.4
Industry and Regional Development	207	205	-1.0	1,682	1,983	17.9
Other	1,497	1,102	-26.4	5,080	5,632	10.9
Total	4,677	3,417	-26.9	20,224	21,474	6.2
Total transfer payments	18,606	10,267	-44.8	100,871	102,528	1.6
Other program expenses						
Crown corporation and foundation expenses						
Canadian Broadcasting Corporation	0	0	n/a	1,037	1,098	5.9
Canada Mortgage and Housing Corporation	190	176	-7.4	2,045	2,033	-0.6
Other	697	874	25.4	2,535	2,571	1.4
Total	887	1,050	18.4	5,617	5,702	1.5
Defence	1,633	1,566	-4.1	13,562	14,736	8.7
All other departments and agencies	3,950	3,771	-4.5	33,965	35,345	4.1
Total other program expenses	6,470	6,387	-1.3	53,144	55,783	5.0
Total program expenses	25,076	16,654	-33.6	154,015	158,311	2.8
Public debt charges	2,687	3,004	11.8	34,122	33,722	-1.2
Total budgetary expenses	27,763	19,658	-29.2	188,137	192,033	2.1

Note: Totals may not sum due to rounding.

Table 4
Budgetary balance and financial source/requirement

	March		April to March	
	2005	2006	2004–05	2005–06
			($ millions)	
Budgetary balance (deficit/surplus)	-9,919	-1,051	8,752	12,028
Non-budgetary transactions				
Capital investing activities	-862	-674	-2,264	-2,783
Other investing activities	-636	359	-2,651	-2,772
Pension and other accounts	278	515	-2,628	153
Other activities				
Accounts payable, receivables, accruals and allowances	5,321	2,192	-3,307	-5,205
Foreign exchange activities	1,517	-1,567	3,441	1,045
Amortization of tangible capital assets	502	221	3,318	2,969
Total other activities	7,340	846	3,452	-1,191
Total non-budgetary transactions	6,120	1,046	-4,091	-6,593
Net financial source/requirement	-3,799	-5	4,661	5,435

Note: Totals may not sum due to rounding.

Table 5
Financial source/requirement and net financing activities

	March		April to March	
	2005	2006	2004–05	2005–06
			($ millions)	
Net financial source/requirement	-3,799	-5	4,661	5,435
Net increase (+)/decrease (-) in financing activities				
Unmatured debt transactions				
Canadian currency borrowings				
Marketable bonds	1,348	674	-12,288	-4,852
Treasury bills	11,500	11,700	13,800	4,400
Canada Savings Bonds	-83	-124	-2,244	-1,732
Other	-6	-68	-35	-290
Total	12,759	12,182	-767	-2,474
Foreign currency borrowings	822	1,719	-4,254	-2,202
Total	13,581	13,901	-5,021	-4,676
Obligations related to capital leases	66	-15	231	50
Net change in financing activities	13,647	13,886	-4,790	-4,626
Change in cash balance	9,848	13,881	-129	809

Note: Totals may not sum due to rounding.

Table 6

Condensed statement of assets and liabilities

	March 31, 2005	March 31, 2006	Change
		($ millions)	
Liabilities			
Accounts payable, accruals and allowances	90,478	85,961	-4,517
Interest-bearing debt			
Unmatured debt			
Payable in Canadian dollars			
Marketable bonds	266,570	261,718	-4,852
Treasury bills	127,199	131,599	4,400
Canada Savings Bonds	19,080	17,348	-1,732
Other	3,393	3,103	-290
Subtotal	416,242	413,768	-2,474
Payable in foreign currencies	16,286	14,084	-2,202
Obligations related to capital leases	2,932	2,982	50
Total unmatured debt	435,460	430,834	-4,626
Pension and other accounts			
Public sector pensions	129,579	131,479	1,900
Other employee and veteran future benefits	41,549	43,112	1,563
Other pension and other accounts	8,680	5,370	-3,310
Total pension and other accounts	179,808	179,961	153
Total interest-bearing debt	615,268	610,795	-4,473
Total liabilities	705,746	696,756	-8,990
Financial assets			
Cash and accounts receivable	76,349	77,846	1,497
Foreign exchange accounts	40,871	39,826	-1,045
Loans, investments and advances (net of allowances)	39,249	42,021	2,772
Total financial assets	156,469	159,693	3,224
Net debt	549,277	537,063	-12,214
Non-financial assets	54,870	54,684	-186
Federal debt (accumulated deficit)	494,407	482,379	-12,028

For additional copies or subscription inquiries, please contact the Distribution Centre at 613 995-2855.
For other inquiries about this publication, contact Chris Forbes at 613 995-6391.
Also available on the Internet (including advance tentative release dates) at www.fin.gc.ca.
Ce document est également offert en français.
May 2006

Economic accounts key indicators, Canada[1]

	2004	2005	2006	2007	2008	2009	2010
	millions of dollars at current prices						
GDP by income and by expenditure							
Wages, salaries and supplementary labour income	657,249	695,093	743,392	784,885	818,563	814,707	849,618
	5.8	*5.8*	*6.9*	*5.6*	*4.3*	*-0.5*	*4.3*
Corporation profits before taxes	168,219	186,585	197,286	200,943	223,001	149,087	180,723
	16.4	*10.9*	*5.7*	*1.9*	*11.0*	*-33.1*	*21.2*
Interest and miscellaneous investment income	66,835	76,714	81,209	87,082	98,337	79,387	85,598
	6.8	*14.8*	*5.9*	*7.2*	*12.9*	*-19.3*	*7.8*
Net income of unincorporated business	84,210	85,234	86,750	90,411	94,675	98,843	104,989
	7.1	*1.2*	*1.8*	*4.2*	*4.7*	*4.4*	*6.2*
Taxes less subsidies	148,822	155,284	160,588	166,716	164,776	164,064	172,628
	6.0	*4.3*	*3.4*	*3.8*	*-1.2*	*-0.4*	*5.2*
Personal disposable income	760,462	794,269	853,190	901,634	953,568	966,269	1,013,778
	5.5	*4.4*	*7.4*	*5.7*	*5.8*	*1.3*	*4.9*
Personal saving rate[2]	3.2	2.1	3.5	2.8	3.9	4.6	4.8
	...	...	...	...	...	...	...
	millions of chained (2002) dollars						
Personal expenditure on consumer goods and services	697,566	723,146	753,263	787,765	811,157	814,215	841,466
	3.3	*3.7*	*4.2*	*4.6*	*3.0*	*0.4*	*3.3*
Government current expenditure on goods and services	236,138	239,471	246,749	253,466	264,608	274,131	280,846
	2.0	*1.4*	*3.0*	*2.7*	*4.4*	*3.6*	*2.4*
Gross fixed capital formation	257,712	281,727	301,606	312,285	318,670	277,316	305,166
	7.8	*9.3*	*7.1*	*3.5*	*2.0*	*-13.0*	*10.0*
Investment in inventories	7,723	14,254	12,563	12,256	9,715	-540	8,872
	...	...	...	...	...	...	...
Exports of goods and services	491,675	500,988	503,934	510,105	486,145	419,126	445,967
	5.0	*1.9*	*0.6*	*1.2*	*-4.7*	*-13.8*	*6.4*
Imports of goods and services	481,854	516,269	541,720	573,732	582,178	504,142	570,377
	8.0	*7.1*	*4.9*	*5.9*	*1.5*	*-13.4*	*13.1*
Gross domestic product at market prices	1,211,239	1,247,807	1,283,033	1,311,260	1,320,291	1,283,722	1,324,993
	3.1	*3.0*	*2.8*	*2.2*	*0.7*	*-2.8*	*3.2*
GDP at basic prices, by industry							
Goods-producing industries	360,281	368,652	371,046	372,586	368,514	334,478	352,456
	2.7	*2.3*	*0.6*	*0.4*	*-1.1*	*-9.2*	*5.4*
Services-producing industries	764,791	790,243	821,208	847,881	863,697	864,940	886,794
	3.3	*3.3*	*3.9*	*3.2*	*1.9*	*0.1*	*2.5*
Industrial production	269,590	274,074	273,998	272,736	264,301	239,250	251,004
	1.5	*1.7*	*-0.0*	*-0.5*	*-3.1*	*-9.5*	*4.9*
Non-durable manufacturing	75,534	75,467	73,385	71,006	67,793	63,860	65,151
	-0.6	*-0.1*	*-2.8*	*-3.2*	*-4.5*	*-5.8*	*2.0*
Durable manufacturing	109,362	112,607	112,440	110,733	104,283	86,116	93,022
	3.8	*3.0*	*-0.1*	*-1.5*	*-5.8*	*-17.4*	*8.0*
Agriculture, forestry, fishing and hunting	27,669	28,404	27,958	27,570	30,008	28,082	28,487
	8.6	*2.7*	*-1.6*	*-1.4*	*8.8*	*-6.4*	*1.4*
Mining, oil and gas extraction	55,672	55,941	57,271	57,776	56,538	52,125	54,967
	1.3	*0.5*	*2.4*	*0.9*	*-2.1*	*-7.8*	*5.5*
Construction	63,453	66,725	69,462	72,330	74,875	68,011	73,467
	6.0	*5.2*	*4.1*	*4.1*	*3.5*	*-9.2*	*8.0*
Manufacturing	184,814	187,901	185,527	181,348	171,785	150,431	158,326
	1.9	*1.7*	*-1.3*	*-2.3*	*-5.3*	*-12.4*	*5.2*
Wholesale trade	59,990	63,662	66,839	70,107	69,628	65,268	68,822
	3.8	*6.1*	*5.0*	*4.9*	*-0.7*	*-6.3*	*5.4*
Retail trade	62,666	64,841	68,822	71,733	73,293	72,774	75,634
	3.6	*3.5*	*6.1*	*4.2*	*2.2*	*-0.7*	*3.9*
Finance and insurance, real estate and renting and leasing and management of companies and enterprises	215,074	222,677	232,289	240,577	245,547	251,128	257,488
	3.6	*3.5*	*4.3*	*3.6*	*2.1*	*2.3*	*2.5*
Education services	53,764	55,292	57,008	58,413	60,140	61,219	62,539
	2.3	*2.8*	*3.1*	*2.5*	*3.0*	*1.8*	*2.2*
Health care and social assistance	71,589	72,735	74,468	76,715	78,715	80,888	82,761
	1.8	*1.6*	*2.4*	*3.0*	*2.6*	*2.8*	*2.3*
Public administration	64,085	65,115	67,452	69,136	71,447	73,742	75,390
	1.2	*1.6*	*3.6*	*2.5*	*3.3*	*3.2*	*2.2*

1. The first line is the series itself. The second line is the percentage change.
2. Personal saving divided by personal disposable income, multiplied by 100.

Department of Finance Canada
Ministère des Finances Canada

Fiscal Reference Tables

October 2011

Canada

Cette publication est également disponible en français.

Cat. No.: F1-26/2011E-PDF

Preface

The *Fiscal Reference Tables* provide annual data on the financial position of the federal, provincial-territorial and local governments. The data are presented on both a Public Accounts basis—corresponding to the accounting conventions used to report financial information to the respective legislatures—as well as on a National Accounts basis—as prepared by Statistics Canada and the Organisation for Economic Co-operation and Development.

For information or clarification, please contact Douglas Nevison at 613-995-6391, Fiscal Policy Division, Department of Finance, Ottawa, Ontario, K1A 0G5.

Table of Contents

National Accounts

International Fiscal Comparisons

Federal Government
Public Accounts

Table 1

Fiscal transactions (millions of dollars)

Year	Revenues	Program expenses	Operating surplus or deficit (-)	Public debt charges	Budgetary surplus or deficit (-)	Other comprehensive income	Accumulated deficit	Non-budgetary transactions	Financial requirement (-)/ source
					(millions of dollars)				
1966-67	9,975	9,278	697	1,182	-485		17,708	86	-399
1967-68	10,925	10,681	244	1,286	-1,042		18,750	508	-534
1968-69	12,320	11,523	797	1,464	-667		19,417	-1,167	-1,834
1969-70	14,755	12,921	1,834	1,694	140		19,277	-284	-144
1970-71	15,387	14,516	871	1,887	-1,016		20,293	-1,310	-2,326
1971-72	17,119	16,795	324	2,110	-1,786		22,079	-263	-2,049
1972-73	19,808	19,409	399	2,300	-1,901		23,980	501	-1,400
1973-74	22,997	22,643	354	2,565	-2,211		26,191	893	-1,318
1974-75	29,965	28,952	1,013	3,238	-2,225		28,416	763	-1,462
1975-76	32,441	34,675	-2,234	3,970	-6,204		34,620	1,501	-4,703
1976-77	35,283	37,472	-2,189	4,708	-6,897		41,517	2,490	-4,407
1977-78	35,633	40,981	-5,348	5,531	-10,879		52,396	2,816	-8,063
1978-79	38,214	44,219	-6,005	7,024	-13,029		65,425	103	-12,926
1979-80	43,310	46,783	-3,473	8,494	-11,967		77,392	4,074	-7,893
1980-81	53,181	57,079	-3,898	10,658	-14,556		91,948	5,845	-8,711
1981-82	67,289	67,849	-560	15,114	-15,674		107,622	6,249	-9,425
1982-83	67,430	79,576	-12,146	16,903	-29,049		136,671	2,698	-26,351
1983-84	65,261	77,194	-11,933	20,430	-32,363		157,252	8,185	-24,178
1984-85	71,999	84,279	-12,280	24,887	-37,167		194,419	7,166	-30,001
1985-86	77,742	83,474	-5,732	27,657	-33,389		227,808	3,870	-29,519
1986-87	86,746	87,870	-1,124	28,718	-29,842		257,650	2,356	-27,486
1987-88	97,215	95,009	2,206	31,223	-29,017		286,667	4,225	-24,792
1988-89	106,349	98,764	7,585	35,532	-27,947		314,614	4,016	-23,931
1989-90	115,887	103,784	12,103	41,246	-29,143		343,757	11,324	-17,819
1990-91	119,685	108,550	11,135	45,034	-33,899		377,656	5,888	-28,011
1991-92	126,086	114,544	11,542	43,861	-32,319		409,975	1,566	-30,753
1992-93	124,486	122,173	2,313	41,332	-39,019		448,994	11,100	-27,919
1993-94	123,873	122,304	1,569	40,099	-38,530		487,524	4,898	-33,632
1994-95	130,791	123,238	7,553	44,185	-36,632		524,156	11,147	-25,485
1995-96	140,257	120,856	19,401	49,407	-30,006		554,162	7,392	-22,614
1996-97	149,889	111,327	38,562	47,281	-8,719		562,881	515	-8,204
1997-98	160,864	114,785	46,079	43,120	2,959		559,922	7,566	10,525
1998-99	165,520	116,438	49,082	43,303	5,779		554,143	1,111	6,890
1999-00	176,408	118,766	57,642	43,384	14,258		539,885	-3,231	11,027
2000-01	194,349	130,566	63,783	43,892	19,891		519,994	-11,651	8,240
2001-02	183,930	136,231	47,699	39,651	8,048		511,946	-8,120	-72
2002-03	190,570	146,679	43,891	37,270	6,621		505,325	2,777	9,398
2003-04	198,590	153,676	44,914	35,769	9,145		496,180	-1,542	7,603
2004-05	211,943	176,362	35,581	34,118	1,463		494,717	5,140	6,603
2005-06	222,203	175,213	46,990	33,772	13,218		481,499	-6,409	6,809
2006-07	235,966	188,269	47,697	33,945	13,752	479	467,268	-5,248	8,504
2007-08	242,420	199,498	42,922	33,325	9,597	34	457,637	4,931	14,528
2008-09	233,092	207,857	25,235	30,990	-5,755	-318	463,710	-84,312	-90,067
2009-10	218,600	244,784	-26,184	29,414	-55,598	211	519,097	-8,043	-63,641
2010-11	237,091	239,592	-2,501	30,871	-33,372	2,142	550,327	-12,784	-46,156

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 2

Fiscal transactions (per cent of GDP)

Year	Revenues	Program expenses	Operating surplus or deficit (-)	Public debt charges	Budgetary surplus or deficit (-)	Other comprehensive income	Accumulated deficit	Non-budgetary transactions	Financial requirement (-)/ source
					(per cent of GDP)				
1966-67	15.4	14.3	1.1	1.8	-0.7		27.3	0.1	-0.6
1967-68	15.7	15.3	0.4	1.8	-1.5		26.9	0.7	-0.8
1968-69	16.2	15.1	1.0	1.9	-0.9		25.5	-1.5	-2.4
1969-70	17.6	15.4	2.2	2.0	0.2		23.0	-0.3	-0.2
1970-71	17.1	16.1	1.0	2.1	-1.1		22.5	-1.5	-2.6
1971-72	17.4	17.1	0.3	2.1	-1.8		22.4	-0.3	-2.1
1972-73	18.0	17.7	0.4	2.1	-1.7		21.8	0.5	-1.3
1973-74	17.8	17.6	0.3	2.0	-1.7		20.3	0.7	-1.0
1974-75	19.5	18.8	0.7	2.1	-1.4		18.4	0.5	-0.9
1975-76	18.7	20.0	-1.3	2.3	-3.6		19.9	0.9	-2.7
1976-77	17.6	18.7	-1.1	2.4	-3.4		20.8	1.2	-2.2
1977-78	16.1	18.5	-2.4	2.5	-4.9		23.7	1.3	-3.6
1978-79	15.6	18.1	-2.5	2.9	-5.3		26.7	0.0	-5.3
1979-80	15.5	16.7	-1.2	3.0	-4.3		27.7	1.5	-2.8
1980-81	16.9	18.2	-1.2	3.4	-4.6		29.2	1.9	-2.8
1981-82	18.7	18.8	-0.2	4.2	-4.3		29.9	1.7	-2.6
1982-83	17.8	20.9	-3.2	4.4	-7.6		36.0	0.7	-6.9
1983-84	15.9	18.8	-2.9	5.0	-7.9		38.2	2.0	-5.9
1984-85	16.0	18.7	-2.7	5.5	-8.3		43.2	1.6	-6.7
1985-86	16.0	17.2	-1.2	5.7	-6.9		46.9	0.8	-6.1
1986-87	16.9	17.1	-0.2	5.6	-5.8		50.3	0.5	-5.4
1987-88	17.4	17.0	0.4	5.6	-5.2		51.3	0.8	-4.4
1988-89	17.3	16.1	1.2	5.8	-4.6		51.3	0.7	-3.9
1989-90	17.6	15.8	1.8	6.3	-4.4		52.3	1.7	-2.7
1990-91	17.6	16.0	1.6	6.6	-5.0		55.5	0.9	-4.1
1991-92	18.4	16.7	1.7	6.4	-4.7		59.8	0.2	-4.5
1992-93	17.8	17.4	0.3	5.9	-5.6		64.1	1.6	-4.0
1993-94	17.0	16.8	0.2	5.5	-5.3		67.0	0.7	-4.6
1994-95	17.0	16.0	1.0	5.7	-4.8		68.0	1.4	-3.3
1995-96	17.3	14.9	2.4	6.1	-3.7		68.4	0.9	-2.8
1996-97	17.9	13.3	4.6	5.6	-1.0		67.3	0.1	-1.0
1997-98	18.2	13.0	5.2	4.9	0.3		63.4	0.9	1.2
1998-99	18.1	12.7	5.4	4.7	0.6		60.6	0.1	0.8
1999-00	18.0	12.1	5.9	4.4	1.5		55.0	-0.3	1.1
2000-01	18.1	12.1	5.9	4.1	1.8		48.3	-1.1	0.8
2001-02	16.6	12.3	4.3	3.6	0.7		46.2	-0.7	0.0
2002-03	16.5	12.7	3.8	3.2	0.6		43.8	0.2	0.8
2003-04	16.4	12.7	3.7	2.9	0.8		40.9	-0.1	0.6
2004-05	16.4	13.7	2.8	2.6	0.1		38.3	0.4	0.5
2005-06	16.2	12.8	3.4	2.5	1.0		35.0	-0.5	0.5
2006-07	16.3	13.0	3.3	2.3	0.9	0.0	32.2	-0.4	0.6
2007-08	15.8	13.0	2.8	2.2	0.6	0.0	29.9	0.3	0.9
2008-09	14.5	13.0	1.6	1.9	-0.4	0.0	28.9	-5.3	-5.6
2009-10	14.3	16.0	-1.7	1.9	-3.6	0.0	34.0	-0.5	-4.2
2010-11	14.6	14.7	-0.2	1.9	-2.1	0.1	33.9	-0.8	-2.8

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 3

Revenues (millions of dollars)

Year	Personal income tax	Corporate income tax	Non-resident income tax	Other taxes and duties	Total tax revenues	Employment Insurance premiums	Other revenues	Total revenues
				(millions of dollars)				
1966-67	3,050	1,743	305	3,628	8,726	343	906	9,975
1967-68	3,650	1,821	323	3,718	9,512	346	1,067	10,925
1968-69	4,334	2,213	318	3,747	10,612	432	1,276	12,320
1969-70	5,588	2,839	349	4,009	12,785	490	1,480	14,755
1970-71	6,395	2,426	378	4,060	13,259	493	1,635	15,387
1971-72	7,227	2,396	420	4,637	14,680	569	1,870	17,119
1972-73	8,378	2,920	353	5,272	16,923	745	2,140	19,808
1973-74	9,226	3,710	338	6,355	19,629	1,001	2,367	22,997
1974-75	11,710	4,836	434	8,506	25,486	1,585	2,894	29,965
1975-76	12,709	5,748	493	8,143	27,093	2,039	3,309	32,441
1976-77	14,634	5,363	521	8,637	29,155	2,470	3,658	35,283
1977-78	13,988	5,280	569	9,123	28,960	2,537	4,136	35,633
1978-79	14,656	5,654	645	9,697	30,652	2,783	4,779	38,214
1979-80	16,808	6,951	883	10,215	34,857	2,778	5,675	43,310
1980-81	19,837	8,106	966	11,661	40,570	3,303	9,308	53,181
1981-82	24,046	8,118	1,138	15,843	49,145	4,753	13,391	67,289
1982-83	26,330	7,139	1,130	15,776	50,375	4,900	12,155	67,430
1983-84	26,530	7,174	908	16,215	50,827	7,229	7,205	65,261
1984-85	28,455	9,234	1,021	18,177	56,887	7,676	7,436	71,999
1985-86	32,238	9,068	1,053	19,491	61,850	8,630	7,262	77,742
1986-87	36,733	9,732	1,355	21,049	68,869	9,667	8,210	86,746
1987-88	42,422	10,710	1,162	22,941	77,235	10,602	9,378	97,215
1988-89	45,456	11,549	1,578	25,771	84,354	11,107	10,888	106,349
1989-90	50,584	12,820	1,361	28,155	92,920	10,727	12,240	115,887
1990-91	56,201	11,545	1,372	24,067	93,185	12,551	13,949	119,685
1991-92	59,687	9,215	1,261	27,308	97,471	15,338	13,277	126,086
1992-93	58,331	7,095	1,191	26,771	93,388	17,576	13,522	124,486
1993-94	55,173	9,098	1,533	26,940	92,744	19,298	11,831	123,873
1994-95	60,648	10,969	1,700	27,457	100,774	18,293	11,724	130,791
1995-96	64,049	15,372	1,882	27,251	108,554	19,089	12,614	140,257
1996-97	67,796	16,235	2,671	29,204	115,906	19,949	14,034	149,889
1997-98	74,949	21,179	1,999	31,146	129,273	19,242	12,349	160,864
1998-99	77,894	21,213	2,208	31,717	133,032	19,064	13,424	165,520
1999-00	85,070	22,115	2,646	33,298	143,129	18,628	14,651	176,408
2000-01	92,662	28,293	2,982	35,769	159,706	18,655	15,988	194,349
2001-02	86,972	24,242	2,925	37,133	151,272	17,637	15,021	183,930
2002-03	89,530	22,222	3,291	41,357	156,400	17,870	16,300	190,570
2003-04	92,957	27,431	3,142	41,365	164,895	17,546	16,149	198,590
2004-05	98,521	29,956	3,560	42,857	174,894	17,307	19,742	211,943
2005-06	103,691	31,724	4,529	46,156	186,100	16,535	19,568	222,203
2006-07	110,477	37,745	4,877	45,317	198,416	16,789	20,761	235,966
2007-08	113,063	40,628	5,693	44,207	203,591	16,558	22,271	242,420
2008-09	116,024	29,476	6,298	39,806	191,604	16,887	24,601	233,092
2009-10	103,947	30,361	5,293	40,573	180,174	16,761	21,665	218,600
2010-11	113,457	29,969	5,137	42,903	191,466	17,501	28,124	237,091

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 4

Revenues (per cent of GDP)

Year	Personal income tax	Corporate incomein tax	Non-resident come tax	Other taxes and duties	Total tax revenues	Employment Insurance premiums	Other revenues	Total revenues
				(per cent of GDP)				
1966-67	4.7	2.7	0.5	5.6	13.5	0.5	1.4	15.4
1967-68	5.2	2.6	0.5	5.3	13.6	0.5	1.5	15.7
1968-69	5.7	2.9	0.4	4.9	13.9	0.6	1.7	16.2
1969-70	6.7	3.4	0.4	4.8	15.3	0.6	1.8	17.6
1970-71	7.1	2.7	0.4	4.5	14.7	0.5	1.8	17.1
1971-72	7.3	2.4	0.4	4.7	14.9	0.6	1.9	17.4
1972-73	7.6	2.7	0.3	4.8	15.4	0.7	1.9	18.0
1973-74	7.2	2.9	0.3	4.9	15.2	0.8	1.8	17.8
1974-75	7.6	3.1	0.3	5.5	16.5	1.0	1.9	19.5
1975-76	7.3	3.3	0.3	4.7	15.6	1.2	1.9	18.7
1976-77	7.3	2.7	0.3	4.3	14.6	1.2	1.8	17.6
1977-78	6.3	2.4	0.3	4.1	13.1	1.1	1.9	16.1
1978-79	6.0	2.3	0.3	4.0	12.5	1.1	2.0	15.6
1979-80	6.0	2.5	0.3	3.7	12.5	1.0	2.0	15.5
1980-81	6.3	2.6	0.3	3.7	12.9	1.1	3.0	16.9
1981-82	6.7	2.3	0.3	4.4	13.6	1.3	3.7	18.7
1982-83	6.9	1.9	0.3	4.2	13.3	1.3	3.2	17.8
1983-84	6.4	1.7	0.2	3.9	12.4	1.8	1.8	15.9
1984-85	6.3	2.1	0.2	4.0	12.7	1.7	1.7	16.0
1985-86	6.6	1.9	0.2	4.0	12.7	1.8	1.5	16.0
1986-87	7.2	1.9	0.3	4.1	13.4	1.9	1.6	16.9
1987-88	7.6	1.9	0.2	4.1	13.8	1.9	1.7	17.4
1988-89	7.4	1.9	0.3	4.2	13.8	1.8	1.8	17.3
1989-90	7.7	1.9	0.2	4.3	14.1	1.6	1.9	17.6
1990-91	8.3	1.7	0.2	3.5	13.7	1.8	2.1	17.6
1991-92	8.7	1.3	0.2	4.0	14.2	2.2	1.9	18.4
1992-93	8.3	1.0	0.2	3.8	13.3	2.5	1.9	17.8
1993-94	7.6	1.3	0.2	3.7	12.8	2.7	1.6	17.0
1994-95	7.9	1.4	0.2	3.6	13.1	2.4	1.5	17.0
1995-96	7.9	1.9	0.2	3.4	13.4	2.4	1.6	17.3
1996-97	8.1	1.9	0.3	3.5	13.9	2.4	1.7	17.9
1997-98	8.5	2.4	0.2	3.5	14.6	2.2	1.4	18.2
1998-99	8.5	2.3	0.2	3.5	14.5	2.1	1.5	18.1
1999-00	8.7	2.3	0.3	3.4	14.6	1.9	1.5	18.0
2000-01	8.6	2.6	0.3	3.3	14.8	1.7	1.5	18.1
2001-02	7.8	2.2	0.3	3.4	13.7	1.6	1.4	16.6
2002-03	7.8	1.9	0.3	3.6	13.6	1.5	1.4	16.5
2003-04	7.7	2.3	0.3	3.4	13.6	1.4	1.3	16.4
2004-05	7.6	2.3	0.3	3.3	13.5	1.3	1.5	16.4
2005-06	7.5	2.3	0.3	3.4	13.5	1.2	1.4	16.2
2006-07	7.6	2.6	0.3	3.1	13.7	1.2	1.4	16.3
2007-08	7.4	2.7	0.4	2.9	13.3	1.1	1.5	15.8
2008-09	7.2	1.8	0.4	2.5	11.9	1.1	1.5	14.5
2009-10	6.8	2.0	0.3	2.7	11.8	1.1	1.4	14.3
2010-11	7.0	1.8	0.3	2.6	11.8	1.1	1.7	14.6

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 5

Revenues (per cent of total)

Year	Personal income tax	Corporate income tax	Non-resident income tax	Other taxes and duties	Total tax revenues	Employment Insurance premiums	Other revenues	Total revenues
				(per cent of total)				
1966-67	30.6	17.5	3.1	36.4	87.5	3.4	9.1	100.0
1967-68	33.4	16.7	3.0	34.0	87.1	3.2	9.8	100.0
1968-69	35.2	18.0	2.6	30.4	86.1	3.5	10.4	100.0
1969-70	37.9	19.2	2.4	27.2	86.6	3.3	10.0	100.0
1970-71	41.6	15.8	2.5	26.4	86.2	3.2	10.6	100.0
1971-72	42.2	14.0	2.5	27.1	85.8	3.3	10.9	100.0
1972-73	42.3	14.7	1.8	26.6	85.4	3.8	10.8	100.0
1973-74	40.1	16.1	1.5	27.6	85.4	4.4	10.3	100.0
1974-75	39.1	16.1	1.4	28.4	85.1	5.3	9.7	100.0
1975-76	39.2	17.7	1.5	25.1	83.5	6.3	10.2	100.0
1976-77	41.5	15.2	1.5	24.5	82.6	7.0	10.4	100.0
1977-78	39.3	14.8	1.6	25.6	81.3	7.1	11.6	100.0
1978-79	38.4	14.8	1.7	25.4	80.2	7.3	12.5	100.0
1979-80	38.8	16.0	2.0	23.6	80.5	6.4	13.1	100.0
1980-81	37.3	15.2	1.8	21.9	76.3	6.2	17.5	100.0
1981-82	35.7	12.1	1.7	23.5	73.0	7.1	19.9	100.0
1982-83	39.0	10.6	1.7	23.4	74.7	7.3	18.0	100.0
1983-84	40.7	11.0	1.4	24.8	77.9	11.1	11.0	100.0
1984-85	39.5	12.8	1.4	25.2	79.0	10.7	10.3	100.0
1985-86	41.5	11.7	1.4	25.1	79.6	11.1	9.3	100.0
1986-87	42.3	11.2	1.6	24.3	79.4	11.1	9.5	100.0
1987-88	43.6	11.0	1.2	23.6	79.4	10.9	9.6	100.0
1988-89	42.7	10.9	1.5	24.2	79.3	10.4	10.2	100.0
1989-90	43.6	11.1	1.2	24.3	80.2	9.3	10.6	100.0
1990-91	47.0	9.6	1.1	20.1	77.9	10.5	11.7	100.0
1991-92	47.3	7.3	1.0	21.7	77.3	12.2	10.5	100.0
1992-93	46.9	5.7	1.0	21.5	75.0	14.1	10.9	100.0
1993-94	44.5	7.3	1.2	21.7	74.9	15.6	9.6	100.0
1994-95	46.4	8.4	1.3	21.0	77.0	14.0	9.0	100.0
1995-96	45.7	11.0	1.3	19.4	77.4	13.6	9.0	100.0
1996-97	45.2	10.8	1.8	19.5	77.3	13.3	9.4	100.0
1997-98	46.6	13.2	1.2	19.4	80.4	12.0	7.7	100.0
1998-99	47.1	12.8	1.3	19.2	80.4	11.5	8.1	100.0
1999-00	48.2	12.5	1.5	18.9	81.1	10.6	8.3	100.0
2000-01	47.7	14.6	1.5	18.4	82.2	9.6	8.2	100.0
2001-02	47.3	13.2	1.6	20.2	82.2	9.6	8.2	100.0
2002-03	47.0	11.7	1.7	21.7	82.1	9.4	8.6	100.0
2003-04	46.8	13.8	1.6	20.8	83.0	8.8	8.1	100.0
2004-05	46.5	14.1	1.7	20.2	82.5	8.2	9.3	100.0
2005-06	46.7	14.3	2.0	20.8	83.8	7.4	8.8	100.0
2006-07	46.8	16.0	2.1	19.2	84.1	7.1	8.8	100.0
2007-08	46.6	16.8	2.3	18.2	84.0	6.8	9.2	100.0
2008-09	49.8	12.6	2.7	17.1	82.2	7.2	10.6	100.0
2009-10	47.6	13.9	2.4	18.6	82.4	7.7	9.9	100.0
2010-11	47.9	12.6	2.2	18.1	80.8	7.4	11.9	100.0

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 6

Other taxes and duties

Year	Goods and Services Tax	Sales tax	Customs import duties	Energy taxes	Other	Total other taxes and duties
			(millions of dollars)			
1966-67		2,073	778		777	3,628
1967-68		2,146	746		826	3,718
1968-69		2,098	762		887	3,747
1969-70		2,294	818		897	4,009
1970-71		2,281	815		964	4,060
1971-72		2,653	989		995	4,637
1972-73		3,052	1,182		1,038	5,272
1973-74		3,590	1,384	287	1,094	6,355
1974-75		3,866	1,809	1,669	1,162	8,506
1975-76		3,515	1,887	1,488	1,253	8,143
1976-77		3,929	2,097	1,261	1,350	8,637
1977-78		4,427	2,312	1,030	1,354	9,123
1978-79		4,729	2,747	844	1,377	9,697
1979-80		4,651	2,996	1,171	1,397	10,215
1980-81		5,355	3,185	1,509	1,612	11,661
1981-82		6,148	3,435	4,521	1,739	15,843
1982-83		5,842	2,828	5,147	1,959	15,776
1983-84		6,561	3,376	4,168	2,110	16,215
1984-85		7,592	3,794	4,479	2,312	18,177
1985-86		9,345	3,971	3,348	2,827	19,491
1986-87		11,972	4,187	1,965	2,925	21,049
1987-88		12,927	4,385	2,603	3,026	22,941
1988-89		15,645	4,521	2,646	2,959	25,771
1989-90		17,672	4,587	2,471	3,425	28,155
1990-91	3,110	10,053	4,001	3,192	3,711	24,067
1991-92	15,311		3,999	3,441	4,557	27,308
1992-93	15,420		3,811	3,437	4,103	26,771
1993-94	15,939		3,652	3,640	3,709	26,940
1994-95	17,062		3,575	3,824	2,996	27,457
1995-96	16,880		2,969	4,404	2,998	27,251
1996-97	18,159		2,676	4,467	3,902	29,204
1997-98	19,717		2,766	4,638	4,025	31,146
1998-99	20,936		2,359	4,716	3,706	31,717
1999-00	23,121		2,105	4,757	3,315	33,298
2000-01	24,759		2,784	4,792	3,434	35,769
2001-02	25,292		3,040	4,848	3,953	37,133
2002-03	28,248		3,278	4,935	4,896	41,357
2003-04	28,286		2,887	4,952	5,240	41,365
2004-05	29,758		3,091	5,054	4,954	42,857
2005-06	33,020		3,330	5,076	4,730	46,156
2006-07	31,296		3,704	5,128	5,189	45,317
2007-08	29,920		3,903	5,139	5,245	44,207
2008-09	25,740		4,036	5,161	4,869	39,806
2009-10	26,947		3,490	5,178	4,958	40,573
2010-11	28,379		3,520	5,342	5,662	42,903

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 7

Expenses (millions of dollars)

Year	Major transfers to persons	Major transfers to other levels of government	National Defence	Other	Total program expenses	Public debt charges	Total expenses
				(millions of dollars)			
1966-67	1,983	1,016	1,702	4,577	9,278	1,182	10,460
1967-68	2,385	1,464	1,842	4,990	10,681	1,286	11,967
1968-69	2,612	1,813	1,875	5,223	11,523	1,464	12,987
1969-70	2,888	2,237	1,892	5,904	12,921	1,694	14,615
1970-71	3,281	2,954	1,932	6,349	14,516	1,887	16,403
1971-72	3,942	3,610	2,019	7,224	16,795	2,110	18,905
1972-73	5,153	4,134	2,096	8,026	19,409	2,300	21,709
1973-74	6,042	4,585	2,377	9,639	22,643	2,565	25,208
1974-75	7,620	5,884	2,722	12,726	28,952	3,238	32,190
1975-76	9,233	6,874	3,163	15,405	34,675	3,970	38,645
1976-77	9,873	8,399	3,564	15,636	37,472	4,708	42,180
1977-78	11,104	8,512	3,981	17,384	40,981	5,531	46,512
1978-79	12,030	9,551	4,315	18,323	44,219	7,024	51,243
1979-80	11,967	10,601	4,588	19,627	46,783	8,494	55,277
1980-81	13,793	11,578	5,298	26,410	57,079	10,658	67,737
1981-82	16,051	13,088	5,975	32,735	67,849	15,114	82,963
1982-83	21,697	14,177	6,903	36,799	79,576	16,903	96,479
1983-84	22,514	17,125	7,209	30,346	77,194	20,430	97,624
1984-85	23,888	18,548	7,900	33,943	84,279	24,887	109,166
1985-86	25,062	18,879	8,386	31,147	83,474	27,657	111,131
1986-87	26,423	19,569	9,143	32,735	87,870	28,718	116,588
1987-88	27,400	20,518	9,708	37,383	95,009	31,223	126,232
1988-89	28,780	22,145	10,206	37,633	98,764	35,532	134,296
1989-90	30,501	23,417	10,982	38,884	103,784	41,246	145,030
1990-91	34,343	22,928	11,323	39,956	108,550	45,034	153,584
1991-92	38,900	24,865	10,759	40,020	114,544	43,861	158,405
1992-93	41,002	26,544	10,780	43,847	122,173	41,332	163,505
1993-94	42,407	26,947	11,087	41,863	122,304	40,099	162,403
1994-95	40,280	26,313	10,580	46,065	123,238	44,185	167,423
1995-96	39,121	26,076	9,817	45,842	120,856	49,407	170,263
1996-97	38,826	22,162	8,807	41,532	111,327	47,281	158,608
1997-98	38,952	20,504	9,087	46,242	114,785	43,120	157,905
1998-99	39,884	25,523	9,308	41,723	116,438	43,303	159,741
1999-00	40,157	23,243	10,113	45,253	118,766	43,384	162,150
2000-01	43,354	24,724	9,744	52,744	130,566	43,892	174,458
2001-02	45,880	26,616	10,443	53,292	136,231	39,651	175,882
2002-03	48,011	30,645	11,803	56,220	146,679	37,270	183,949
2003-04	50,022	29,392	12,869	61,393	153,676	35,769	189,445
2004-05	51,307	41,955	14,318	68,782	176,362	34,118	210,480
2005-06	52,609	40,815	15,034	66,755	175,213	33,772	208,985
2006-07	55,582	42,514	15,732	74,441	188,269	33,945	222,214
2007-08	58,147	46,152	17,331	77,868	199,498	33,325	232,823
2008-09	61,586	46,515	18,770	80,986	207,857	30,990	238,847
2009-10	68,579	56,990	20,863	98,352	244,784	29,414	274,198
2010-11	68,135	52,971	21,273	97,213	239,592	30,871	270,463

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 8

Expenses (per cent of GDP)

Year	Major transfers to persons	Major transfers to other levels of government	National Defence	Other	Total program expenses	Public debt charges	Total expenses
				(per cent of GDP)			
1966-67	3.1	1.6	2.6	7.1	14.3	1.8	16.1
1967-68	3.4	2.1	2.6	7.2	15.3	1.8	17.2
1968-69	3.4	2.4	2.5	6.9	15.1	1.9	17.1
1969-70	3.4	2.7	2.3	7.0	15.4	2.0	17.4
1970-71	3.6	3.3	2.1	7.0	16.1	2.1	18.2
1971-72	4.0	3.7	2.1	7.3	17.1	2.1	19.2
1972-73	4.7	3.8	1.9	7.3	17.7	2.1	19.8
1973-74	4.7	3.6	1.8	7.5	17.6	2.0	19.5
1974-75	4.9	3.8	1.8	8.3	18.8	2.1	20.9
1975-76	5.3	4.0	1.8	8.9	20.0	2.3	22.3
1976-77	4.9	4.2	1.8	7.8	18.7	2.4	21.1
1977-78	5.0	3.9	1.8	7.9	18.5	2.5	21.0
1978-79	4.9	3.9	1.8	7.5	18.1	2.9	20.9
1979-80	4.3	3.8	1.6	7.0	16.7	3.0	19.8
1980-81	4.4	3.7	1.7	8.4	18.2	3.4	21.5
1981-82	4.5	3.6	1.7	9.1	18.8	4.2	23.0
1982-83	5.7	3.7	1.8	9.7	20.9	4.4	25.4
1983-84	5.5	4.2	1.8	7.4	18.8	5.0	23.7
1984-85	5.3	4.1	1.8	7.5	18.7	5.5	24.3
1985-86	5.2	3.9	1.7	6.4	17.2	5.7	22.9
1986-87	5.2	3.8	1.8	6.4	17.1	5.6	22.7
1987-88	4.9	3.7	1.7	6.7	17.0	5.6	22.6
1988-89	4.7	3.6	1.7	6.1	16.1	5.8	21.9
1989-90	4.6	3.6	1.7	5.9	15.8	6.3	22.1
1990-91	5.1	3.4	1.7	5.9	16.0	6.6	22.6
1991-92	5.7	3.6	1.6	5.8	16.7	6.4	23.1
1992-93	5.9	3.8	1.5	6.3	17.4	5.9	23.3
1993-94	5.8	3.7	1.5	5.8	16.8	5.5	22.3
1994-95	5.2	3.4	1.4	6.0	16.0	5.7	21.7
1995-96	4.8	3.2	1.2	5.7	14.9	6.1	21.0
1996-97	4.6	2.6	1.1	5.0	13.3	5.6	19.0
1997-98	4.4	2.3	1.0	5.2	13.0	4.9	17.9
1998-99	4.4	2.8	1.0	4.6	12.7	4.7	17.5
1999-00	4.1	2.4	1.0	4.6	12.1	4.4	16.5
2000-01	4.0	2.3	0.9	4.9	12.1	4.1	16.2
2001-02	4.1	2.4	0.9	4.8	12.3	3.6	15.9
2002-03	4.2	2.7	1.0	4.9	12.7	3.2	16.0
2003-04	4.1	2.4	1.1	5.1	12.7	2.9	15.6
2004-05	4.0	3.3	1.1	5.3	13.7	2.6	16.3
2005-06	3.8	3.0	1.1	4.9	12.8	2.5	15.2
2006-07	3.8	2.9	1.1	5.1	13.0	2.3	15.3
2007-08	3.8	3.0	1.1	5.1	13.0	2.2	15.2
2008-09	3.8	2.9	1.2	5.1	13.0	1.9	14.9
2009-10	4.5	3.7	1.4	6.4	16.0	1.9	17.9
2010-11	4.2	3.3	1.3	6.0	14.7	1.9	16.6

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 9

Expenses (per cent of total)

Year	Major transfers to persons	Major transfers to other levels of government	National Defence	Other	Total program expenses	Public debt charges	Total expenses
				(per cent of total)			
1966-67	19.0	9.7	16.3	43.8	88.7	11.3	100.0
1967-68	19.9	12.2	15.4	41.7	89.3	10.7	100.0
1968-69	20.1	14.0	14.4	40.2	88.7	11.3	100.0
1969-70	19.8	15.3	12.9	40.4	88.4	11.6	100.0
1970-71	20.0	18.0	11.8	38.7	88.5	11.5	100.0
1971-72	20.9	19.1	10.7	38.2	88.8	11.2	100.0
1972-73	23.7	19.0	9.7	37.0	89.4	10.6	100.0
1973-74	24.0	18.2	9.4	38.2	89.8	10.2	100.0
1974-75	23.7	18.3	8.5	39.5	89.9	10.1	100.0
1975-76	23.9	17.8	8.2	39.9	89.7	10.3	100.0
1976-77	23.4	19.9	8.4	37.1	88.8	11.2	100.0
1977-78	23.9	18.3	8.6	37.4	88.1	11.9	100.0
1978-79	23.5	18.6	8.4	35.8	86.3	13.7	100.0
1979-80	21.6	19.2	8.3	35.5	84.6	15.4	100.0
1980-81	20.4	17.1	7.8	39.0	84.3	15.7	100.0
1981-82	19.3	15.8	7.2	39.5	81.8	18.2	100.0
1982-83	22.5	14.7	7.2	38.1	82.5	17.5	100.0
1983-84	23.1	17.5	7.4	31.1	79.1	20.9	100.0
1984-85	21.9	17.0	7.2	31.1	77.2	22.8	100.0
1985-86	22.6	17.0	7.5	28.0	75.1	24.9	100.0
1986-87	22.7	16.8	7.8	28.1	75.4	24.6	100.0
1987-88	21.7	16.3	7.7	29.6	75.3	24.7	100.0
1988-89	21.4	16.5	7.6	28.0	73.5	26.5	100.0
1989-90	21.0	16.1	7.6	26.8	71.6	28.4	100.0
1990-91	22.4	14.9	7.4	26.0	70.7	29.3	100.0
1991-92	24.6	15.7	6.8	25.3	72.3	27.7	100.0
1992-93	25.1	16.2	6.6	26.8	74.7	25.3	100.0
1993-94	26.1	16.6	6.8	25.8	75.3	24.7	100.0
1994-95	24.1	15.7	6.3	27.5	73.6	26.4	100.0
1995-96	23.0	15.3	5.8	26.9	71.0	29.0	100.0
1996-97	24.5	14.0	5.6	26.2	70.2	29.8	100.0
1997-98	24.7	13.0	5.8	29.3	72.7	27.3	100.0
1998-99	25.0	16.0	5.8	26.1	72.9	27.1	100.0
1999-00	24.8	14.3	6.2	27.9	73.2	26.8	100.0
2000-01	24.9	14.2	5.6	30.2	74.8	25.2	100.0
2001-02	26.1	15.1	5.9	30.3	77.5	22.5	100.0
2002-03	26.1	16.7	6.4	30.6	79.7	20.3	100.0
2003-04	26.4	15.5	6.8	32.4	81.1	18.9	100.0
2004-05	24.4	19.9	6.8	32.7	83.8	16.2	100.0
2005-06	25.2	19.5	7.2	31.9	83.8	16.2	100.0
2006-07	25.0	19.1	7.1	33.5	84.7	15.3	100.0
2007-08	25.0	19.8	7.4	33.4	85.7	14.3	100.0
2008-09	25.8	19.5	7.9	33.9	87.0	13.0	100.0
2009-10	25.0	20.8	7.6	35.9	89.3	10.7	100.0
2010-11	25.2	19.6	7.9	35.9	88.6	11.4	100.0

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 10

Major transfers to persons

Year	Old Age Security benefits	Family allowance/ children's benefits	Employment Insurance benefits	Relief for Heating Expenses	Total
		(millions of dollars)			
1966-67	1,073	603	307		1,983
1967-68	1,388	608	389		2,385
1968-69	1,541	612	459		2,612
1969-70	1,731	615	542		2,888
1970-71	1,907	616	758		3,281
1971-72	2,205	614	1,123		3,942
1972-73	2,524	608	2,021		5,153
1973-74	3,035	993	2,014		6,042
1974-75	3,445	1,824	2,351		7,620
1975-76	3,934	1,958	3,341		9,233
1976-77	4,437	1,980	3,456		9,873
1977-78	4,861	2,122	4,121		11,104
1978-79	5,491	2,093	4,446		12,030
1979-80	6,320	1,725	3,922		11,967
1980-81	7,418	1,851	4,524		13,793
1981-82	8,585	2,020	5,446		16,051
1982-83	9,643	2,231	9,823		21,697
1983-84	10,406	2,326	9,782		22,514
1984-85	11,418	2,418	10,052		23,888
1985-86	12,525	2,501	10,036		25,062
1986-87	13,445	2,534	10,444		26,423
1987-88	14,349	2,564	10,487		27,400
1988-89	15,202	2,606	10,972		28,780
1989-90	16,154	2,653	11,694		30,501
1990-91	17,039	2,639	14,665		34,343
1991-92	18,168	2,606	18,126		38,900
1992-93	18,758	3,179	19,065		41,002
1993-94	19,578	5,203	17,626		42,407
1994-95	20,143	5,322	14,815		40,280
1995-96	20,430	5,215	13,476		39,121
1996-97	21,207	5,239	12,380		38,826
1997-98	21,758	5,352	11,842		38,952
1998-99	22,285	5,715	11,884		39,884
1999-00	22,856	6,000	11,301		40,157
2000-01	23,668	6,783	11,444	1,459	43,354
2001-02	24,641	7,471	13,726	42	45,880
2002-03	25,692	7,823	14,496		48,011
2003-04	26,902	8,062	15,058		50,022
2004-05	27,871	8,688	14,748		51,307
2005-06	28,992	9,200	14,417		52,609
2006-07	30,284	11,214	14,084		55,582
2007-08	31,955	11,894	14,298		58,147
2008-09	33,377	11,901	16,308		61,586
2009-10	34,653	12,340	21,586		68,579
2010-11	35,629	12,656	19,850		68,135

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 11

Major transfers to other levels of government

Year	Canada Health and Social Transfer [1]	Fiscal transfers [2]	Insurance and medical care	Education support	Canada Assistance Plan	Other	Quebec Abatement [2]	Total
				(millions of dollars)				
1966-67		371	384	71	190			1,016
1967-68		578	435	108	343			1,464
1968-69		615	588	227	383			1,813
1969-70		734	806	301	396			2,237
1970-71		959	1,088	388	519			2,954
1971-72		1,136	1,400	450	624			3,610
1972-73		1,326	1,649	481	678			4,134
1973-74		1,633	1,749	485	718			4,585
1974-75		2,323	2,121	504	936			5,884
1975-76		2,511	2,549	535	1,279			6,874
1976-77		3,252	3,008	649	1,490			8,399
1977-78		3,206	2,814	1,096	1,396			8,512
1978-79		3,175	3,488	1,365	1,523			9,551
1979-80		3,575	3,858	1,515	1,653			10,601
1980-81		4,055	3,982	1,600	1,941			11,578
1981-82		4,879	4,283	1,628	2,298			13,088
1982-83		5,753	4,060	1,532	2,832			14,177
1983-84		6,208	5,564	2,065	3,288			17,125
1984-85		6,208	6,330	2,265	3,745			18,548
1985-86		6,286	6,400	2,277	3,916			18,879
1986-87		6,679	6,607	2,232	4,051			19,569
1987-88		7,472	6,558	2,242	4,246			20,518
1988-89		8,684	6,678	2,227	4,556			22,145
1989-90		9,582	6,663	2,166	5,006			23,417
1990-91		9,245	6,033	1,862	5,788			22,928
1991-92		9,935	6,689	2,142	6,099			24,865
1992-93		8,664	8,307	2,887	6,686			26,544
1993-94		10,101	7,232	2,378	7,236			26,947
1994-95		8,870	7,691	2,486	7,266			26,313
1995-96		9,822	7,115	2,365	7,191		-417	26,076
1996-97	14,911	9,863	-217	-41	105		-2,459	22,162
1997-98	12,421	10,464	162	5	24		-2,572	20,504
1998-99	16,018	12,121	2		8		-2,626	25,523
1999-00	14,891	11,254			56		-2,958	23,243
2000-01	13,500	13,016				1,217	-3,009	24,724
2001-02	17,300	12,188				375	-3,247	26,616
2002-03	21,100	11,397				987	-2,839	30,645
2003-04	22,341	10,004				342	-3,295	29,392
2004-05	28,031	13,467				3,807	-3,350	41,955
2005-06	27,225	12,977				3,940	-3,327	40,815
2006-07	28,640	13,740				4,018	-3,884	42,514
2007-08	31,346	15,178				2,956	-3,328	46,152
2008-09	33,327	15,807				1,024	-3,643	46,515
2009-10	35,678	16,789				7,822	-3,299	56,990
2010-11	37,210	17,577				1,935	-3,751	52,971

[1] In 1996-97, the Canada Health and Social Transfer (CHST) was introduced to replace the Canada Assistance Plan, education support, and insurance and medical care. Since April 2004, the CHST has been divided into the Canada Health Transfer and the Canada Social Transfer.

[2] Certain comparative figures have been reclassified to conform to the current year's presentation.

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 12

Details of program expenses

Year	Transfers to persons	Transfers to other levels of government	Other transfers	Total transfer payments	Crown corporation expenses	National Defence	Other departments and agencies	Total program expenses
				(millions of dollars)				
1983-84	22,514	17,125	12,367	52,006	4,760	7,209	13,219	77,194
1984-85	23,888	18,548	14,719	57,155	6,159	7,900	13,065	84,279
1985-86	25,062	18,879	13,375	57,316	4,479	8,386	13,293	83,474
1986-87	26,423	19,569	13,262	59,254	4,936	9,143	14,537	87,870
1987-88	27,400	20,518	15,272	63,190	5,872	9,708	16,239	95,009
1988-89	28,780	22,145	15,249	66,174	4,772	10,206	17,612	98,764
1989-90	30,501	23,417	14,450	68,368	5,237	10,982	19,197	103,784
1990-91	34,343	22,928	13,808	71,079	6,575	11,323	19,573	108,550
1991-92	38,900	24,865	15,808	79,573	6,349	10,759	17,863	114,544
1992-93	41,002	26,544	16,520	84,066	6,880	10,780	20,447	122,173
1993-94	42,407	26,947	16,844	86,198	4,715	11,087	20,304	122,304
1994-95	40,280	26,313	18,450	85,043	5,217	10,580	22,398	123,238
1995-96	39,121	26,076	16,638	81,835	9,606	9,817	19,598	120,856
1996-97	38,826	22,162	16,011	76,999	5,204	8,807	20,317	111,327
1997-98	38,952	20,504	20,236	79,692	4,441	9,087	21,565	114,785
1998-99	39,884	25,523	14,343	79,750	5,790	9,308	21,590	116,438
1999-00	40,157	23,243	17,212	80,612	5,246	10,113	22,795	118,766
2000-01	43,354	24,724	20,116	88,194	5,402	9,744	27,226	130,566
2001-02	45,880	26,616	17,504	90,000	6,085	10,443	29,703	136,231
2002-03	48,011	30,645	20,673	99,329	6,551	11,803	28,996	146,679
2003-04	50,022	29,392	22,945	102,359	6,566	12,869	31,882	153,676
2004-05	51,307	41,955	25,453	118,715	8,907	14,318	34,422	176,362
2005-06	52,609	40,815	24,893	118,317	7,195	15,034	34,667	175,213
2006-07	55,582	42,514	26,844	124,940	7,211	15,732	40,386	188,269
2007-08	58,147	46,152	27,032	131,331	7,340	17,331	43,496	199,498
2008-09	61,586	46,515	30,192	138,293	8,066	18,770	42,728	207,857
2009-10	68,579	56,990	39,892	165,461	10,428	20,863	48,032	244,784
2010-11	68,135	52,971	36,820	157,926	10,547	21,273	49,846	239,592

Table 13
Public debt charges

Year	Gross public debt charges	Return on investments	Net public debt charges	Gross public debt charges as a percentage of revenues	Gross public debt charges as a percentage of expenses	Gross public debt charges as a percentage of interest- bearing debt
		(millions of dollars)			(per cent)	
1966-67	1,182	519	663	11.8	11.3	4.4
1967-68	1,286	612	674	11.8	10.7	4.5
1968-69	1,464	695	769	11.9	11.3	4.8
1969-70	1,694	860	834	11.5	11.6	5.3
1970-71	1,887	1,000	887	12.3	11.5	5.3
1971-72	2,110	1,133	977	12.3	11.2	5.4
1972-73	2,300	1,265	1,035	11.6	10.6	5.5
1973-74	2,565	1,461	1,104	11.2	10.2	5.9
1974-75	3,238	1,802	1,436	10.8	10.1	6.6
1975-76	3,970	2,083	1,887	12.2	10.3	7.2
1976-77	4,708	2,410	2,298	13.3	11.2	7.6
1977-78	5,531	2,592	2,939	15.5	11.9	7.6
1978-79	7,024	3,059	3,965	18.4	13.7	7.8
1979-80	8,494	3,646	4,848	19.6	15.4	8.7
1980-81	10,658	4,409	6,249	20.0	15.7	9.5
1981-82	15,114	5,200	9,914	22.5	18.2	12.0
1982-83	16,903	4,628	12,275	25.1	17.5	11.0
1983-84	20,430	4,266	16,164	31.3	20.9	9.7
1984-85	24,887	4,298	20,589	34.6	22.8	10.1
1985-86	27,657	3,661	23,996	35.6	24.9	9.9
1986-87	28,718	4,255	24,463	33.1	24.6	9.2
1987-88	31,223	4,737	26,486	32.1	24.7	9.2
1988-89	35,532	5,547	29,985	33.4	26.5	9.6
1989-90	41,246	5,850	35,396	35.6	28.4	10.4
1990-91	45,034	6,807	38,227	37.6	29.3	10.4
1991-92	43,861	6,521	37,340	34.8	27.7	9.4
1992-93	41,332	6,838	34,494	33.2	25.3	8.2
1993-94	40,099	5,240	34,859	32.4	24.7	7.4
1994-95	44,185	4,719	39,466	33.8	26.4	7.7
1995-96	49,407	5,344	44,063	35.2	29.0	8.0
1996-97	47,281	4,247	43,034	31.5	29.8	7.5
1997-98	43,120	4,721	38,399	26.8	27.3	6.9
1998-99	43,303	4,890	38,413	26.2	27.1	6.9
1999-00	43,384	5,455	37,929	24.6	26.8	6.9
2000-01	43,892	6,424	37,468	22.6	25.2	7.0
2001-02	39,651	5,625	34,026	21.6	22.5	6.4
2002-03	37,270	7,127	30,143	19.6	20.3	6.1
2003-04	35,769	6,809	28,960	18.0	18.9	5.8
2004-05	34,118	6,985	27,133	16.1	16.2	5.6
2005-06	33,772	8,184	25,588	15.2	16.2	5.6
2006-07	33,945	8,642	25,303	14.4	15.3	5.7
2007-08	33,325	7,308	26,017	13.7	14.3	5.7
2008-09	30,990	9,566	21,424	13.3	13.0	4.4
2009-10	29,414	6,487	22,927	13.5	10.7	3.9
2010-11	30,871	12,236	18,635	13.0	11.4	3.9

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 14

Interest-bearing debt

Year	Unmatured debt held by residents	Unmatured debt held by non-residents	Total unmatured debt	Percentage held by non-residents	Public sector pensions	Other liabilities	Total pension and other liabilities	Total interest-bearing debt
	(millions of dollars)			(per cent)		(millions of dollars)		
1966-67	18,734	815	19,549	4.2	5,530	1,833	7,363	26,912
1967-68	19,593	693	20,286	3.4	6,310	1,816	8,126	28,412
1968-69	20,712	993	21,705	4.6	7,163	1,852	9,015	30,720
1969-70	21,145	939	22,084	4.3	8,003	1,840	9,843	31,927
1970-71	24,132	709	24,841	2.9	8,920	1,914	10,834	35,675
1971-72	26,495	717	27,212	2.6	9,874	1,953	11,827	39,039
1972-73	28,156	855	29,011	2.9	10,952	1,975	12,927	41,938
1973-74	28,417	724	29,141	2.5	12,174	1,998	14,172	43,313
1974-75	32,147	850	32,997	2.6	13,654	2,089	15,743	48,740
1975-76	36,138	1,410	37,548	3.8	15,377	2,037	17,414	54,962
1976-77	40,367	2,134	42,501	5.0	17,252	2,060	19,312	61,813
1977-78	49,068	2,405	51,473	4.7	19,361	2,217	21,578	73,051
1978-79	59,323	7,003	66,326	10.6	21,536	2,383	23,919	90,245
1979-80	64,119	7,405	71,524	10.4	23,722	2,562	26,284	97,808
1980-81	73,151	9,276	82,427	11.3	26,529	2,751	29,280	111,707
1981-82	81,963	10,578	92,541	11.4	30,143	3,374	33,517	126,058
1982-83	104,089	11,785	115,874	10.2	34,143	3,516	37,659	153,533
1983-84	130,027	12,970	142,997	9.1	38,009	29,492	67,501	210,498
1984-85	152,573	19,871	172,444	11.5	42,312	30,908	73,220	245,664
1985-86	174,990	25,859	200,849	12.9	46,994	32,110	79,104	279,953
1986-87	191,283	36,926	228,209	16.2	51,992	32,684	84,676	312,885
1987-88	205,344	44,572	249,916	17.8	57,417	33,467	90,884	340,800
1988-89	215,769	58,378	274,147	21.3	63,241	33,846	97,087	371,234
1989-90	227,686	63,959	291,645	21.9	69,626	34,861	104,487	396,132
1990-91	246,962	73,751	320,713	23.0	76,139	35,916	112,055	432,768
1991-92	264,792	84,879	349,671	24.3	81,881	36,621	118,502	468,173
1992-93	273,729	105,968	379,697	27.9	87,911	37,184	125,095	504,792
1993-94	298,159	114,021	412,180	27.7	94,097	37,253	131,350	543,530
1994-95	321,238	116,375	437,613	26.6	101,033	38,766	139,799	577,412
1995-96	343,412	124,476	467,888	26.6	107,882	40,612	148,494	616,382
1996-97	352,767	124,430	477,197	26.1	114,205	42,073	156,278	633,475
1997-98	349,451	118,737	468,188	25.4	117,457	43,417	160,874	629,062
1998-99	353,275	107,027	460,302	23.3	122,407	45,784	168,191	628,493
1999-00	355,036	98,960	453,996	21.8	128,346	47,405	175,751	629,747
2000-01	353,548	92,610	446,158	20.8	129,185	49,788	178,973	625,131
2001-02	366,754	75,056	441,810	17.0	126,921	51,021	177,942	619,752
2002-03	352,209	85,334	437,543	19.5	125,708	52,579	178,287	615,830
2003-04	373,759	60,225	433,984	13.9	127,560	53,338	180,898	614,882
2004-05	370,148	57,276	427,424	13.4	129,579	50,229	179,808	607,232
2005-06	361,452	59,697	421,149	14.2	131,062	48,862	179,924	601,073
2006-07	358,972	55,220	414,192	13.3	134,726	50,334	185,060	599,252
2007-08	339,962	50,735	390,697	13.0	137,371	53,796	191,167	581,864
2008-09	441,408	72,612	514,020	14.1	139,909	56,234	196,143	710,163
2009-10	467,984	91,142	559,126	16.3	142,843	60,814	203,657	762,783
2010-11	462,620	128,535	591,155	21.7	146,135	64,521	210,656	801,811

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 15

Gross and net debt

Year	Interest-bearing debt	Accounts payable and accrued liabilities	Gross debt	Financial assets	Net debt	Non-financial assets	Accumulated deficit
				(millions of dollars)			
1966-67	26,912	1,487	28,399	10,691			17,708
1967-68	28,412	1,835	30,247	11,497			18,750
1968-69	30,720	1,977	32,697	13,280			19,417
1969-70	31,927	2,164	34,091	14,814			19,277
1970-71	35,675	2,368	38,043	17,750			20,293
1971-72	39,039	3,194	42,233	20,154			22,079
1972-73	41,938	4,092	46,030	22,050			23,980
1973-74	43,313	5,345	48,658	22,467			26,191
1974-75	48,740	5,560	54,300	25,884			28,416
1975-76	54,962	6,007	60,969	26,349			34,620
1976-77	61,813	7,457	69,270	27,753			41,517
1977-78	73,051	8,487	81,538	29,142			52,396
1978-79	90,245	8,972	99,217	33,792			65,425
1979-80	97,808	9,262	107,070	29,678			77,392
1980-81	111,707	11,859	123,566	31,618			91,948
1981-82	126,058	15,529	141,587	33,965			107,622
1982-83	153,533	17,361	170,894	34,223			136,671
1983-84	210,498	34,475	244,973	73,117	171,856	14,604	157,252
1984-85	245,664	38,817	284,481	71,811	212,670	18,251	194,419
1985-86	279,953	39,416	319,369	70,125	249,244	21,436	227,808
1986-87	312,885	42,131	355,016	73,184	281,832	24,182	257,650
1987-88	340,800	47,211	388,011	75,036	312,975	26,308	286,667
1988-89	371,234	50,214	421,448	77,879	343,569	28,955	314,614
1989-90	396,132	53,164	449,296	74,539	374,757	31,000	343,757
1990-91	432,768	54,894	487,662	76,582	411,080	33,424	377,656
1991-92	468,173	56,075	524,248	78,519	445,729	35,754	409,975
1992-93	504,792	58,398	563,190	75,973	487,217	38,223	448,994
1993-94	543,530	63,723	607,253	79,327	527,926	40,402	487,524
1994-95	577,412	71,321	648,733	81,239	567,494	43,338	524,156
1995-96	616,382	74,881	691,263	92,655	598,608	44,446	554,162
1996-97	633,475	75,928	709,403	100,407	608,996	46,115	562,881
1997-98	629,062	81,739	710,801	103,644	607,157	47,235	559,922
1998-99	628,493	83,671	712,164	109,298	602,866	48,723	554,143
1999-00	629,747	83,876	713,623	123,507	590,116	50,231	539,885
2000-01	625,131	88,479	713,610	141,873	571,737	51,743	519,994
2001-02	619,752	83,244	702,996	137,684	565,312	53,366	511,946
2002-03	615,830	83,196	699,026	139,456	559,570	54,245	505,325
2003-04	614,882	85,212	700,094	149,092	551,002	54,822	496,180
2004-05	607,232	97,740	704,972	155,385	549,587	54,870	494,717
2005-06	601,073	101,432	702,505	165,559	536,946	55,447	481,499
2006-07	599,252	106,511	705,763	181,858	523,905	56,637	467,268
2007-08	581,864	110,463	692,327	176,046	516,281	58,644	457,637
2008-09	710,163	113,999	824,162	298,949	525,213	61,503	463,710
2009-10	762,783	120,525	883,308	300,836	582,472	63,375	519,097
2010-11	801,811	119,060	920,871	303,963	616,908	66,581	550,327

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Table 16

Unmatured debt held by outside parties

Year	Domestic marketable bonds [1]	Foreign marketable bonds [1, 2]	Total marketable bonds	Treasury bills [1]	Retail debt [3]	Canada Pension Plan bonds	Other unmatured debt	Unamortized discounts and premiums and cross-currency swap revaluation	Less: government's own holdings	Total
					(millions of dollars)					
1966-67	11,018	523	11,541	2,310	6,017	2		-121	-200	19,549
1967-68	11,573	318	11,891	2,480	6,096	6		-138	-49	20,286
1968-69	12,294	600	12,894	2,840	6,169	12		-163	-47	21,705
1969-70	12,279	605	12,884	2,895	6,579	16		-183	-107	22,084
1970-71	13,021	495	13,516	3,735	7,804	21		-175	-60	24,841
1971-72	13,385	493	13,878	3,830	9,712	28		-169	-67	27,212
1972-73	13,423	491	13,914	4,290	10,989	35		-157	-60	29,011
1973-74	13,592	415	14,007	4,905	10,406	43		-156	-64	29,141
1974-75	14,311	365	14,676	5,630	12,915	52		-199	-77	32,997
1975-76	15,481	337	15,818	6,495	15,517	62		-257	-87	37,548
1976-77	17,748	335	18,083	8,255	16,304	72		-124	-89	42,501
1977-78	21,182	1,190	22,372	11,295	18,011	84		-191	-98	51,473
1978-79	26,532	7,376	33,908	13,535	19,247	96		-314	-146	66,326
1979-80	32,947	4,860	37,807	16,325	18,081	113		-497	-305	71,524
1980-81	40,849	4,794	45,643	21,770	15,812	136		-711	-223	82,427
1981-82	43,493	5,428	48,921	19,375	24,978	154		-626	-261	92,541
1982-83	48,377	6,385	54,762	29,125	32,641	171		-688	-137	115,874
1983-84	57,036	6,086	63,122	41,700	38,204	189	1,112	-1,016	-314	142,997
1984-85	69,438	9,057	78,495	52,300	41,960	205	1,112	-1,387	-241	172,444
1985-86	81,067	13,797	94,864	61,950	44,245	445	1,112	-1,492	-275	200,849
1986-87	94,426	11,997	106,423	76,950	44,309	1,796	1,112	-1,514	-867	228,209
1987-88	103,899	11,282	115,181	81,050	53,323	2,492	1,112	-2,005	-1,237	249,916
1988-89	115,748	8,320	124,068	102,700	47,756	3,005	1,112	-3,266	-1,228	274,147
1989-90	127,682	5,675	133,357	118,550	40,929	3,072	1,112	-4,029	-1,346	291,645
1990-91	143,600	4,526	148,126	139,150	34,444	3,492	1,112	-4,302	-1,309	320,713
1991-92	158,062	3,444	161,506	152,300	35,598	3,501	1,112	-3,326	-1,020	349,671
1992-93	178,465	5,409	183,874	162,050	34,369	3,505	1,112	-4,156	-1,057	379,697
1993-94	203,445	10,668	214,113	166,000	31,331	3,497	1,112	-2,907	-966	412,180
1994-95	225,747	16,921	242,668	164,450	31,386	3,488	1,838	-5,223	-994	437,613
1995-96	252,766	16,809	269,575	166,100	31,428	3,478	1,885	-3,544	-1,034	467,888
1996-97	282,563	23,016	305,579	135,400	33,493	3,468	1,935	-1,590	-1,088	477,197
1997-98	294,605	27,183	321,788	112,300	30,479	3,456	1,924	-528	-1,231	468,188
1998-99	295,774	36,000	331,774	96,950	28,217	4,063	2,614	-4	-3,312	460,302
1999-00	294,441	32,588	327,029	99,850	26,899	3,552	2,601	-2,823	-3,112	453,996
2000-01	295,487	33,664	329,151	88,700	26,416	3,473	2,591	-1,304	-2,869	446,158
2001-02	294,898	27,547	322,445	94,200	24,021	3,391	2,619	-1,737	-3,129	441,810
2002-03	289,208	21,603	310,811	104,600	22,584	3,371	2,664	-3,760	-2,727	437,543
2003-04	278,962	20,828	299,790	113,400	21,330	3,427	2,774	-5,247	-1,490	433,984
2004-05	266,674	16,543	283,217	127,200	19,080	3,393	2,932	-7,264	-1,134	427,424
2005-06	261,872	14,333	276,205	131,600	17,342	3,102	2,927	-9,038	-989	421,149
2006-07	257,909	10,617	268,526	134,100	15,175	1,743	3,096	-7,750	-698	414,192
2007-08	253,802	9,716	263,518	117,000	13,068	1,042	4,236	-7,633	-534	390,697
2008-09	295,322	10,649	305,971	192,500	12,532	523	4,184	-1,061	-629	514,020
2009-10	368,013	8,298	376,311	175,900	11,855	452	4,090	-9,325	-157	559,126
2010-11	416,411	7,681	424,092	163,000	10,141	27	3,875	-9,576	-404	591,155

[1] Including government holdings of its own debt.

[2] Including Canada bills, Canada notes and Euro medium-term notes.

[3] Includes Canada Savings Bonds and Canada Premium Bonds.

Due to a break in the series following the introduction of full accrual accounting, data from 1983-84 onward are not directly comparable with earlier years.

Provincial and Territorial Governments Public Accounts

Table 17

Newfoundland and Labrador

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	1,328	1,218	2,546	2,286	457	2,743	-	-197	3,289
1988-89	1,350	1,315	2,664	2,436	454	2,890	-	-226	3,195
1989-90	1,505	1,426	2,931	2,647	459	3,106	-	-175	3,369
1990-91	1,569	1,398	2,967	2,824	490	3,314	-	-347	3,550
1991-92	1,681	1,427	3,108	2,888	496	3,384	-	-276	3,918
1992-93	1,693	1,500	3,194	2,967	488	3,455	-	-261	4,270
1993-94	1,696	1,462	3,158	2,864	500	3,364	-	-205	6,453
1994-95	1,887	1,710	3,597	3,041	1,004	4,045	74	-374	6,831
1995-96	2,076	1,572	3,647	3,115	822	3,937	100	-190	7,121
1996-97	2,132	1,578	3,711	3,092	819	3,911	93	-107	7,254
1997-98	1,981	2,019	4,000	3,131	865	3,996	129	133	7,301
1998-99	1,961	1,834	3,795	3,131	1,008	4,139	157	-187	7,851
1999-00	2,134	1,620	3,755	3,285	883	4,168	144	-269	8,087
2000-01	2,144	1,757	3,901	3,430	951	4,382	131	-350	8,437
2001-02	2,243	1,657	3,900	3,572	942	4,514	146	-468	8,932
2002-03	2,360	1,589	3,950	3,765	979	4,744	150	-644	10,616
2003-04	2,651	1,543	4,194	4,151	982	5,133	25	-914	11,487
2004-05	2,799	1,513	4,312	4,032	940	4,972	171	-489	11,888
2005-06	3,498	1,880	5,378	4,409	947	5,356	178	199	11,684
2006-07	3,597	1,743	5,340	4,590	777	5,367	181	154	11,558
2007-08	5,154	1,788	6,942	4,969	751	5,720	199	1,421	10,188
2008-09	5,869	2,558	8,427	5,537	745	6,282	205	2,350	7,968
2009-10	5,560	1,545	7,106	6,439	890	7,329	191	-33	8,220
2010-11	6,071	1,760	7,831	6,723	823	7,547	201	485	8,218

Source: Public Accounts of Newfoundland and Labrador. (For 2010-11: 2011 Budget).

[1] Net income of government business entreprises.

Due to a break in the series following accounting changes, data from 1994-95 onward are not directly comparable with earlier years.

Table 18

Prince Edward Island

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	312	245	557	503	71	574	-	-17	179
1988-89	344	282	626	556	81	637	-	-11	191
1989-90	374	299	673	594	87	681	-	-8	199
1990-91	395	312	707	632	95	727	-	-20	219
1991-92	416	299	715	662	103	765	-	-50	269
1992-93	408	303	711	692	101	793	-	-82	351
1993-94	457	282	739	699	111	810	-	-71	772
1994-95	480	332	812	704	117	821	7	-1	990
1995-96	481	308	789	669	120	789	4	4	986
1996-97	513	287	800	692	118	810	7	-4	990
1997-98	496	292	788	702	102	804	9	-7	997
1998-99	502	350	852	750	101	852	6	6	990
1999-00	547	353	900	806	103	908	3	-5	1,024
2000-01	568	383	952	855	108	963	0	-12	1,036
2001-02	573	400	974	876	106	982	-9	-17	1,053
2002-03	628	341	969	895	103	998	-26	-55	1,178
2003-04	634	387	1,021	988	106	1,095	-52	-125	1,313
2004-05	673	444	1,116	1,031	105	1,136	-14	-34	1,330
2005-06	726	444	1,170	1,059	110	1,169	-	1	1,323
2006-07	756	474	1,231	1,086	120	1,207	-	24	1,312
2007-08	785	518	1,303	1,188	119	1,307	-	-4	1,347
2008-09	832	558	1,390	1,312	109	1,420	-	-31	1,415
2009-10	868	639	1,507	1,477	104	1,581	-	-74	1,581
2010-11	834	624	1,459	1,407	106	1,512	-	-54	1,720

Source: Public Accounts of Prince Edward Island. (For 2010-11: 2011 Budget).

[1] Pension adjustment, Workforce Renewal Program adjustment (2004-05).

Table 19

Nova Scotia

Year	Own-source revenues	Federal sh transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	1,955	1,253	3,208	2,977	566	3,543	108	-227	3,756
1988-89	2,109	1,438	3,547	3,347	560	3,907	118	-242	3,947
1989-90	2,245	1,530	3,775	3,602	571	4,173	131	-267	4,454
1990-91	2,349	1,599	3,948	3,676	672	4,348	143	-257	4,731
1991-92	2,321	1,602	3,923	3,799	682	4,481	152	-406	5,426
1992-93	2,335	1,591	3,926	3,916	779	4,695	152	-617	7,288
1993-94	2,493	1,567	4,060	3,861	865	4,727	121	-546	8,120
1994-95	2,510	1,858	4,368	3,799	912	4,711	110	-233	8,514
1995-96	2,548	1,938	4,486	3,907	897	4,804	116	-201	8,715
1996-97	2,751	1,757	4,508	3,813	811	4,624	0	-116	9,139
1997-98	2,522	1,927	4,449	4,018	865	4,884	-7	-442	9,290
1998-99	2,637	2,016	4,653	4,414	1,003	5,418	503	-261	10,298
1999-00	2,850	1,972	4,822	4,508	1,060	5,568	-51	-797	11,231
2000-01	3,023	2,040	5,063	4,434	1,115	5,549	633	147	11,370
2001-02	3,203	2,054	5,257	4,555	1,161	5,715	572	113	12,144
2002-03	3,366	1,908	5,274	4,737	1,046	5,782	535	28	12,226
2003-04	3,743	2,024	5,767	5,196	1,040	6,236	507	38	12,328
2004-05	3,932	2,327	6,259	5,604	1,034	6,638	549	170	12,305
2005-06	4,367	2,428	6,795	6,118	988	7,106	508	196	12,239
2006-07	4,602	2,570	7,172	6,579	930	7,508	519	182	12,357
2007-08	5,043	3,023	8,066	7,208	925	8,133	486	419	12,115
2008-09	5,072	2,947	8,018	7,648	867	8,515	522	26	12,318
2009-10	4,871	3,240	8,112	8,047	823	8,870	489	-269	13,045
2010-11	5,585	3,152	8,738	7,897	843	8,740	571	569	12,827

Source: Public Accounts of Nova Scotia.

[1] Includes sinking fund earnings, net income (losses) of government business enterprises, and consolidation, accounting and other adjustments.

Table 20

New Brunswick

Year	Own-source revenues	Federal sh transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	1,918	1,261	3,179	3,100	415	3,515	-	-335	2,919
1988-89	2,167	1,360	3,527	3,179	427	3,606	-	-79	2,993
1989-90	2,214	1,459	3,673	3,260	437	3,697	-	-24	3,013
1990-91	2,297	1,504	3,801	3,507	475	3,982	-	-182	3,236
1991-92	2,352	1,455	3,807	3,686	476	4,162	-	-354	3,603
1992-93	2,268	1,742	4,011	3,737	538	4,275	-	-264	5,297
1993-94	2,507	1,517	4,024	3,705	585	4,290	-	-266	5,810
1994-95	2,672	1,626	4,298	3,732	645	4,377	-	-79	5,889
1995-96	2,803	1,623	4,426	3,791	595	4,386	-	41	5,850
1996-97	2,950	1,521	4,471	3,840	564	4,405	-	66	5,783
1997-98	2,786	1,653	4,439	3,865	574	4,439	-	0	5,788
1998-99	2,325	2,122	4,447	4,034	616	4,651	-	-204	5,992
1999-00	2,974	1,827	4,801	4,219	611	4,830	-	-30	7,056
2000-01	3,068	1,795	4,863	4,082	637	4,719	-100	43	6,915
2001-02	3,216	2,035	5,251	4,421	652	5,073	-100	79	6,759
2002-03	3,331	1,930	5,261	4,710	661	5,371	110	1	6,865
2003-04	3,569	1,918	5,487	5,086	583	5,669	-	-182	6,963
2004-05	3,664	2,355	6,019	5,203	581	5,784	-	235	6,824
2005-06	3,970	2,393	6,363	5,530	591	6,122	-	241	6,710
2006-07	4,202	2,487	6,689	5,883	559	6,443	-	247	6,576
2007-08	4,444	2,578	7,022	6,333	577	6,910	-	112	6,949
2008-09	4,440	2,727	7,166	6,740	603	7,342	-	-176	7,388
2009-10	4,147	2,901	7,048	7,154	617	7,770	-	-722	8,471
2010-11	4,577	2,919	7,497	7,487	643	8,130	-	-633	9,480

Source: Public Accounts of New Brunswick.

[1] Contribution to/from Fiscal Stabilization Fund.

Table 21

Quebec

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	21,992	6,117	28,109	26,830	3,675	30,505	-	-2,396	31,115
1988-89	23,366	6,386	29,752	27,654	3,802	31,456	-	-1,704	32,819
1989-90	24,359	6,674	31,033	28,782	4,015	32,797	-	-1,764	34,583
1990-91	26,073	6,972	33,045	31,583	4,437	36,020	-	-2,975	37,558
1991-92	27,720	6,747	34,467	34,102	4,666	38,768	-	-4,301	41,885
1992-93	27,561	7,764	35,325	35,599	4,756	40,355	-	-5,030	46,914
1993-94	28,165	7,762	35,927	35,534	5,316	40,850	-	-4,923	51,837
1994-95	28,815	7,494	36,309	36,248	5,882	42,130	-	-5,821	57,677
1995-96	30,000	8,126	38,126	36,039	6,034	42,073	-	-3,947	61,624
1996-97	30,522	6,704	37,226	34,583	5,855	40,438	-	-3,212	64,833
1997-98	30,415	5,656	36,071	33,037	6,765	39,802	1,574	-2,157	88,597
1998-99	32,936	7,813	40,749	35,440	6,573	42,013	1,390	126	88,810
1999-00	35,417	6,064	41,481	36,074	6,752	42,826	1,352	7	89,162
2000-01	37,447	7,895	45,342	38,394	6,972	45,366	451	427	88,208
2001-02	35,638	8,885	44,523	40,377	6,687	47,064	2,563	22	92,772
2002-03	37,301	8,932	46,233	42,111	6,583	48,694	1,733	-728	95,601
2003-04	38,819	9,370	48,189	43,598	6,655	50,253	1,706	-358	97,025
2004-05	41,069	9,229	50,298	45,619	6,853	52,472	1,510	-664	99,042
2005-06	42,374	9,969	52,343	46,996	6,875	53,871	1,565	37	104,683
2006-07	46,184	11,015	57,199	49,293	7,039	56,332	-758	109	124,297
2007-08	45,881	13,629	59,510	52,080	7,021	59,101	-409	0	124,681
2008-09	45,152	14,023	59,175	55,442	6,504	61,946	2,771	0	134,237
2009-10	44,130	15,161	59,291	58,389	6,117	64,506	2,041	-3,174	150,100
2010-11	46,925	15,451	62,376	59,819	6,934	66,753	177	-4,200	158,995

Source: Public Accounts of Quebec. (For 2010-11: 2011 Budget).

[1] Includes the net results of consolidated organizations, contingency reserve, transactions with the budgetary reserve and transfers to the Generations Fund.

Due to a break in the series following the implementation of the accounting reform, data from 1997-98 onward are not directly comparable with earlier years.

Table 22

Ontario

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	27,174	4,984	32,158	31,171	3,476	34,647	-	-2,489	34,020
1988-89	31,878	5,113	36,991	34,703	3,767	38,470	-	-1,479	35,499
1989-90	35,861	5,364	41,225	37,318	3,817	41,135	-	90	35,409
1990-91	37,130	5,762	42,892	42,145	3,776	45,921	-	-3,029	38,438
1991-92	34,429	6,324	40,753	47,487	4,196	51,683	-	-10,930	49,368
1992-93	34,253	7,554	41,807	48,942	5,293	54,235	-	-12,428	61,796
1993-94	36,603	7,071	43,674	47,747	7,129	54,876	-	-11,202	80,599
1994-95	38,432	7,607	46,039	48,336	7,832	56,168	-	-10,129	90,728
1995-96	41,857	7,880	49,737	50,062	8,475	58,537	-	-8,800	101,864
1996-97	43,936	5,778	49,714	48,012	8,607	56,619	-	-6,905	108,769
1997-98	47,684	5,098	52,782	48,019	8,729	56,748	-	-3,966	112,735
1998-99	51,535	4,515	56,050	49,036	9,016	58,052	-	-2,002	114,737
1999-00	59,157	5,885	65,042	53,347	11,027	64,374	-	668	134,398
2000-01	60,165	6,129	66,294	53,519	10,873	64,392	-	1,902	132,496
2001-02	64,553	7,754	72,307	61,595	10,337	71,932	-	375	132,121
2002-03	65,781	8,894	74,675	64,864	9,694	74,558	-	117	132,647
2003-04	64,376	9,893	74,269	70,148	9,604	79,752	-	-5,483	138,816
2004-05	71,979	11,882	83,861	76,048	9,368	85,416	-	-1,555	140,921
2005-06	77,054	13,251	90,305	80,988	9,019	90,007	-	298	149,928
2006-07	82,604	14,036	96,640	85,540	8,831	94,371	-	2,269	150,618
2007-08	86,982	16,597	103,579	94,065	8,914	102,979	-	600	156,616
2008-09	80,342	16,591	96,933	94,776	8,566	103,342	-	-6,409	169,585
2009-10	77,173	18,620	95,793	106,336	8,719	115,055	-	-19,262	193,589
2010-11	83,617	23,041	106,658	111,189	9,480	120,669	-	-14,011	214,511

Source: Public Accounts of Ontario.

Due to a break in the series following the line-by-line consolidation of the Ontario Electricity Financial Corporation, data from 1999-2000 onward are not directly comparable with earlier years.

Due to a break in the series, data from 2001-2002 onward are not directly comparable with earlier years. Notably, Education Property Taxes are reported as revenue starting with the 2010 Budget, whereas previously they were netted against expenditures.

Table 23

Manitoba

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	2,726	1,313	4,039	3,848	490	4,338	0	-300	4,415
1988-89	2,975	1,568	4,543	4,045	439	4,484	-200	-141	4,332
1989-90	2,949	1,657	4,606	4,261	487	4,748	0	-142	4,449
1990-91	2,983	1,695	4,678	4,536	501	5,037	67	-292	4,773
1991-92	3,146	1,821	4,967	4,779	492	5,271	-30	-334	5,216
1992-93	2,882	1,816	4,698	4,905	559	5,464	200	-566	6,378
1993-94	3,247	1,629	4,876	4,752	585	5,337	30	-431	6,806
1994-95	3,310	1,895	5,205	4,804	597	5,401	0	-196	6,901
1995-96	3,789	1,873	5,662	4,913	592	5,505	0	157	6,854
1996-97	4,107	1,716	5,823	4,929	539	5,468	-264	91	6,474
1997-98	3,920	1,884	5,804	5,232	520	5,752	25	77	9,719
1998-99	4,393	1,560	5,953	5,442	515	5,957	36	32	9,926
1999-00	4,335	2,073	6,408	6,042	465	6,507	110	11	10,046
2000-01	4,739	2,091	6,830	6,182	511	6,693	-96	41	9,888
2001-02	4,623	2,206	6,829	6,406	414	6,820	54	63	10,001
2002-03	4,874	2,230	7,104	6,705	321	7,026	-74	4	10,341
2003-04	5,775	2,716	8,491	8,271	799	9,070	0	-579	11,052
2004-05	7,037	3,156	10,193	8,813	818	9,631	0	562	11,101
2005-06	7,625	3,103	10,728	9,474	860	10,334	0	394	10,952
2006-07	8,113	3,320	11,433	10,155	793	10,948	0	485	10,800
2007-08	8,899	3,597	12,496	11,074	864	11,938	0	558	10,550
2008-09	8,897	3,866	12,763	11,482	830	12,312	0	451	11,468
2009-10	8,723	3,924	12,647	12,092	756	12,848	0	-201	11,794
2010-11	9,044	4,086	13,130	12,905	762	13,667	70	-467	13,244

Source: Public Accounts of Manitoba. (For 2010-11: 2011 Budget).

[1] Includes the contribution to/from the Fiscal Stabilization Fund and contributions to the Debt Retirement Fund.
Due to a break in the series following the move to summary account budgeting, data from 2003-04 onward are not directly comparable with earlier years.

Table 24

Saskatchewan

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	2,382	914	3,296	3,556	282	3,838	-	-542	2,517
1988-89	2,628	1,067	3,695	3,700	320	4,020	-	-324	2,885
1989-90	2,927	1,231	4,158	4,013	523	4,536	-	-378	3,316
1990-91	3,169	1,489	4,658	4,544	475	5,019	-	-361	3,688
1991-92	2,789	1,260	4,049	4,390	502	4,892	-	-843	5,999
1992-93	3,072	1,304	4,376	4,228	740	4,968	-	-592	6,587
1993-94	3,432	1,248	4,680	4,079	873	4,952	-	-272	7,769
1994-95	3,928	1,297	5,225	4,215	882	5,097	-	128	7,641
1995-96	4,157	975	5,132	4,264	849	5,113	-	19	7,622
1996-97	4,742	761	5,503	4,302	794	5,096	-	407	7,215
1997-98	4,609	553	5,162	4,372	755	5,127	-	35	7,180
1998-99	4,642	961	5,603	4,830	745	5,575	-	28	7,152
1999-00	4,648	1,209	5,857	5,077	696	5,773	-	83	7,069
2000-01	5,881	872	6,754	5,257	664	5,921	-775	58	7,011
2001-02	4,822	1,237	6,059	5,721	617	6,338	280	1	7,010
2002-03	5,656	801	6,457	5,762	611	6,374	-82	1	7,009
2003-04	5,525	1,033	6,558	6,166	603	6,768	211	1	7,054
2004-05	6,126	1,666	7,792	6,448	579	7,027	-383	383	6,880
2005-06	6,952	1,265	8,218	7,133	545	7,678	-139	400	6,636
2006-07	7,254	1,389	8,643	7,707	538	8,245	-105	293	6,446
2007-08	8,263	1,603	9,866	8,036	547	8,583	-641	641	6,049
2008-09	10,616	1,709	12,325	9,835	520	10,355	419	2,389	3,848
2009-10	8,662	1,604	10,266	9,619	480	10,099	257	425	3,638
2010-11	9,460	1,600	11,061	10,541	424	10,965	-48	47	3,676

Source: Public Accounts of Saskatchewan.

[1] Contribution from/to (-) the Fiscal Stabilization Fund and to the Saskatchewan Infrastructure Fund.

Table 25

Alberta

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	9,993	1,912	11,905	12,698	572	13,270	-	-1,365	1,527
1988-89	9,765	2,135	11,900	13,110	797	13,907	-	-2,007	3,592
1989-90	10,896	1,943	12,839	13,840	1,115	14,955	-	-2,116	5,947
1990-91	11,820	2,365	14,185	14,735	1,282	16,017	-	-1,832	5,692
1991-92	11,587	2,150	13,737	15,052	1,314	16,366	-	-2,629	7,939
1992-93	11,814	2,457	14,271	16,176	1,419	17,595	-	-3,324	11,824
1993-94	13,316	2,090	15,406	15,123	1,654	16,777	-	-1,371	13,379
1994-95	14,235	1,929	16,164	13,480	1,746	15,226	-	938	12,707
1995-96	13,767	1,748	15,515	12,681	1,683	14,364	-	1,151	11,607
1996-97	15,301	1,351	16,652	12,701	1,462	14,163	-	2,489	8,709
1997-98	16,571	1,183	17,754	13,773	1,322	15,095	-	2,659	5,979
1998-99	15,484	1,335	16,819	14,346	1,379	15,725	-	1,094	4,876
1999-00	18,463	1,640	20,103	16,356	956	17,312	-	2,791	2,074
2000-01	23,714	1,813	25,527	17,976	980	18,956	-	6,571	-4,300
2001-02	19,662	2,264	21,926	20,071	774	20,845	-	1,081	-5,043
2002-03	20,588	2,074	22,662	20,053	476	20,529	-	2,133	-6,769
2003-04	22,961	2,926	25,887	21,480	271	21,751	-	4,136	-10,548
2004-05	26,109	3,219	29,328	23,851	302	24,153	-	5,175	-15,160
2005-06	32,150	3,392	35,542	26,743	248	26,991	-	8,551	-22,883
2006-07	34,940	3,077	38,017	29,292	215	29,507	-	8,510	-30,454
2007-08	35,121	3,048	38,169	33,218	214	33,432	-	4,737	-31,527
2008-09	31,620	4,185	35,805	36,455	208	36,663	-	-858	-26,873
2009-10	30,717	4,941	35,658	36,327	363	36,690	-	-1,032	-23,738
2010-11	29,829	5,025	34,854	37,969	295	38,264	-	-3,410	-18,398

Source: Public Accounts of Alberta.

Table 26

British Columbia

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	9,072	2,054	11,126	10,530	525	11,055	0	71	3,762
1988-89	10,615	2,149	12,764	11,304	530	11,834	0	930	3,533
1989-90	11,575	2,121	13,696	12,743	457	13,200	0	496	5,538
1990-91	12,247	2,096	14,343	14,532	478	15,010	0	-667	6,312
1991-92	12,564	2,198	14,762	16,511	590	17,101	0	-2,339	8,843
1992-93	13,967	2,416	16,382	17,122	736	17,858	0	-1,476	10,529
1993-94	15,665	2,269	17,934	17,989	844	18,833	0	-899	11,507
1994-95	17,264	2,463	19,726	19,023	931	19,954	0	-228	11,954
1995-96	17,343	2,394	19,737	19,167	887	20,054	0	-317	12,162
1996-97	17,755	1,955	19,710	19,596	867	20,463	0	-753	12,338
1997-98	18,131	1,837	19,968	19,301	834	20,135	0	-167	12,515
1998-99	22,823	2,549	25,372	23,284	3,049	26,333	0	-961	21,914
1999-00	23,627	3,180	26,807	23,884	2,936	26,820	0	-13	22,966
2000-01	26,393	3,296	29,689	25,459	2,980	28,439	-52	1,198	23,136
2001-02	24,849	3,320	28,169	27,573	2,748	30,321	1,117	-1,035	24,797
2002-03	23,952	3,823	27,775	27,687	2,540	30,227	-169	-2,621	27,691
2003-04	25,536	3,619	29,155	27,926	2,448	30,374	-123	-1,342	28,876
2004-05	28,133	5,222	33,355	28,360	2,306	30,666	0	2,689	27,152
2005-06	30,121	5,825	35,946	30,038	2,203	32,241	-710	2,995	25,910
2006-07	32,047	6,387	38,434	32,187	2,270	34,457	-264	3,713	23,411
2007-08	33,812	5,932	39,744	34,762	2,236	36,998	-444	2,302	22,638
2008-09	32,360	5,985	38,345	36,060	2,158	38,218	18	145	24,912
2009-10	30,551	6,917	37,468	37,128	2,204	39,332	0	-1,864	28,112
2010-11	31,929	7,997	39,926	37,982	2,253	40,235	0	-309	30,637

Source: Public Accounts of British Columbia.

[1] Includes the impacts of the joint trusteeship of pension plans, restructuring exit expenses, negociating framework incentive payments and climate action dividend.

Due to a break in the series following the move to fully comply with generally accepted accounting principles (GAAP), data from 1998-99 onward are not directly comparable with earlier years.

Table 27

Yukon Territory

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	92	184	276	279	0	279	-	-3	-45
1988-89	111	191	302	297	0	297	-	5	-50
1989-90	112	199	311	308	0	308	-	3	-54
1990-91	104	229	333	344	0	344	-	-12	-64
1991-92	108	243	351	365	0	365	-	-14	-50
1992-93	89	267	356	419	1	420	-	-64	13
1993-94	154	307	461	445	1	446	-	15	-2
1994-95	172	310	482	452	1	453	-	29	-31
1995-96	168	321	489	460	0	460	-	29	-60
1996-97	157	286	443	454	0	455	-	-12	-48
1997-98	153	302	455	450	0	451	-	4	-51
1998-99	115	371	485	455	0	455	-	30	-80
1999-00	153	330	483	499	0	500	-	-16	-64
2000-01	166	386	552	518	0	518	1	35	-99
2001-02	129	374	503	524	0	525	1	-21	-85
2002-03	148	402	550	555	0	556	1	-5	-80
2003-04	140	456	597	585	0	586	1	12	-76
2004-05	154	506	659	654	0	655	1	5	-48
2005-06	158	584	742	668	0	668	1	75	-100
2006-07	175	610	784	727	0	727	1	57	-132
2007-08	128	650	778	769	0	769	1	10	-140
2008-09	250	632	882	890	0	890	1	-7	-136
2009-10	279	656	935	1,007	0	1,007	46	-26	-67
2010-11	355	690	1,046	1,128	0	1,128	62	-20	-18

Source: Public Accounts of the Yukon Territory. (For 2010-11: 2011 Budget).

[1] Includes changes in tangible capital assets, estimated year-end lapses, recoveries of prior years' expenditures, net profits of restricted funds and items transferred to the balance sheet.

Table 28

Northwest Territories

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1987-88	120	649	769	798	0	798	-	-29	-41
1988-89	130	747	877	854	5	858	-	19	-66
1989-90	167	796	962	967	5	972	-	-10	-55
1990-91	163	879	1,042	1,045	5	1,050	-	-8	-55
1991-92	216	900	1,116	1,140	4	1,144	-	-28	-31
1992-93	222	911	1,133	1,123	4	1,127	-	6	-56
1993-94	215	973	1,188	1,207	3	1,210	-	-22	-19
1994-95	214	1,004	1,218	1,244	0	1,244	-	-26	12
1995-96	234	1,026	1,260	1,277	5	1,282	-	-22	28
1996-97	219	963	1,182	1,189	5	1,194	-	-12	21
1997-98	244	1,066	1,311	1,175	5	1,180	-	131	-85
1998-99	203	1,016	1,220	1,253	0	1,253	-	-33	-43
1999-00	140	572	712	747	2	749	-	-37	17
2000-01	268	615	883	765	0	766	-	118	-66
2001-02	642	315	957	837	0	837	-	120	-127
2002-03	438	408	846	880	0	880	-	-34	-29
2003-04	-43	914	871	936	0	936	-	-65	76
2004-05	201	780	981	998	0	998	-	-17	133
2005-06	224	877	1,101	1,065	0	1,065	-	36	124
2006-07	324	879	1,204	1,116	0	1,116	-	88	105
2007-08	346	959	1,306	1,211	0	1,212	-	94	54
2008-09	337	919	1,256	1,297	0	1,297	-	-41	132
2009-10	306	988	1,294	1,341	0	1,341	-	-48	245
2010-11	298	1,022	1,320	1,314	0	1,314	-	6	N/A

Source: Public Accounts of the Northwest Territories. (For 2010-11: 2011 Budget).

Starting in 1999-2000, the figures represent the Northwest Territories Budget after the division of the territories.

Table 29

Nunavut

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other[1]	Deficit (-) or surplus	Net debt
				(millions of dollars)					
1999-00	55	591	646	574	-	574	0	72	-23
2000-01	88	652	740	678	-	678	0	62	-7
2001-02	79	654	733	731	-	731	0	2	25
2002-03	95	713	809	797	-	797	0	12	43
2003-04	90	754	844	837	-	837	0	7	100
2004-05	84	848	932	877	-	877	0	55	99
2005-06	97	946	1,043	933	-	933	0	109	9
2006-07	94	1,176	1,270	1,124	-	1,124	0	146	-100
2007-08	134	1,042	1,177	1,155	-	1,155	0	21	-75
2008-09	145	1,115	1,260	1,283	-	1,283	0	-23	-17
2009-10	144	1,096	1,241	1,186	-	1,186	0	54	24
2010-11	133	1,171	1,305	1,211	-	1,211	-48	48	101

Source: Public Accounts of Nunavut. (For 2010-11: 2011 Budget).

[1] Supplementary requirements

Table 30

All provinces and territories (millions of dollars)

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other	Deficit (-) or surplus	Debt
				(millions of dollars)					
1987-88	79,064	22,104	101,168	98,576	10,529	109,105	108	-7,829	87,412
1988-89	87,438	23,750	111,188	105,184	11,182	116,366	-82	-5,259	92,869
1989-90	95,184	24,699	119,883	112,334	11,974	124,308	131	-4,294	100,168
1990-91	100,299	26,299	126,598	124,104	12,686	136,790	210	-9,981	108,078
1991-92	99,329	26,426	125,755	134,861	13,521	148,382	122	-22,505	132,385
1992-93	100,564	29,625	130,189	139,826	15,414	155,240	352	-24,698	161,191
1993-94	107,950	28,177	136,127	138,005	18,466	156,471	151	-20,193	193,032
1994-95	113,918	29,525	143,443	139,078	20,549	159,627	192	-15,992	209,813
1995-96	119,222	29,785	149,006	140,345	20,959	161,304	221	-12,077	224,374
1996-97	125,085	24,657	149,742	137,203	20,442	157,646	-165	-8,068	231,476
1997-98	129,511	23,471	152,982	137,076	21,337	158,413	1,730	-3,701	259,966
1998-99	139,556	26,442	165,998	146,416	24,006	170,422	2,092	-2,332	272,423
1999-00	154,500	27,316	181,816	155,418	25,491	180,910	1,558	2,465	293,044
2000-01	167,664	29,725	197,389	161,550	25,792	187,342	192	10,240	284,024
2001-02	164,233	33,155	197,388	177,260	24,437	201,697	4,624	315	290,359
2002-03	168,519	34,045	202,564	183,520	23,015	206,535	2,179	-1,792	297,339
2003-04	173,777	37,554	211,331	195,369	23,091	218,460	2,275	-4,854	304,465
2004-05	191,958	43,147	235,105	207,538	22,886	230,424	1,834	6,516	302,467
2005-06	209,315	46,358	255,673	221,156	22,386	243,543	1,403	13,533	307,215
2006-07	224,893	49,163	274,056	235,280	22,073	257,353	-426	16,277	316,794
2007-08	234,993	54,963	289,957	256,069	22,168	278,236	-809	10,911	319,445
2008-09	225,931	57,813	283,744	268,756	21,109	289,864	3,943	-2,177	346,247
2009-10	216,132	62,233	278,365	286,542	21,073	307,615	3,025	-26,225	395,014
2010-11	228,659	68,540	297,199	297,571	22,563	320,135	988	-21,947	434,994

Sources: Provincial/territorial Public Accounts and 2011 Budgets.

Table 31

All provinces and territories (per cent of GDP)

Year	Own-source revenues	Federal cash transfers	Total revenues	Total program expenditures	Debt charges	Total expenditures	Other	Deficit (-) or surplus	Debt
				(per cent of GDP)					
1987-88	14.1	4.0	18.1	17.6	1.9	19.5	0.0	-1.4	15.6
1988-89	14.3	3.9	18.1	17.2	1.8	19.0	0.0	-0.9	15.1
1989-90	14.5	3.8	18.2	17.1	1.8	18.9	0.0	-0.7	15.2
1990-91	14.8	3.9	18.6	18.3	1.9	20.1	0.0	-1.5	15.9
1991-92	14.5	3.9	18.3	19.7	2.0	21.6	0.0	-3.3	19.3
1992-93	14.4	4.2	18.6	20.0	2.2	22.2	0.1	-3.5	23.0
1993-94	14.8	3.9	18.7	19.0	2.5	21.5	0.0	-2.8	26.5
1994-95	14.8	3.8	18.6	18.0	2.7	20.7	0.0	-2.1	27.2
1995-96	14.7	3.7	18.4	17.3	2.6	19.9	0.0	-1.5	27.7
1996-97	14.9	2.9	17.9	16.4	2.4	18.8	0.0	-1.0	27.7
1997-98	14.7	2.7	17.3	15.5	2.4	17.9	0.2	-0.4	29.5
1998-99	15.3	2.9	18.1	16.0	2.6	18.6	0.2	-0.3	29.8
1999-00	15.7	2.8	18.5	15.8	2.6	18.4	0.2	0.3	29.8
2000-01	15.6	2.8	18.3	15.0	2.4	17.4	0.0	1.0	26.4
2001-02	14.8	3.0	17.8	16.0	2.2	18.2	0.4	0.0	26.2
2002-03	14.6	3.0	17.6	15.9	2.0	17.9	0.2	-0.2	25.8
2003-04	14.3	3.1	17.4	16.1	1.9	18.0	0.2	-0.4	25.1
2004-05	14.9	3.3	18.2	16.1	1.8	17.8	0.1	0.5	23.4
2005-06	15.2	3.4	18.6	16.1	1.6	17.7	0.1	1.0	22.4
2006-07	15.5	3.4	18.9	16.2	1.5	17.7	0.0	1.1	21.9
2007-08	15.4	3.6	19.0	16.7	1.4	18.2	-0.1	0.7	20.9
2008-09	14.1	3.6	17.7	16.8	1.3	18.1	0.2	-0.1	21.6
2009-10	14.1	4.1	18.2	18.7	1.4	20.1	0.2	-1.7	25.8
2010-11	14.1	4.2	18.3	18.3	1.4	19.7	0.1	-1.4	26.8

Sources: Provincial/territorial Public Accounts and 2011 Budgets and *National Income and Expenditure Accounts* (13-001).

National Accounts

Table 32

Total government income

National Economic and Financial Accounts

Year	Taxes on incomes, persons	Taxes on incomes, corporations	Taxes on incomes, non-residents	Contributions to social insurance plans	Taxes on production and imports	Other transfers from persons	Investment income	Sales of goods and services	Total income[1]
				(millions of dollars)					
1966	4,114	2,355	195	1,324	8,638	446	1,510	1,308	19,890
1967	5,106	2,396	211	1,489	9,448	488	1,684	1,511	22,333
1968	6,145	2,852	200	1,608	10,260	653	2,038	1,630	25,386
1969	7,697	3,221	222	1,818	11,337	897	2,510	1,754	29,456
1970	9,069	3,070	260	1,883	12,040	1,126	2,762	1,956	32,166
1971	10,417	3,346	272	1,995	13,131	1,163	3,146	2,240	35,710
1972	11,611	3,920	276	2,306	14,796	1,099	3,678	2,494	40,180
1973	13,618	5,079	324	2,738	16,815	1,149	4,607	2,865	47,195
1974	16,602	7,051	434	3,844	21,048	1,228	6,172	3,210	59,589
1975	18,538	7,494	464	4,741	21,728	1,249	7,274	3,746	65,234
1976	21,400	7,128	500	5,895	25,376	1,619	8,396	4,518	74,832
1977	23,811	7,238	532	6,357	27,863	1,812	9,957	4,927	82,497
1978	24,728	8,188	570	7,067	29,576	2,007	12,087	5,997	90,220
1979	27,774	10,038	764	7,571	32,321	2,251	14,790	6,889	102,398
1980	32,139	12,078	1,013	8,446	36,520	2,469	17,519	7,672	117,856
1981	38,565	12,796	1,113	10,863	47,870	2,755	19,995	8,924	142,881
1982	43,098	11,755	1,196	11,980	50,320	3,222	20,975	10,273	152,819
1983	45,667	12,320	1,052	14,184	52,780	3,633	22,441	11,314	163,391
1984	48,721	14,984	1,019	15,612	57,354	3,831	24,377	12,848	178,746
1985	53,262	15,563	955	17,633	61,339	3,974	25,381	13,512	191,619
1986	61,618	14,573	1,683	19,601	67,495	4,135	22,900	14,837	206,842
1987	69,288	16,990	1,222	21,721	74,613	4,508	22,786	16,015	227,143
1988	77,568	17,586	1,678	24,775	82,565	4,982	25,114	17,243	251,511
1989	83,222	18,566	1,545	24,849	90,939	5,481	28,025	18,632	271,259
1990	96,171	16,834	1,727	28,944	94,693	4,051	29,257	20,073	291,750
1991	97,154	15,015	1,514	31,071	100,693	4,588	28,207	21,425	299,667
1992	97,283	14,517	1,576	35,011	104,677	4,989	27,824	22,562	308,439
1993	96,379	16,263	1,649	36,545	107,609	5,191	28,057	23,351	315,044
1994	100,311	19,342	1,698	38,938	110,658	5,421	29,571	24,574	330,513
1995	106,190	22,138	1,964	40,489	113,945	5,844	31,295	26,115	347,980
1996	113,608	26,239	2,844	39,980	116,876	5,832	31,763	26,994	364,136
1997	120,790	32,250	2,958	42,029	123,207	6,510	31,887	28,499	388,130
1998	128,935	30,800	2,817	43,465	127,238	7,155	31,823	30,549	402,782
1999	134,197	39,410	3,386	45,721	133,273	6,915	33,038	32,368	428,308
2000	143,951	48,175	3,755	49,748	138,998	7,116	43,512	33,414	468,669
2001	145,926	36,352	4,530	53,178	143,651	8,171	40,824	34,771	467,403
2002	138,655	35,746	4,381	57,303	151,426	8,875	37,377	36,687	470,450
2003	140,803	39,909	4,157	60,404	158,093	9,711	43,014	37,975	494,066
2004	151,364	46,244	4,643	62,122	165,484	10,216	43,428	40,471	523,972
2005	165,051	48,687	5,478	65,374	172,548	10,892	48,360	43,392	559,782
2006	174,237	57,177	7,001	68,122	177,116	11,283	53,211	46,137	594,284
2007	190,753	55,285	6,890	70,394	183,239	11,902	54,374	49,191	622,028
2008	190,994	54,761	7,810	71,895	182,302	11,905	61,121	51,881	632,669
2009	176,658	53,320	5,868	74,571	182,283	11,204	44,429	54,116	602,449
2010	179,394	55,160	5,966	75,258	191,247	11,492	49,428	57,097	625,042

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

[1] Includes Canada Pension Plan and Québec Pension Plan. Excludes intergovernmental transfers.

Table 33

Total government outlay

National Economic and Financial Accounts

Year	Goods and services	Transfers to persons	Transfers to business	Transfers to non-residents	Interest on the public debt	Total outlay[1]
			(millions of dollars)			
1966	11,977	3,016	685	228	1,883	17,789
1967	13,910	3,746	669	250	2,110	20,685
1968	15,708	4,397	681	200	2,433	23,419
1969	17,717	4,867	732	208	2,816	26,340
1970	20,498	5,552	785	295	3,309	30,439
1971	22,702	6,526	860	301	3,751	34,140
1972	25,197	7,930	929	326	4,244	38,626
1973	28,600	9,052	1,178	369	4,910	44,109
1974	34,456	11,412	2,920	468	5,488	54,744
1975	41,649	14,207	4,371	670	6,639	67,536
1976	48,017	16,082	3,984	637	8,242	76,962
1977	54,276	18,389	4,078	728	9,432	86,903
1978	59,488	20,675	4,146	925	11,741	96,975
1979	65,934	21,448	5,686	960	14,057	108,085
1980	74,755	24,848	8,628	1,084	17,033	126,348
1981	85,372	28,392	9,934	1,152	22,530	147,380
1982	97,212	36,210	9,635	1,386	27,419	171,862
1983	104,731	41,839	10,487	1,489	29,858	188,404
1984	110,933	45,075	12,295	1,854	35,147	205,304
1985	119,577	48,668	12,129	1,919	40,585	222,878
1986	126,248	52,136	11,174	2,223	43,222	235,003
1987	133,883	56,068	11,028	2,606	46,279	249,864
1988	145,155	59,923	10,611	2,875	50,806	269,370
1989	157,093	64,724	9,818	2,785	58,285	292,705
1990	171,491	73,004	10,052	2,969	64,286	321,802
1991	183,659	83,830	12,854	3,177	64,526	348,046
1992	191,349	93,077	12,323	3,196	65,241	365,186
1993	194,514	98,323	10,382	2,997	66,851	373,067
1994	196,164	98,495	9,608	2,899	69,597	376,763
1995	198,574	98,512	8,746	2,867	77,527	386,226
1996	198,155	98,865	8,710	2,800	76,284	384,814
1997	200,255	100,431	9,361	2,716	74,035	386,798
1998	209,866	104,558	9,900	2,634	75,476	402,434
1999	218,422	106,006	9,853	2,852	75,030	412,163
2000	233,498	110,487	10,658	2,770	76,491	433,904
2001	246,477	117,633	15,130	3,033	73,219	455,492
2002	261,115	121,047	13,371	3,207	67,081	465,821
2003	276,391	124,775	17,641	3,587	65,413	487,807
2004	287,868	130,153	16,662	3,834	63,807	502,324
2005	303,249	136,247	17,264	4,718	62,630	524,108
2006	323,745	145,754	16,528	4,419	62,971	553,417
2007	342,799	154,609	16,523	4,632	63,510	582,073
2008	367,858	165,101	17,526	5,135	62,041	617,661
2009	391,851	176,630	18,219	5,308	58,361	650,369
2010	410,666	185,601	18,619	5,683	60,210	680,779

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

[1] Includes Canada Pension Plan and Québec Pension Plan. Excludes intergovernmental transfers.

Table 34

Total government saving and capital and financial account

National Economic and Financial Accounts

Year	Saving	Capital consumption allowances	Net capital transfers	Non-financial capital acquisition	Net lending[1]
			(millions of dollars)		
1966	2,101	1,241	-98	3,289	-45
1967	1,648	1,360	-125	3,457	-574
1968	1,967	1,456	-137	3,627	-341
1969	3,116	1,616	-176	3,553	1,003
1970	1,727	1,787	-214	3,625	-325
1971	1,570	2,012	-290	4,292	-1,000
1972	1,554	2,231	-383	4,472	-1,070
1973	3,086	2,595	-455	4,454	772
1974	4,845	3,290	-477	5,967	1,691
1975	-2,302	3,839	-645	7,035	-6,143
1976	-2,130	4,230	-763	6,904	-5,567
1977	-4,406	4,671	-1,394	7,925	-9,054
1978	-6,755	5,148	-2,174	7,905	-11,686
1979	-5,687	5,744	-1,193	8,406	-9,542
1980	-8,492	6,492	-1,300	9,487	-12,787
1981	-4,499	7,621	-2,330	10,987	-10,195
1982	-19,043	8,498	-3,638	12,510	-26,693
1983	-25,013	9,015	-5,346	12,269	-33,613
1984	-26,558	9,581	-4,807	13,173	-34,957
1985	-31,259	10,249	-5,231	15,470	-41,711
1986	-28,161	10,673	-4,086	15,031	-36,605
1987	-22,721	11,318	-3,370	15,534	-30,307
1988	-17,859	12,186	-4,265	16,634	-26,572
1989	-21,446	13,195	-2,995	18,989	-30,235
1990	-30,052	14,180	-3,013	20,748	-39,633
1991	-48,379	14,250	-2,081	21,047	-57,257
1992	-56,747	14,690	-1,215	20,656	-63,928
1993	-58,023	15,282	-726	19,887	-63,354
1994	-46,250	16,181	-364	21,251	-51,684
1995	-38,246	17,004	-278	21,661	-43,181
1996	-20,678	17,441	-816	19,368	-23,421
1997	1,332	18,100	2,525	20,317	1,640
1998	348	18,649	1,956	20,188	765
1999	16,145	19,236	607	20,133	15,855
2000	34,765	20,145	1,505	24,710	31,705
2001	11,911	20,884	1,945	27,448	7,292
2002	4,629	21,830	997	28,544	-1,088
2003	6,259	22,227	612	30,122	-1,024
2004	21,648	23,300	-1,277	32,525	11,146
2005	35,674	24,626	-1,958	37,094	21,248
2006	40,867	26,494	-2,471	41,110	23,780
2007	39,955	28,650	-1,718	45,336	21,551
2008	15,008	31,760	-934	52,151	-6,317
2009	-47,920	33,896	-3,566	57,134	-74,724
2010	-55,737	36,237	-3,456	67,288	-90,244

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

[1] Includes Canada Pension Plan and Québec Pension Plan.

Table 35

Federal government income

National Economic and Financial Accounts

Year	Taxes on incomes, persons	Taxes on incomes, corporations	Taxes on incomes, non-residents	Contributions to social insurance plans	Taxes on production and imports	Other transfers from persons	Transfers from other levels of government	Investment income	Sales of goods and services	Total income
					(millions of dollars)					
1966	2,952	1,774	195	342	3,572	3	0	542	194	9,574
1967	3,569	1,758	211	350	3,713	3	0	629	259	10,492
1968	4,279	2,107	200	399	3,770	4	0	699	290	11,748
1969	5,519	2,402	222	494	4,038	2	0	939	304	13,920
1970	6,413	2,276	260	490	4,045	2	0	1,051	328	14,865
1971	7,217	2,477	272	530	4,492	4	0	1,179	377	16,548
1972	7,969	2,901	276	696	5,134	5	0	1,326	455	18,762
1973	9,250	3,643	324	903	5,850	6	0	1,488	473	21,937
1974	11,131	5,012	434	1,542	8,513	8	0	1,832	517	28,989
1975	12,284	5,380	464	1,952	7,987	8	87	2,081	625	30,868
1976	14,489	5,061	500	2,476	8,747	10	128	2,347	739	34,497
1977	14,305	5,135	532	2,551	9,249	12	126	2,638	743	35,291
1978	13,707	5,737	570	2,814	9,866	14	130	3,016	895	36,749
1979	16,336	6,860	764	2,799	10,788	16	147	3,160	1,158	42,028
1980	19,132	8,406	1,013	3,125	12,312	17	167	3,791	1,106	49,069
1981	22,977	9,323	1,113	4,717	19,126	14	184	4,648	1,321	63,423
1982	25,747	9,212	1,196	4,793	17,724	14	233	4,661	1,566	65,146
1983	26,809	9,536	1,052	7,017	16,483	15	224	4,557	1,732	67,425
1984	28,189	11,319	1,019	7,627	18,310	17	222	4,632	2,207	73,542
1985	32,141	11,586	955	8,753	19,113	21	260	4,814	2,522	80,165
1986	37,898	10,302	1,683	9,615	21,413	22	290	4,606	2,744	88,573
1987	42,143	11,864	1,222	10,250	23,921	23	317	4,499	3,054	97,293
1988	46,511	11,857	1,678	11,637	26,057	19	354	5,238	3,220	106,571
1989	51,130	12,132	1,545	10,315	28,922	32	382	5,769	3,480	113,707
1990	58,636	10,442	1,727	13,027	27,160	34	256	5,937	3,660	120,879
1991	59,039	9,892	1,514	15,064	30,367	40	461	5,613	3,843	125,833
1992	60,056	9,981	1,576	17,922	30,998	61	523	5,224	3,728	130,069
1993	58,400	10,695	1,649	18,619	31,055	53	539	4,151	3,554	128,715
1994	58,723	12,200	1,698	19,940	30,632	27	555	4,142	3,994	131,911
1995	63,582	13,372	1,964	19,497	31,447	25	757	5,439	4,230	140,313
1996	67,712	16,225	2,844	18,824	32,383	52	667	4,750	4,497	147,954
1997	73,735	20,229	2,958	20,212	34,936	52	662	5,240	4,532	162,556
1998	80,043	19,416	2,817	19,005	35,457	22	712	5,657	4,321	167,450
1999	82,573	25,798	3,386	18,659	36,237	14	785	6,158	4,074	177,684
2000	90,220	31,763	3,755	18,751	38,339	28	739	7,597	4,534	195,726
2001	93,446	24,223	4,530	18,344	39,841	33	796	7,959	4,763	193,935
2002	87,484	24,258	4,381	18,213	43,229	62	906	7,118	4,797	190,448
2003	88,511	27,893	4,157	17,833	45,084	57	789	7,083	4,819	196,226
2004	94,943	31,744	4,643	17,172	46,551	69	997	6,419	5,130	207,668
2005	102,450	32,201	5,478	17,830	48,516	93	1,049	6,455	5,693	219,765
2006	105,705	38,409	7,001	16,949	48,315	55	837	7,143	6,160	230,574
2007	116,950	37,096	6,890	17,001	48,768	53	1,061	9,631	6,773	244,223
2008	117,449	35,303	7,810	16,663	44,445	106	997	11,592	7,048	241,413
2009	107,378	32,745	5,868	16,790	43,634	107	899	8,598	7,301	223,320
2010	108,853	33,418	5,966	17,366	45,611	69	939	8,828	7,582	228,632

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 36

Federal government outlay

National Economic and Financial Accounts

Year	Goods and services	Transfers to persons	Transfers to business	Transfers to non-residents	Transfers to other levels of government	Interest on the public debt	Total outlay
			(millions of dollars)				
1966	3,577	2,214	521	228	2,071	1,151	9,762
1967	3,957	2,678	544	250	2,327	1,245	11,001
1968	4,276	3,020	569	200	2,739	1,409	12,213
1969	4,610	3,293	577	208	2,947	1,589	13,224
1970	4,922	3,707	635	295	3,637	1,862	15,058
1971	5,401	4,289	553	301	4,680	1,974	17,198
1972	6,029	5,738	584	326	4,709	2,253	19,639
1973	6,706	6,538	758	365	4,959	2,518	21,844
1974	8,137	8,199	2,253	464	6,340	2,961	28,354
1975	9,369	10,056	3,543	666	8,025	3,705	35,364
1976	10,832	10,842	2,898	632	8,975	4,519	38,698
1977	12,362	12,271	2,710	720	10,294	5,101	43,458
1978	13,279	13,670	2,640	916	11,276	6,410	48,191
1979	14,215	13,469	3,675	948	12,087	8,080	52,474
1980	15,335	15,043	6,193	1,071	13,307	9,897	60,846
1981	18,183	17,039	7,042	1,136	14,583	13,739	71,722
1982	20,567	22,488	5,995	1,366	16,516	16,675	83,607
1983	21,725	25,960	6,094	1,464	18,303	17,463	91,009
1984	23,771	27,368	7,390	1,826	20,876	21,006	102,237
1985	26,657	29,190	7,074	1,885	22,774	24,738	112,318
1986	27,276	30,816	5,741	2,183	22,185	26,216	114,417
1987	28,370	31,635	6,263	2,555	23,899	27,883	120,605
1988	29,878	33,048	5,357	2,814	26,132	31,711	128,940
1989	31,813	34,923	4,579	2,715	27,016	37,424	138,470
1990	34,965	38,997	4,293	2,887	28,466	41,880	151,488
1991	35,803	45,385	6,604	3,086	29,276	41,053	161,207
1992	36,386	49,317	4,587	3,091	31,496	39,558	164,435
1993	37,575	51,600	3,586	2,886	32,320	39,219	167,186
1994	37,797	50,166	3,439	2,784	31,545	40,157	165,888
1995	37,777	48,879	3,270	2,747	33,463	46,254	172,390
1996	36,610	48,752	3,252	2,671	29,449	45,352	166,086
1997	35,019	49,234	4,135	2,577	25,697	43,407	160,069
1998	36,268	50,739	3,825	2,490	26,452	43,910	163,684
1999	37,909	51,575	3,587	2,704	32,458	43,632	171,865
2000	42,137	53,479	3,537	2,613	32,239	45,299	179,304
2001	43,189	57,965	3,682	2,867	34,937	41,830	184,470
2002	46,427	60,857	2,969	3,032	33,316	36,767	183,368
2003	47,979	62,949	4,313	3,402	40,191	35,169	194,003
2004	49,274	65,603	5,083	3,538	39,596	33,458	196,552
2005	51,904	67,903	4,887	4,400	56,819	32,103	218,016
2006	54,645	70,547	4,293	4,076	51,690	32,122	217,373
2007	56,233	76,578	3,638	4,262	56,177	31,543	228,431
2008	61,509	81,119	3,782	4,737	62,423	30,034	243,604
2009	65,404	88,051	4,484	4,875	64,611	26,850	254,275
2010	66,762	90,670	4,210	5,222	73,854	27,544	268,262

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 37

Federal government saving and capital and financial account

National Economic and Financial Accounts

Year	Saving	Capital consumption allowances	Net capital transfers	Non-financial capital acquisition	Net lending
			(millions of dollars)		
1966	-188	322	-95	499	-460
1967	-509	350	-107	525	-791
1968	-465	368	-115	682	-894
1969	696	399	-154	516	425
1970	-193	429	-188	469	-421
1971	-650	476	-236	521	-931
1972	-877	517	-269	655	-1,284
1973	93	589	-317	505	-140
1974	635	731	-308	1,033	25
1975	-4,496	850	-395	1,174	-5,215
1976	-4,201	923	-485	1,072	-4,835
1977	-8,167	1,006	-1,132	1,212	-9,505
1978	-11,442	1,094	-1,898	1,280	-13,526
1979	-10,446	1,195	-873	1,038	-11,162
1980	-11,777	1,306	-898	1,176	-12,545
1981	-8,299	1,500	-1,866	1,336	-10,001
1982	-18,461	1,649	-2,834	1,695	-21,341
1983	-23,584	1,706	-4,010	1,992	-27,880
1984	-28,695	1,824	-3,784	3,022	-33,677
1985	-32,153	1,963	-4,085	3,723	-37,998
1986	-25,844	2,064	-2,556	2,597	-28,933
1987	-23,312	2,201	-2,079	2,800	-25,990
1988	-22,369	2,353	-3,112	3,164	-26,292
1989	-24,763	2,542	-1,841	3,635	-27,697
1990	-30,609	2,733	-1,835	3,598	-33,309
1991	-35,374	2,720	-950	3,610	-37,214
1992	-34,366	2,772	-251	3,942	-35,787
1993	-38,471	2,923	137	4,285	-39,696
1994	-33,977	3,179	62	4,352	-35,088
1995	-32,077	3,311	691	3,625	-31,700
1996	-18,132	3,288	-22	2,091	-16,957
1997	2,487	3,427	3,837	3,275	6,476
1998	3,766	3,509	3,374	2,973	7,676
1999	5,819	3,460	3,041	3,550	8,770
2000	16,422	3,451	3,668	3,513	20,028
2001	9,465	3,575	2,919	3,949	12,010
2002	7,080	3,840	2,014	3,538	9,396
2003	2,223	3,717	1,722	3,541	4,121
2004	11,116	3,726	-118	3,894	10,830
2005	1,749	3,780	-535	3,975	1,019
2006	13,201	3,866	-508	4,081	12,478
2007	15,792	4,051	-483	3,985	15,375
2008	-2,191	4,333	383	4,546	-2,021
2009	-30,955	4,557	-1,721	4,838	-32,957
2010	-39,630	4,789	-1,725	6,019	-42,585

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 38

Provincial and territorial government income

National Economic and Financial Accounts

Year	Taxes on incomes, persons	Taxes on incomes, corporations	Contributions to social insurance plans	Taxes on production and imports	Other transfers from persons	Transfers from other levels of government	Investment income	Sales of goods and services	Total income
				(millions of dollars)					
1966	1,162	581	263	2,599	400	2,060	863	722	8,650
1967	1,537	638	289	2,976	435	2,346	887	815	9,923
1968	1,866	745	287	3,405	607	2,745	1,093	894	11,642
1969	2,178	819	315	3,879	854	2,986	1,241	969	13,241
1970	2,656	794	336	4,269	1,080	3,678	1,275	1,083	15,171
1971	3,200	869	362	4,681	1,111	4,725	1,398	1,260	17,606
1972	3,642	1,019	420	5,378	1,043	4,714	1,679	1,369	19,264
1973	4,368	1,436	535	6,343	1,087	4,997	2,299	1,597	22,662
1974	5,471	2,039	694	7,379	1,162	6,384	3,315	1,739	28,183
1975	6,254	2,114	884	7,747	1,177	8,031	3,986	2,056	32,249
1976	6,911	2,067	1,215	9,469	1,531	8,935	4,549	2,478	37,155
1977	9,506	2,103	1,367	10,499	1,713	10,303	5,612	2,772	43,875
1978	11,021	2,451	1,527	10,757	1,895	11,331	7,052	3,307	49,341
1979	11,438	3,178	1,685	12,172	2,101	12,171	9,113	3,625	55,483
1980	13,007	3,672	1,782	13,437	2,310	13,369	10,664	4,067	62,308
1981	15,588	3,473	2,175	16,400	2,585	14,683	11,478	4,644	71,026
1982	17,351	2,543	2,443	19,407	3,041	16,572	11,827	5,437	78,621
1983	18,858	2,784	2,609	22,261	3,436	18,350	13,145	5,999	87,442
1984	20,532	3,665	2,842	24,038	3,626	20,883	14,386	6,625	96,597
1985	21,121	3,977	3,176	26,211	3,758	22,760	14,797	6,987	102,787
1986	23,720	4,271	3,741	28,626	3,896	22,174	12,196	7,554	106,178
1987	27,145	5,126	4,340	31,655	4,231	23,800	11,900	7,733	115,930
1988	31,057	5,729	5,202	35,822	4,656	26,011	12,945	8,344	129,766
1989	32,092	6,434	5,733	39,047	5,108	26,753	14,585	9,009	138,761
1990	37,535	6,392	5,800	42,685	3,661	28,145	15,175	9,671	149,064
1991	38,115	5,123	5,160	43,744	4,174	29,135	14,600	10,478	150,529
1992	37,227	4,536	5,464	45,114	4,533	31,232	14,857	11,486	154,449
1993	37,979	5,568	5,718	47,049	4,710	32,130	16,179	12,045	161,378
1994	41,588	7,142	6,067	50,419	4,928	31,120	17,772	12,518	171,554
1995	42,608	8,766	6,536	52,737	5,372	33,162	17,928	13,377	180,486
1996	45,896	10,014	6,395	54,071	5,327	28,996	19,496	14,049	184,244
1997	47,055	12,021	6,217	56,685	5,987	25,392	19,620	14,766	187,743
1998	48,892	11,384	6,180	60,262	6,617	26,399	19,000	16,216	194,950
1999	51,624	13,612	6,062	64,295	6,331	32,644	19,753	17,461	211,782
2000	53,731	16,412	6,076	67,715	6,404	32,404	28,183	18,201	229,126
2001	52,480	12,129	6,213	69,842	7,383	34,903	25,817	18,924	227,691
2002	51,171	11,488	6,563	73,218	8,042	33,294	23,192	20,321	227,289
2003	52,292	12,016	7,363	76,458	8,843	40,160	28,854	21,422	247,408
2004	56,421	14,500	8,145	80,357	9,294	39,553	29,679	22,822	260,771
2005	62,601	16,486	8,710	83,181	9,895	56,545	34,472	24,373	296,263
2006	68,532	18,768	10,186	86,108	10,241	51,133	37,899	25,612	308,479
2007	73,803	18,189	10,317	89,029	10,777	55,532	35,831	26,967	320,445
2008	73,545	19,458	10,587	89,988	10,730	61,896	40,693	28,442	335,339
2009	69,280	20,575	10,889	89,087	9,762	63,521	27,034	29,822	319,970
2010	70,541	21,742	11,149	93,755	10,026	72,614	31,636	31,293	342,756

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 39

Provincial and territorial government outlay

National Economic and Financial Accounts

Year	Goods and services	Transfers to persons	Transfers to business	Transfers to other levels of government	Interest on the public debt	Total outlay
			(millions of dollars)			
1966	4,436	735	129	1,829	359	7,488
1967	5,423	959	89	2,072	435	8,978
1968	6,270	1,216	73	2,290	548	10,397
1969	7,212	1,365	98	2,541	710	11,926
1970	8,884	1,510	82	3,194	856	14,526
1971	9,934	1,782	222	3,605	1,049	16,592
1972	11,093	1,673	255	4,050	1,243	18,314
1973	12,619	1,886	314	4,544	1,534	20,897
1974	15,416	2,464	532	5,453	1,681	25,546
1975	19,461	3,139	669	6,957	1,992	32,218
1976	22,096	3,859	901	7,660	2,503	37,019
1977	24,793	4,452	1,147	9,502	2,888	42,782
1978	27,579	4,948	1,240	9,654	3,693	47,114
1979	31,034	5,483	1,719	10,673	4,196	53,105
1980	36,296	6,783	2,023	12,937	5,150	63,189
1981	41,393	7,693	2,479	13,751	6,534	71,850
1982	47,570	9,244	3,102	16,117	8,200	84,233
1983	52,145	10,439	3,857	16,887	9,558	92,886
1984	54,300	11,316	4,334	17,367	11,126	98,443
1985	58,278	12,111	4,459	18,346	12,549	105,743
1986	62,548	12,966	4,797	19,386	13,693	113,390
1987	66,499	14,111	4,090	20,361	15,056	120,117
1988	73,113	15,045	4,533	21,903	15,730	130,324
1989	79,643	16,530	4,465	23,049	17,366	141,053
1990	86,545	18,925	4,866	25,590	18,684	154,610
1991	93,956	20,937	5,307	27,979	19,587	167,766
1992	97,988	23,651	6,541	30,687	21,594	180,461
1993	98,567	24,603	5,553	30,653	23,337	182,713
1994	99,106	24,815	4,963	31,247	25,221	185,352
1995	100,835	25,406	4,264	32,233	26,957	189,695
1996	101,092	25,576	4,242	30,085	26,756	187,751
1997	103,936	25,945	4,025	29,594	26,679	190,179
1998	109,514	26,717	5,069	30,962	27,978	200,240
1999	114,799	27,170	5,171	31,594	27,986	206,720
2000	122,292	28,574	6,043	31,959	28,017	216,885
2001	131,201	29,662	10,289	33,459	28,044	232,655
2002	139,247	29,781	8,836	34,885	27,096	239,845
2003	148,120	30,066	11,651	35,808	27,048	252,693
2004	155,137	30,981	9,809	38,778	26,992	261,697
2005	162,800	33,297	10,498	42,305	27,275	276,175
2006	173,808	38,570	10,223	46,904	27,522	297,027
2007	187,864	39,446	10,813	48,691	28,588	315,402
2008	202,092	42,922	11,459	51,772	28,541	336,786
2009	214,664	45,030	11,325	54,203	27,996	353,218
2010	226,596	49,675	11,927	56,399	28,976	373,573

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 40

Provincial and territorial government saving and capital and financial account

National Economic and Financial Accounts

Year	Saving	Capital consumption allowances	Net capital transfers	Non-financial capital acquisition	Net lending
			(millions of dollars)		
1966	1,162	518	-3	1,486	191
1967	945	559	-18	1,571	-85
1968	1,245	602	-22	1,519	306
1969	1,315	672	-22	1,612	353
1970	645	753	-26	1,622	-250
1971	1,014	833	-54	2,113	-320
1972	950	934	-64	2,137	-317
1973	1,765	1,094	-99	2,164	596
1974	2,637	1,420	-137	2,635	1,285
1975	31	1,668	-214	3,194	-1,709
1976	136	1,836	-221	2,991	-1,240
1977	1,093	2,033	-196	3,596	-666
1978	2,227	2,249	-181	3,537	758
1979	2,378	2,517	-236	4,053	606
1980	-881	2,879	-310	4,423	-2,735
1981	-824	3,458	-338	5,338	-3,042
1982	-5,612	3,846	-630	5,926	-8,322
1983	-5,444	4,087	-1,090	5,675	-8,122
1984	-1,846	4,359	-787	5,588	-3,862
1985	-2,956	4,668	-867	6,502	-5,657
1986	-7,212	4,842	-1,212	6,810	-10,392
1987	-4,187	5,099	-990	6,680	-6,758
1988	-558	5,472	-894	6,505	-2,485
1989	-2,292	5,888	-853	7,517	-4,774
1990	-5,546	6,302	-874	8,233	-8,351
1991	-17,237	6,288	-836	8,529	-20,314
1992	-26,012	6,466	-629	7,980	-28,155
1993	-21,335	6,670	-543	7,238	-22,446
1994	-13,798	6,982	-44	7,804	-14,664
1995	-9,209	7,267	-481	8,191	-10,614
1996	-3,507	7,450	-322	7,853	-4,232
1997	-2,436	7,626	-702	7,667	-3,179
1998	-5,290	7,779	-4,330	7,845	-9,686
1999	5,062	8,070	-3,650	6,646	2,836
2000	12,241	8,535	-1,623	11,004	8,149
2001	-4,964	8,919	-586	11,892	-8,523
2002	-12,556	9,246	-667	13,054	-17,031
2003	-5,285	9,436	-1,780	13,955	-11,584
2004	-926	9,856	-870	14,600	-6,540
2005	20,088	10,425	-1,002	16,548	12,963
2006	11,452	11,321	-1,697	18,497	2,579
2007	5,043	12,355	-918	20,823	-4,343
2008	-1,447	13,821	-622	23,670	-11,918
2009	-33,248	14,791	-1,152	26,078	-45,687
2010	-30,817	15,994	-951	32,154	-47,928

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 41

Local government income

National Economic and Financial Accounts

Year	Indirect taxes	Transfers from persons	Transfers from other levels of government	Investment income	Sales of goods and services	Total income
			(millions of dollars)			
1966	2,467	43	1,881	95	392	4,878
1967	2,759	50	2,112	113	437	5,471
1968	3,085	42	2,326	131	446	6,030
1969	3,420	41	2,552	147	481	6,641
1970	3,726	44	3,199	163	545	7,677
1971	3,958	48	3,607	194	603	8,410
1972	4,284	51	4,098	207	670	9,310
1973	4,622	56	4,553	250	795	10,276
1974	5,156	58	5,453	320	954	11,941
1975	5,994	64	6,918	345	1,065	14,386
1976	7,160	78	7,626	432	1,301	16,597
1977	8,115	87	9,421	442	1,412	19,477
1978	8,953	98	9,538	527	1,795	20,911
1979	9,361	134	10,548	737	2,106	22,886
1980	10,771	142	12,827	935	2,499	27,174
1981	12,344	156	13,665	1,308	2,959	30,432
1982	13,189	167	15,975	1,421	3,270	34,022
1983	14,036	182	16,777	1,280	3,583	35,858
1984	15,006	188	17,281	1,485	4,016	37,976
1985	16,015	195	18,204	1,577	4,003	39,994
1986	17,456	217	19,230	1,615	4,539	43,057
1987	19,037	254	20,267	1,659	5,228	46,445
1988	20,686	307	21,797	1,877	5,679	50,346
1989	22,970	341	23,038	2,303	6,143	54,795
1990	24,848	356	25,793	2,543	6,742	60,282
1991	26,582	374	27,790	2,366	7,104	64,216
1992	28,565	395	30,573	2,251	7,348	69,132
1993	29,505	428	30,484	2,284	7,752	70,453
1994	29,607	466	31,289	2,331	8,062	71,755
1995	29,761	447	31,888	2,553	8,508	73,157
1996	30,422	453	30,056	2,482	8,448	71,861
1997	31,586	471	29,541	2,288	9,201	73,087
1998	31,519	516	30,787	2,514	10,012	75,348
1999	32,741	570	31,059	2,591	10,833	77,794
2000	32,944	684	31,397	2,977	10,679	78,681
2001	33,968	755	32,795	2,983	11,084	81,585
2002	34,979	771	34,096	2,759	11,569	84,174
2003	36,551	811	35,151	3,096	11,734	87,343
2004	38,576	853	37,925	3,192	12,519	93,065
2005	40,851	904	41,647	3,190	13,326	99,918
2006	42,693	987	46,756	3,380	14,365	108,181
2007	45,442	1,072	48,420	3,739	15,451	114,124
2008	47,869	1,069	51,456	3,598	16,391	120,383
2009	49,562	1,335	54,548	3,940	16,993	126,378
2010	51,881	1,397	56,855	4,022	18,222	132,377

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 42

Local government outlay

National Economic and Financial Accounts

Year	Goods and services	Transfers to persons	Transfers to businessgove	Transfers to other levels of rnment	Interest on the public debt	Total outlay
			(millions of dollars)			
1966	3,949	67	35	41	373	4,465
1967	4,513	109	36	59	430	5,147
1968	5,140	146	39	42	476	5,843
1969	5,869	158	57	50	517	6,651
1970	6,662	231	68	46	591	7,598
1971	7,339	283	85	47	728	8,482
1972	8,041	271	90	53	748	9,203
1973	9,238	276	106	47	858	10,525
1974	10,860	254	135	44	846	12,139
1975	12,774	303	159	54	942	14,232
1976	15,031	345	185	54	1,220	16,835
1977	17,057	322	221	54	1,443	19,097
1978	18,562	368	266	69	1,638	20,903
1979	20,611	407	292	106	1,781	23,197
1980	23,034	469	412	119	1,986	26,020
1981	25,675	521	413	198	2,257	29,064
1982	28,958	610	538	147	2,544	32,797
1983	30,733	744	536	161	2,837	35,011
1984	32,721	802	571	143	3,015	37,252
1985	34,481	850	596	104	3,298	39,329
1986	36,266	939	636	123	3,313	41,277
1987	38,835	1,045	675	124	3,340	44,019
1988	41,971	1,129	721	127	3,365	47,313
1989	45,426	1,250	774	108	3,495	51,053
1990	49,764	1,713	893	138	3,722	56,230
1991	53,675	2,700	943	131	3,886	61,335
1992	56,740	3,410	1,195	145	4,089	65,579
1993	58,145	3,899	1,243	180	4,295	67,762
1994	59,018	3,949	1,206	172	4,219	68,564
1995	59,712	3,738	1,212	111	4,316	69,089
1996	60,187	2,950	1,216	185	4,176	68,714
1997	60,989	2,640	1,201	304	3,949	69,083
1998	63,692	3,523	1,006	484	3,588	72,293
1999	65,396	2,990	1,095	436	3,412	73,329
2000	68,705	3,248	1,078	342	3,175	76,548
2001	71,634	3,641	1,159	98	3,345	79,877
2002	75,006	2,637	1,566	95	3,218	82,522
2003	79,800	2,747	1,677	101	3,196	87,521
2004	82,976	2,940	1,770	101	3,357	91,144
2005	88,058	3,026	1,879	117	3,252	96,332
2006	94,775	2,976	2,012	132	3,327	103,222
2007	98,150	3,305	2,072	145	3,379	107,051
2008	103,713	3,827	2,285	154	3,466	113,445
2009	111,030	4,268	2,410	154	3,515	121,377
2010	116,425	4,510	2,482	155	3,690	127,262

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 43

Local government saving and capital and financial account

National Economic and Financial Accounts

Year	Saving	Capital consumption allowances	Net capital transfers	Non-financial capital acquisition	Net lending
			(millions of dollars)		
1966	413	401	0	1,304	-490
1967	324	451	0	1,361	-586
1968	187	486	0	1,426	-753
1969	-10	545	0	1,425	-890
1970	79	605	0	1,534	-850
1971	-72	703	0	1,658	-1,027
1972	107	780	-50	1,680	-843
1973	-249	912	-39	1,785	-1,161
1974	-198	1,139	-32	2,299	-1,390
1975	154	1,321	-36	2,667	-1,228
1976	-238	1,471	-57	2,841	-1,665
1977	380	1,632	-66	3,117	-1,171
1978	8	1,805	-95	3,088	-1,370
1979	-311	2,032	-84	3,315	-1,678
1980	1,154	2,307	-92	3,888	-519
1981	1,368	2,663	-126	4,313	-408
1982	1,225	3,003	-174	4,889	-835
1983	847	3,222	-246	4,602	-779
1984	724	3,398	-236	4,563	-677
1985	665	3,618	-279	5,245	-1,241
1986	1,780	3,767	-318	5,624	-395
1987	2,426	4,018	-301	6,054	89
1988	3,033	4,361	-259	6,965	170
1989	3,742	4,765	-301	7,837	369
1990	4,052	5,145	-304	8,917	-24
1991	2,881	5,242	-295	8,908	-1,080
1992	3,553	5,452	-335	8,734	-64
1993	2,691	5,689	-320	8,364	-304
1994	3,191	6,020	-382	9,095	-266
1995	4,068	6,426	-488	9,845	161
1996	3,147	6,703	-472	9,424	-46
1997	4,004	7,047	-610	9,375	1,066
1998	3,055	7,361	2,912	9,370	3,958
1999	4,465	7,706	1,216	9,937	3,450
2000	2,133	8,159	-540	10,193	-441
2001	1,708	8,390	-388	11,607	-1,897
2002	1,652	8,744	-350	11,952	-1,906
2003	-178	9,074	670	12,626	-3,060
2004	1,921	9,718	-289	14,031	-2,681
2005	3,586	10,421	-421	16,571	-2,985
2006	4,959	11,307	-266	18,532	-2,532
2007	7,073	12,244	-317	20,528	-1,528
2008	6,938	13,606	-695	23,935	-4,086
2009	5,001	14,548	-693	26,218	-7,362
2010	5,115	15,454	-780	29,115	-9,326

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 44

Total Canada Pension Plan and Québec Pension Plan

National Economic and Financial Accounts

Year	Income	Contributions to social insurance plans	Investment income	Outlay	Gross current expenditure on goods and services	Current transfers to persons	Current transfers to non-residents	Saving
				(millions of dollars)				
1966	729	719	10	15	15	0	0	714
1967	905	850	55	17	17	0	0	888
1968	1,037	922	115	37	22	15	0	1,000
1969	1,192	1,009	183	77	26	51	0	1,115
1970	1,330	1,057	273	134	30	104	0	1,196
1971	1,478	1,103	375	200	28	172	0	1,278
1972	1,656	1,190	466	282	34	248	0	1,374
1973	1,870	1,300	570	393	37	352	4	1,477
1974	2,313	1,608	705	542	43	495	4	1,771
1975	2,767	1,905	862	758	45	709	4	2,009
1976	3,272	2,204	1,068	1,099	58	1,036	5	2,173
1977	3,704	2,439	1,265	1,416	64	1,344	8	2,288
1978	4,218	2,726	1,492	1,766	68	1,689	9	2,452
1979	4,867	3,087	1,780	2,175	74	2,089	12	2,692
1980	5,668	3,539	2,129	2,656	90	2,553	13	3,012
1981	6,532	3,971	2,561	3,276	121	3,139	16	3,256
1982	7,810	4,744	3,066	4,005	117	3,868	20	3,805
1983	8,017	4,558	3,459	4,849	128	4,696	25	3,168
1984	9,017	5,143	3,874	5,758	141	5,589	28	3,259
1985	9,897	5,704	4,193	6,712	161	6,517	34	3,185
1986	10,728	6,245	4,483	7,613	158	7,415	40	3,115
1987	11,859	7,131	4,728	9,507	179	9,277	51	2,352
1988	12,990	7,936	5,054	10,955	193	10,701	61	2,035
1989	14,169	8,801	5,368	12,302	211	12,021	70	1,867
1990	15,719	10,117	5,602	13,668	217	13,369	82	2,051
1991	16,475	10,847	5,628	15,124	225	14,808	91	1,351
1992	17,117	11,625	5,492	17,039	235	16,699	105	78
1993	17,651	12,208	5,443	18,559	227	18,221	111	-908
1994	18,257	12,931	5,326	19,923	243	19,565	115	-1,666
1995	19,831	14,456	5,375	20,859	250	20,489	120	-1,028
1996	19,796	14,761	5,035	21,982	266	21,587	129	-2,186
1997	20,339	15,600	4,739	23,062	311	22,612	139	-2,723
1998	22,932	18,280	4,652	24,115	392	23,579	144	-1,183
1999	25,536	21,000	4,536	24,737	318	24,271	148	799
2000	29,676	24,921	4,755	25,707	364	25,186	157	3,969
2001	32,686	28,621	4,065	26,984	453	26,365	166	5,702
2002	36,835	32,527	4,308	28,382	435	27,772	175	8,453
2003	39,189	35,208	3,981	29,690	492	29,013	185	9,499
2004	40,943	36,805	4,138	31,406	481	30,629	296	9,537
2005	43,077	38,834	4,243	32,826	487	32,021	318	10,251
2006	45,776	40,987	4,789	34,521	517	33,661	343	11,255
2007	48,249	43,076	5,173	36,202	552	35,280	370	12,047
2008	49,883	44,645	5,238	38,175	544	37,233	398	11,708
2009	51,749	46,892	4,857	40,467	753	39,281	433	11,282
2010	51,685	46,743	4,942	42,090	883	40,746	461	9,595

Source: Statistics Canada, *National Economic and Financial Accounts* (Table 380-0007).

Table 45

Actual, cyclically adjusted and primary-cyclically adjusted budget balances

National Economic and Financial Accounts

	Federal government			Total government		
Year	Actual	Cyclically adjusted[1]	Primary-cyclically adjusted[1]	Actual	Cyclically adjusted[1]	Primary-cyclically adjusted[1]
	(millions of dollars)					
1975	-5,215	-5,553	-3,020	-6,143	-6,570	-3,782
1976	-4,835	-5,840	-2,695	-5,567	-7,127	-3,508
1977	-9,505	-10,822	-7,249	-9,054	-11,199	-7,084
1978	-13,526	-15,186	-10,495	-11,686	-14,542	-9,118
1979	-11,162	-13,897	-7,541	-9,542	-13,931	-7,427
1980	-12,545	-14,446	-6,390	-12,787	-15,532	-7,606
1981	-10,001	-11,361	169	-10,195	-12,254	-1,252
1982	-21,341	-14,673	-159	-26,693	-15,175	-788
1983	-27,880	-19,009	-3,732	-33,613	-19,643	-3,572
1984	-33,677	-29,698	-10,808	-34,957	-29,090	-8,658
1985	-37,998	-38,214	-15,551	-41,711	-42,625	-17,815
1986	-28,933	-30,134	-5,920	-36,605	-38,628	-11,361
1987	-25,990	-29,972	-4,025	-30,307	-37,435	-7,308
1988	-26,292	-37,005	-7,082	-26,572	-43,978	-10,185
1989	-27,697	-39,497	-3,888	-30,235	-48,797	-9,227
1990	-33,309	-39,305	826	-39,633	-48,392	-3,432
1991	-37,214	-31,010	8,300	-57,257	-42,844	1,658
1992	-35,787	-25,531	12,267	-63,928	-41,256	4,164
1993	-39,696	-28,786	8,731	-63,354	-39,581	7,314
1994	-35,088	-28,603	9,903	-51,684	-37,907	12,086
1995	-31,700	-26,559	17,822	-43,181	-31,733	24,890
1996	-16,957	-7,767	35,920	-23,421	-3,891	52,214
1997	6,476	13,526	54,799	1,640	16,193	69,943
1998	7,676	14,558	56,522	765	16,111	71,375
1999	8,770	10,568	51,914	15,855	19,440	74,119
2000	20,028	14,852	57,242	31,705	19,763	73,657
2001	12,010	12,715	51,648	7,292	10,001	62,407
2002	9,396	13,463	47,825	-1,088	8,761	56,208
2003	4,121	8,138	40,582	-1,024	8,633	53,148
2004	10,830	12,051	43,021	11,146	12,824	55,725
2005	1,019	-1,677	27,536	21,248	14,286	54,320
2006	12,478	7,915	36,961	23,780	13,878	51,332
2007	15,375	12,503	39,083	21,551	14,357	48,946
2008	-2,021	298	23,299	-6,317	-1,385	30,621
2009	-32,957	9,383	31,252	-74,724	15,563	46,623
2010	-42,585	203	22,395	-90,244	-4,179	27,736

Sources: Statistics Canada, *Sector Accounts* (Table 380-0007); *Government of Canada Budgetary Revenues and Expenditures* (Table 183-0014); Department of Finance.

Estimates are based on an update of the methodology developed in the Department of Finance working paper "Fiscal Policy and the Business Cycle: A New Approach to Identifying the Interaction" (2003), Stephen Murchison and Janine Robbins. In particular, this update incorporates the effects from terms of trade in the calculation of the cyclical component.

[1] For 2009 and 2010, temporary counter-cyclical fiscal measures are included in the cyclical component of the balance and therefore excluded from the cyclically-adjusted budgetary balance.

Table 46

Actual, cyclically adjusted and primary-cyclically adjusted budget balances as a percentage of GDP at market prices

National Economic and Financial Accounts

	Federal government			Total government		
Year	Actual	Cyclically adjusted[1]	Primary-cyclically adjusted[1]	Actual	Cyclically adjusted[1]	Primary-cyclically adjusted[1]
	(per cent of potential GDP)					
1975	-3.0	-3.2	-1.7	-3.5	-3.8	-2.2
1976	-2.4	-2.9	-1.4	-2.8	-3.6	-1.8
1977	-4.4	-5.0	-3.3	-4.1	-5.1	-3.2
1978	-5.7	-6.4	-4.4	-4.9	-6.1	-3.8
1979	-4.1	-5.1	-2.8	-3.5	-5.1	-2.7
1980	-4.0	-4.7	-2.1	-4.1	-5.0	-2.5
1981	-2.8	-3.2	0.0	-2.8	-3.4	-0.4
1982	-5.3	-3.7	0.0	-6.6	-3.8	-0.2
1983	-6.5	-4.4	-0.9	-7.8	-4.5	-0.8
1984	-7.4	-6.5	-2.4	-7.6	-6.4	-1.9
1985	-7.9	-7.9	-3.2	-8.7	-8.8	-3.7
1986	-5.7	-5.9	-1.2	-7.2	-7.6	-2.2
1987	-4.8	-5.5	-0.7	-5.6	-6.9	-1.3
1988	-4.5	-6.3	-1.2	-4.5	-7.5	-1.7
1989	-4.4	-6.3	-0.6	-4.8	-7.7	-1.5
1990	-5.0	-5.9	0.1	-5.9	-7.2	-0.5
1991	-5.3	-4.4	1.2	-8.1	-6.1	0.2
1992	-4.9	-3.5	1.7	-8.7	-5.6	0.6
1993	-5.2	-3.8	1.2	-8.4	-5.2	1.0
1994	-4.5	-3.6	1.3	-6.6	-4.8	1.5
1995	-3.8	-3.2	2.1	-5.2	-3.8	3.0
1996	-2.0	-0.9	4.1	-2.7	-0.5	6.0
1997	0.7	1.5	6.1	0.2	1.8	7.7
1998	0.8	1.6	6.1	0.1	1.7	7.7
1999	0.9	1.1	5.3	1.6	2.0	7.5
2000	1.9	1.4	5.4	3.0	1.9	6.9
2001	1.1	1.1	4.6	0.7	0.9	5.6
2002	0.8	1.2	4.1	-0.1	0.8	4.9
2003	0.3	0.7	3.3	-0.1	0.7	4.3
2004	0.8	0.9	3.3	0.9	1.0	4.3
2005	0.1	-0.1	2.0	1.5	1.0	4.0
2006	0.9	0.5	2.6	1.6	1.0	3.6
2007	1.0	0.8	2.6	1.4	0.9	3.2
2008	-0.1	0.0	1.4	-0.4	-0.1	1.9
2009	-2.0	0.6	1.9	-4.6	1.0	2.9
2010	-2.5	0.0	1.3	-5.3	-0.2	1.6

Sources: Statistics Canada, *Sector Accounts* (Table 380-0007); *Government of Canada Budgetary Revenues and Expenditures* (Table 183-0014); Gross Domestic Product, Income Based (Table 380-0001); Department of Finance.

Estimates are based on an update of the methodology developed in the Department of Finance working paper "Fiscal Policy and the Business Cycle: A New Approach to Identifying the Interaction" (2003), Stephen Murchison and Janine Robbins. In particular, this update incorporates the effects from terms of trade in the calculation of the cyclical component.

[1] For 2009 and 2010, temporary counter-cyclical fiscal measures are included in the cyclical component of the balance and therefore excluded from the cyclically-adjusted budgetary balance.

Table 47

Change in actual, cyclically adjusted and primary-cyclically adjusted budget balances as a percentage of GDP at market prices

National Economic and Financial Accounts

	Federal government			Total government		
Year	Actual	Cyclically adjusted[1]	Primary-cyclically adjusted[1]	Actual	Cyclically adjusted[1]	Primary-cyclically adjusted[1]
	(per cent of potential GDP)					
1976	0.6	0.2	0.4	0.7	0.2	0.4
1977	-1.9	-2.0	-2.0	-1.3	-1.5	-1.5
1978	-1.3	-1.4	-1.1	-0.8	-1.0	-0.6
1979	1.5	1.3	1.6	1.4	1.0	1.1
1980	0.1	0.4	0.7	-0.6	0.1	0.3
1981	1.2	1.5	2.1	1.3	1.6	2.1
1982	-2.5	-0.5	-0.1	-3.8	-0.3	0.2
1983	-1.1	-0.7	-0.8	-1.1	-0.8	-0.6
1984	-0.9	-2.1	-1.5	0.1	-1.8	-1.1
1985	-0.5	-1.4	-0.9	-1.0	-2.5	-1.8
1986	2.2	2.0	2.1	1.5	1.2	1.5
1987	0.9	0.4	0.4	1.6	0.7	0.9
1988	0.3	-0.8	-0.5	1.0	-0.6	-0.4
1989	0.1	0.1	0.6	-0.3	-0.2	0.3
1990	-0.6	0.4	0.7	-1.1	0.5	1.0
1991	-0.3	1.5	1.0	-2.2	1.2	0.7
1992	0.4	0.9	0.5	-0.6	0.4	0.3
1993	-0.3	-0.3	-0.5	0.4	0.4	0.4
1994	0.8	0.2	0.1	1.8	0.4	0.6
1995	0.6	0.4	0.9	1.4	1.0	1.5
1996	1.9	2.3	2.0	2.5	3.4	3.0
1997	2.7	2.4	1.9	2.9	2.3	1.7
1998	0.1	0.1	0.0	-0.1	-0.1	-0.1
1999	0.1	-0.5	-0.8	1.5	0.2	-0.1
2000	1.0	0.3	0.1	1.4	-0.1	-0.6
2001	-0.8	-0.3	-0.7	-2.3	-1.0	-1.3
2002	-0.3	0.0	-0.5	-0.8	-0.1	-0.8
2003	-0.5	-0.5	-0.8	0.0	-0.1	-0.5
2004	0.5	0.3	0.0	0.9	0.3	0.0
2005	-0.8	-1.1	-1.3	0.7	0.1	-0.3
2006	0.8	0.7	0.6	0.1	-0.1	-0.4
2007	0.1	0.3	0.0	-0.2	0.0	-0.3
2008	-1.1	-0.8	-1.1	-1.8	-1.0	-1.3
2009	-1.9	0.6	0.5	-4.2	1.0	1.0
2010	-0.5	-0.6	-0.6	-0.7	-1.2	-1.2

Sources: Statistics Canada, *Sector Accounts* (Table 380-0007); *Government of Canada Budgetary Revenues and Expenditures* (Table 183-0014); Gross Domestic Product, Income Based (Table 380-0001); Department of Finance.

Estimates are based on an update of the methodology developed in the Department of Finance working paper "Fiscal Policy and the Business Cycle: A New Approach to Identifying the Interaction" (2003), Stephen Murchison and Janine Robbins. In particular, this update incorporates the effects from terms of trade in the calculation of the cyclical component.

A positive sign indicates a move towards smaller deficits or larger surpluses; a negative sign indicates a move towards larger deficits or smaller surpluses.

[1] For 2009 and 2010, temporary counter-cyclical fiscal measures are included in the cyclical component of the balance and therefore excluded from the cyclically-adjusted budgetary balance.

Table 48

Federal government liabilities and assets

National Accounts basis

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
					(millions of dollars)					
Liabilities										
Currency and bank deposits	3,901	4,118	4,189	4,293	4,509	4,728	4,900	5,081	5,190	5,320
Trade payables	486	573	854	583	811	750	359	359	879	1,590
Loans	101	101	103	100	101	101	154	55	164	206
Life insurance and pensions	119,903	129,075	130,355	132,141	134,180	136,758	140,541	142,978	145,238	147,942
Government claims	7,717	8,974	8,870	6,604	1,980	819	691	529	228	821
Other liabilities	51,986	33,866	34,784	39,997	56,796	58,425	57,882	61,999	73,978	75,551
Sub-total	184,094	176,707	179,155	183,718	198,377	201,581	204,527	211,001	225,677	231,430
Canada short-term paper	99,729	107,050	118,941	118,762	129,632	126,307	117,712	183,771	186,313	174,891
Canada bonds	339,262	331,079	315,027	295,423	285,530	278,641	267,330	274,235	358,993	409,538
Sub-total: Unmatured debt	438,991	438,129	433,968	414,185	415,162	404,948	385,042	458,006	545,306	584,429
Total liabilities	623,085	614,836	613,123	597,903	613,539	606,529	589,569	669,007	770,983	815,859
Financial assets										
Currency and deposits	8,929	5,325	4,291	3,770	3,785	4,528	4,441	28,554	14,279	4,176
Trade receivables	20	20	256	211	207	207	263	265	551	551
Loans	14,357	16,816	21,379	16,045	17,575	16,868	18,207	18,294	14,326	19,411
Short-term paper	590	590	603	2,001	2,255	2,255	2,289	2,224	1,771	1,771
Mortgages	360	360	497	609	686	686	499	431	533	533
Bonds	5,730	5,226	6,401	6,223	6,318	6,310	5,939	5,480	5,069	4,900
Government claims	76,338	80,011	71,531	64,983	66,499	72,022	73,110	132,958	190,063	196,634
Shares	1,320	1,320	1,351	117	134	260	211	205	123	123
Foreign investments	241	241	86	65	63	63	42	39	27	27
Other financial assets	10,598	3,690	9,571	7,733	18,515	19,324	6,946	13,051	25,062	29,652
Total financial assets	118,483	113,599	115,966	101,757	116,037	122,523	111,947	201,501	251,804	257,778
Net financial assets	-504,602	-501,237	-497,157	-496,146	-497,502	-484,006	-477,622	-467,506	-519,179	-558,081
Non-financial assets										
Non-residential structures	30,809	30,902	31,348	32,475	33,402	34,936	36,896	38,906	37,956	38,188
Machinery and equipment	9,309	10,158	9,324	9,006	8,805	8,709	9,149	9,684	10,556	10,527
Inventories	396	301	370	406	394	362	377	406	403	372
Land	8,010	8,065	8,245	8,671	8,985	9,502	10,183	10,894	10,742	10,922
Total non-financial assets	48,524	49,426	49,287	50,558	51,586	53,509	56,605	59,890	59,657	60,009
Total assets	167,007	163,025	165,253	152,315	167,623	176,032	168,552	261,391	311,461	317,787
Net worth	-456,078	-451,811	-447,870	-445,588	-445,916	-430,497	-421,017	-407,616	-459,522	-498,072

Source: Statistics Canada, *National Balance Sheet Accounts*.

Table 49

Provincial and local governments' liabilities and assets

National Accounts basis

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
	(millions of dollars)									
Liabilities										
Other deposits	2,620	2,606	0	0	0	0	0	0	0	0
Trade payables	14,993	14,669	16,005	15,549	22,587	26,334	30,287	31,921	33,548	43,748
Loans	14,115	14,885	15,685	18,842	20,613	19,526	20,364	20,810	21,785	24,082
Short-term paper	18,109	21,932	21,066	18,331	15,080	16,475	22,875	36,288	40,801	40,478
Mortgages	2,144	2,095	2,048	2,018	1,925	1,855	1,773	1,745	1,740	1,740
Bonds	344,599	362,934	360,175	376,806	388,447	407,628	410,067	434,363	462,241	501,406
Life insurance and pensions	48,275	50,572	52,511	54,805	56,974	59,921	62,486	65,354	68,171	72,740
Government claims	12,134	11,608	12,804	12,576	11,581	10,756	10,553	11,442	11,561	14,163
Other liabilities	125,394	129,655	140,292	145,586	166,247	194,984	211,941	221,106	233,536	243,976
Total liabilities	582,383	610,956	620,586	644,513	683,454	737,479	770,346	823,029	873,383	942,333
Financial assets										
Currency and deposits	16,162	17,273	18,381	19,819	23,105	25,259	28,102	29,132	29,846	30,329
Trade receivables	5,938	6,078	5,980	5,932	6,872	7,096	7,438	7,928	8,236	8,301
Loans	11,646	13,084	14,140	16,219	18,176	23,090	25,467	28,641	33,147	32,508
Short-term paper	24,405	30,733	27,368	36,980	44,773	47,213	50,909	61,000	62,174	72,370
Mortgages	5,511	5,533	6,761	7,170	9,298	11,264	10,435	10,791	10,568	10,604
Bonds	78,544	79,377	83,906	80,549	90,058	103,623	115,669	121,048	122,103	117,035
Government claims	87,397	86,850	93,757	96,177	103,387	99,306	104,549	121,394	122,113	125,187
Shares	49,162	49,661	51,491	51,048	57,548	67,337	69,968	56,545	65,013	71,525
Foreign investments	5,926	7,488	8,870	10,802	12,627	15,291	19,689	20,529	18,988	19,719
Other financial assets	62,993	56,823	56,574	65,514	74,594	93,874	100,897	102,967	100,938	105,708
Total financial assets	347,684	352,900	367,228	390,210	440,438	493,353	533,123	559,975	573,126	593,286
Net financial assets	-234,699	-258,056	-253,358	-254,303	-243,016	-244,126	-237,223	-263,054	-300,257	-349,047
Non-financial assets										
Residential structures	7,853	8,098	8,303	8,348	8,530	11,312	12,961	13,575	13,811	14,651
Non-residential structures	272,651	282,116	294,719	313,786	328,785	357,142	388,341	433,687	451,645	470,144
Machinery and equipment	18,326	20,094	20,615	21,299	20,539	22,466	24,328	27,187	30,830	30,514
Land	74,650	77,495	81,508	87,813	92,576	102,641	113,492	128,041	134,538	141,592
Total non-financial assets	373,480	387,803	405,145	431,246	450,430	493,561	539,122	602,490	630,824	656,901
Total assets	721,164	740,703	772,373	821,456	890,868	986,914	1,072,245	1,162,465	1,203,950	1,250,187
Net worth	138,781	129,747	151,787	176,943	207,414	249,435	301,899	339,436	330,567	307,854

Source: Statistics Canada, *National Balance Sheet Accounts*.

Table 50

Social security funds

National Accounts basis

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
	(millions of dollars)									
Liabilities										
Total liabilities	451	19	164	63	266	606	1,273	6,721	3,111	2,540
Financial assets										
Bonds:	28,525	26,840	25,238	24,823	25,897	26,066	28,851	26,145	28,430	30,609
Short-term paper	0	446	2,959	8,729	11,837	15,788	18,663	16,151	14,286	16,552
Foreign investments	0	6,737	8,144	11,488	21,617	36,379	34,640	39,937	50,820	51,733
Government claims	20,802	23,626	24,257	26,817	22,923	32,206	35,730	25,772	28,669	33,447
Corporate claims	0	0	0	0	2,821	6,298	10,141	12,880	15,145	22,166
Shares	14,038	13,653	18,256	19,465	18,928	14,553	13,678	13,642	9,954	9,830
Other financial assets	0	1,400	4,209	2,383	2,932	3,973	5,937	14,585	12,468	13,200
Total financial assets	63,365	72,702	83,063	93,705	106,955	135,263	147,640	149,112	159,772	177,537
Net worth	62,914	72,683	82,899	93,642	106,689	134,657	146,367	142,391	156,661	174,997

Source: Statistics Canada, *National Balance Sheet Accounts*.

Table 51

Total government liabilities and assets

National Accounts basis

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
	(millions of dollars)									
Liabilities										
Currency and deposits	6,521	6,724	4,189	4,293	4,509	4,728	4,900	5,081	5,190	5,320
Trade payables	15,479	15,242	16,859	16,132	23,398	27,084	30,646	32,280	34,427	45,338
Loans	14,216	14,986	15,788	18,942	20,714	19,627	20,518	20,865	21,949	24,288
Short-term paper	117,838	128,982	140,007	137,093	144,712	142,782	140,587	220,059	228,417	216,671
Mortgages	2,144	2,095	2,048	2,018	1,925	1,855	1,773	1,745	1,740	1,740
Bonds	683,861	694,013	675,202	672,229	673,977	686,269	677,397	708,598	821,234	910,944
Life insurance and pensions	168,178	179,647	182,866	186,946	191,154	196,679	203,027	208,332	213,409	220,682
Government claims	19,851	20,582	21,674	19,180	13,561	11,575	11,244	11,971	11,789	14,984
Other liabilities	177,831	163,540	175,240	185,646	223,309	254,015	271,096	289,826	309,322	320,765
Total liabilities	1,205,919	1,225,811	1,233,873	1,242,479	1,297,259	1,344,614	1,361,188	1,498,757	1,647,477	1,760,732
Financial assets										
Currency and deposits	25,091	22,598	22,672	23,589	26,890	29,787	32,543	57,686	44,125	34,505
Trade receivables	5,958	6,098	6,236	6,143	7,079	7,303	7,701	8,193	8,787	8,852
Loans	26,003	29,900	35,519	32,264	35,751	39,958	43,674	46,935	47,473	51,919
Short-term paper	24,995	31,769	30,930	47,710	58,865	65,256	71,861	79,375	78,231	90,693
Mortgages	5,871	5,893	7,258	7,779	9,984	11,950	10,934	11,222	11,101	11,137
Bonds	112,799	111,443	115,545	111,595	122,273	135,999	150,459	152,673	155,602	152,544
Government claims	184,537	190,487	189,545	187,977	192,809	203,534	213,389	280,124	340,845	355,268
Corporate claims	0	0	0	0	2,821	6,298	10,141	12,880	15,145	22,166
Shares	64,520	64,634	71,098	70,630	76,610	82,150	83,857	70,392	75,090	81,478
Foreign investments	6,167	14,466	17,100	22,355	34,307	51,733	54,371	60,505	69,835	71,479
Other financial assets	73,591	61,913	70,354	75,630	96,041	117,171	113,780	130,603	138,468	148,560
Total financial assets	529,532	539,201	566,257	585,672	663,430	751,139	792,710	910,588	984,702	1,028,601
Net financial assets	-676,387	-686,610	-667,616	-656,807	-633,829	-593,475	-568,478	-588,169	-662,775	-732,131
Non-financial assets										
Residential structures	7,853	8,098	8,303	8,348	8,530	11,312	12,961	13,575	13,811	14,651
Non-residential structures	303,460	313,018	326,067	346,261	362,187	392,078	425,237	472,593	489,601	508,332
Machinery and equipment	27,635	30,252	29,939	30,305	29,344	31,175	33,477	36,871	41,386	41,041
Inventories	396	301	370	406	394	362	377	406	403	372
Land	82,660	85,560	89,753	96,484	101,561	112,143	123,675	138,935	145,280	152,514
Total non-financial assets	422,004	437,229	454,432	481,804	502,016	547,070	595,727	662,380	690,481	716,910
Total assets	951,536	976,430	1,020,689	1,067,476	1,165,446	1,298,209	1,388,437	1,572,968	1,675,183	1,745,511
Net worth	-254,383	-249,381	-213,184	-175,003	-131,813	-46,405	27,249	74,211	27,706	-15,221

Source: Statistics Canada, *National Balance Sheet Accounts* .

Data in this table include Canada Pension Plan and Québec Pension Plan liabilities and assets.

International Fiscal Comparisons

Table 52

G-7 general government total tax and non-tax receipts

National Accounts basis

Year	Canada	United States	Japan	United Kingdom	Germany	France	Italy	G-7 average
				(per cent of GDP)				
1970	35.7	30.2	22.0	44.9	-	39.9	29.2	31.5
1971	36.3	29.7	23.0	42.9	-	39.3	29.8	31.2
1972	36.6	30.9	23.0	40.8	-	39.5	29.6	31.5
1973	36.6	31.1	23.8	39.4	-	39.5	29.0	31.6
1974	38.7	31.7	25.9	44.0	-	39.9	28.7	32.8
1975	37.6	29.8	25.6	44.3	-	41.2	29.0	31.9
1976	37.4	30.5	25.2	43.9	-	42.8	30.4	32.4
1977	37.3	30.8	26.4	42.6	-	42.9	31.7	32.7
1978	36.8	30.9	26.3	39.8	-	42.8	32.5	32.5
1979	36.6	31.3	28.2	39.6	-	44.4	32.0	33.1
1980	37.5	31.6	28.8	42.2	-	45.6	33.8	33.9
1981	39.6	32.3	29.9	44.4	-	46.2	33.8	34.7
1982	40.2	32.0	30.2	45.3	-	47.0	36.8	35.1
1983	39.7	31.4	30.4	44.4	-	47.8	38.8	34.9
1984	39.8	31.3	31.0	44.1	-	48.5	37.6	34.9
1985	39.5	31.8	31.3	43.4	-	48.7	37.4	35.0
1986	40.4	32.0	31.4	42.3	-	47.8	38.4	35.1
1987	40.6	32.8	32.9	41.1	-	48.3	38.3	35.7
1988	41.0	32.6	32.9	40.9	-	47.2	39.3	35.6
1989	41.2	32.9	32.7	40.7	-	46.9	40.1	35.8
1990	43.0	32.9	33.6	39.4	-	47.0	41.5	36.0
1991	43.9	32.9	33.3	39.8	43.3	47.6	42.6	37.0
1992	44.2	32.8	33.3	38.7	44.8	47.4	45.0	37.2
1993	43.5	33.0	32.0	37.3	45.3	48.5	46.3	37.1
1994	43.0	33.4	31.2	37.8	45.6	48.8	44.4	37.0
1995	43.2	33.8	31.2	38.2	45.1	48.9	45.1	37.3
1996	43.8	34.3	31.6	38.0	45.9	50.4	45.5	37.7
1997	44.5	34.6	31.7	38.4	45.7	50.8	47.6	38.1
1998	44.9	34.9	31.3	39.4	45.9	50.0	46.2	38.2
1999	44.3	34.9	31.2	39.8	46.7	50.8	46.5	38.3
2000	44.1	35.4	31.4	40.3	46.4	50.1	45.3	38.4
2001	42.6	34.4	32.2	40.6	44.7	50.0	44.9	37.9
2002	41.1	31.9	30.8	39.0	44.4	49.4	44.4	36.2
2003	41.1	31.3	30.5	38.7	44.4	49.1	44.7	35.8
2004	40.7	31.6	30.9	39.6	43.5	49.6	44.2	35.8
2005	40.8	33.0	31.7	40.8	43.6	50.5	43.8	36.8
2006	41.1	33.8	34.5	41.5	43.7	50.3	45.3	37.8
2007	40.8	33.9	33.5	41.2	43.8	49.6	46.4	37.7
2008	39.8	32.6	35.1	42.6	43.9	49.6	46.1	37.4
2009	38.5	30.9	33.3	40.3	44.5	48.7	46.5	36.1
2010	38.3	31.6	32.5	40.7	43.4	49.1	46.1	36.2

Source: *OECD Economic Outlook*, No. 89 (May 2011).

Table 53

G-7 general government total outlays

National Accounts basis

Year	Canada	United States	Japan	United Kingdom	Germany	France	Italy	G-7 average
				(per cent of GDP)				
1970	36.0	32.3	20.2	41.8	-	39.6	32.5	32.2
1971	37.3	32.5	21.8	41.2	-	39.2	34.5	32.7
1972	37.5	32.3	23.1	42.8	-	39.3	36.5	33.1
1973	36.0	31.3	23.3	43.6	-	39.1	35.4	32.5
1974	37.6	32.7	25.5	48.1	-	39.4	34.9	34.1
1975	41.1	35.1	28.5	49.4	-	42.8	39.3	36.8
1976	40.2	34.0	29.1	49.2	-	43.3	38.3	36.2
1977	41.4	33.1	30.4	46.4	-	43.4	38.6	35.8
1978	41.6	32.3	32.1	44.8	-	44.4	41.1	35.8
1979	40.0	32.3	33.2	43.6	-	44.6	40.3	35.7
1980	41.6	34.3	33.5	45.9	-	45.7	40.7	37.2
1981	42.5	34.7	34.0	49.4	-	48.4	44.6	38.4
1982	47.3	37.0	34.2	48.4	-	49.8	46.8	40.1
1983	47.9	37.1	34.5	48.2	-	50.3	48.9	40.4
1984	47.5	36.2	33.8	48.3	-	51.3	49.1	39.8
1985	48.0	36.9	32.7	46.6	-	51.7	49.8	39.9
1986	47.5	37.4	32.8	45.3	-	51.1	50.4	40.0
1987	46.1	37.2	33.2	43.2	-	50.3	49.8	39.6
1988	45.4	36.3	32.4	41.0	-	49.9	50.4	38.8
1989	45.8	36.2	31.4	40.4	-	48.7	51.5	38.5
1990	48.8	37.2	31.6	41.5	-	49.4	52.9	39.4
1991	52.3	38.0	31.6	43.2	46.1	50.5	54.0	40.9
1992	53.3	38.6	32.7	45.2	47.3	52.0	55.4	41.9
1993	52.2	38.1	34.5	45.3	48.3	55.0	56.4	42.3
1994	49.7	37.1	35.0	44.6	47.9	54.2	53.5	41.5
1995	48.5	37.1	36.0	44.1	54.8	54.4	52.5	42.2
1996	46.6	36.6	36.7	42.2	49.3	54.5	52.5	41.3
1997	44.3	35.4	35.7	40.6	48.3	54.1	50.2	40.0
1998	44.8	34.6	42.5	39.5	48.1	52.7	49.3	40.5
1999	42.7	34.2	38.6	38.8	48.2	52.6	48.2	39.4
2000	41.1	33.9	39.0	36.6	45.1	51.6	46.1	38.5
2001	42.0	35.0	38.6	39.9	47.5	51.6	48.0	39.7
2002	41.2	35.9	38.8	40.9	48.0	52.6	47.4	40.3
2003	41.2	36.3	38.4	42.4	48.4	53.2	48.3	40.6
2004	39.9	36.0	37.0	43.1	47.2	53.3	47.8	40.0
2005	39.3	36.2	38.4	44.0	46.9	53.4	48.1	40.4
2006	39.4	36.0	36.2	44.3	45.3	52.7	48.7	39.8
2007	39.4	36.8	35.9	44.1	43.5	52.4	47.9	39.9
2008	39.8	39.0	37.2	47.4	43.8	52.9	48.8	41.6
2009	44.1	42.2	42.0	51.2	47.5	56.2	51.8	45.2
2010	43.8	42.3	40.7	51.0	46.7	56.2	50.6	44.8

Source: *OECD Economic Outlook*, No. 89 (May 2011).

Table 54

G-7 general government financial balances

National Accounts basis

Year	Canada	United States	Japan	United Kingdom	Germany	France	Italy	G-7 average
				(per cent of GDP)				
1970	-0.4	-2.1	1.7	3.0	-	0.7	-3.2	-0.7
1971	-1.0	-2.8	1.2	1.7	-	0.5	-4.7	-1.5
1972	-1.0	-1.4	-0.1	-1.9	-	0.5	-6.9	-1.5
1973	0.6	-0.3	0.6	-4.2	-	0.5	-6.4	-0.9
1974	1.1	-1.1	0.4	-4.1	-	0.2	-6.3	-1.4
1975	-3.5	-5.3	-2.9	-5.2	-	-1.8	-10.3	-4.9
1976	-2.8	-3.4	-3.9	-5.3	-	-0.6	-7.9	-3.8
1977	-4.1	-2.3	-4.0	-3.8	-	-0.6	-7.0	-3.0
1978	-4.8	-1.4	-5.8	-5.0	-	-1.6	-8.5	-3.3
1979	-3.4	-1.0	-5.0	-4.1	-	-0.2	-8.3	-2.7
1980	-4.1	-2.7	-4.7	-3.7	-	-0.1	-7.0	-3.3
1981	-2.8	-2.3	-4.1	-5.0	-	-2.2	-10.9	-3.7
1982	-7.0	-5.0	-4.0	-3.0	-	-2.8	-10.0	-5.0
1983	-8.2	-5.7	-4.2	-3.9	-	-2.5	-10.1	-5.5
1984	-7.8	-4.8	-2.8	-4.1	-	-2.8	-11.5	-4.9
1985	-8.6	-5.1	-1.4	-3.2	-	-3.0	-12.4	-4.9
1986	-7.1	-5.3	-1.4	-3.0	-	-3.2	-11.9	-4.9
1987	-5.4	-4.4	-0.4	-2.1	-	-2.1	-11.5	-3.9
1988	-4.3	-3.7	0.5	-0.1	-	-2.6	-11.0	-3.1
1989	-4.6	-3.3	1.3	0.2	-	-1.8	-11.4	-2.7
1990	-5.8	-4.3	2.0	-2.0	-	-2.4	-11.4	-3.4
1991	-8.4	-5.0	1.8	-3.4	-2.8	-2.9	-11.4	-3.9
1992	-9.1	-5.9	0.6	-6.5	-2.5	-4.5	-10.4	-4.7
1993	-8.7	-5.1	-2.5	-8.0	-3.0	-6.4	-10.1	-5.2
1994	-6.7	-3.7	-3.8	-6.8	-2.3	-5.5	-9.1	-4.4
1995	-5.3	-3.3	-4.7	-5.8	-9.7	-5.5	-7.4	-5.0
1996	-2.8	-2.3	-5.1	-4.2	-3.3	-4.0	-7.0	-3.5
1997	0.2	-0.9	-4.0	-2.2	-2.6	-3.3	-2.7	-2.0
1998	0.1	0.3	-11.2	-0.1	-2.2	-2.6	-3.1	-2.3
1999	1.6	0.7	-7.4	0.9	-1.5	-1.8	-1.8	-1.1
2000	2.9	1.5	-7.6	3.7	1.3	-1.5	-0.9	-0.1
2001	0.7	-0.6	-6.3	0.6	-2.8	-1.6	-3.1	-1.8
2002	-0.1	-4.0	-8.0	-2.0	-3.6	-3.2	-3.0	-4.1
2003	-0.1	-5.0	-7.9	-3.7	-4.0	-4.1	-3.5	-4.8
2004	0.9	-4.4	-6.2	-3.6	-3.8	-3.6	-3.6	-4.2
2005	1.5	-3.3	-6.7	-3.3	-3.3	-3.0	-4.4	-3.6
2006	1.6	-2.2	-1.6	-2.7	-1.6	-2.3	-3.3	-2.0
2007	1.4	-2.9	-2.4	-2.8	0.3	-2.7	-1.5	-2.2
2008	0.0	-6.3	-2.2	-4.8	0.1	-3.3	-2.7	-4.2
2009	-5.5	-11.3	-8.7	-10.8	-3.0	-7.5	-5.3	-9.1
2010	-5.5	-10.6	-8.1	-10.3	-3.3	-7.0	-4.5	-8.6

Source: *OECD Economic Outlook,* No. 89 (May 2011).

Table 55

G-7 general government net financial liabilities

National Accounts basis

Year	Canada	United States	Japan	United Kingdom	Germany	France	Italy	G-7 average
				(per cent of GDP)				
1970	12.7	33.3	-6.5	47.2	-	0.8	31.4	24.3
1971	11.5	33.6	-7.2	46.3	-	1.0	35.3	24.4
1972	10.5	31.9	-6.3	41.4	-	2.1	40.3	23.5
1973	7.9	28.6	-5.9	38.0	-	1.1	41.6	21.3
1974	5.7	27.6	-5.1	34.6	-	0.2	39.0	20.2
1975	8.7	30.6	-1.7	32.8	-	0.9	47.6	22.9
1976	9.6	30.9	2.6	32.1	-	-0.6	48.3	23.8
1977	10.5	29.7	6.4	36.7	-	-1.2	48.0	24.2
1978	12.3	27.7	12.6	32.6	-	0.0	50.1	24.2
1979	13.7	25.4	16.4	29.2	-	-1.7	49.1	23.2
1980	14.5	25.6	15.5	29.8	-	-4.3	45.6	22.6
1981	13.5	25.4	19.2	23.9	-	-0.2	49.5	23.3
1982	19.1	29.5	23.5	29.5	-	1.6	53.2	27.4
1983	25.6	33.0	28.3	30.0	-	3.9	62.8	31.4
1984	29.6	34.2	30.5	25.3	-	6.7	66.5	32.9
1985	35.3	37.3	30.8	26.0	-	9.5	73.0	35.6
1986	39.6	40.8	33.0	26.0	-	12.2	77.7	38.6
1987	39.2	43.0	26.9	6.6	-	13.0	82.3	37.3
1988	38.1	44.1	22.4	-0.1	-	14.7	85.1	36.7
1989	41.1	44.2	15.7	-5.0	-	15.3	79.7	34.8
1990	43.7	45.4	13.4	-3.6	-	17.1	82.5	35.4
1991	50.5	49.1	11.7	-1.4	8.5	18.4	86.2	33.3
1992	59.1	52.5	13.8	6.7	14.9	20.0	93.2	36.9
1993	64.2	54.9	17.1	17.4	18.3	26.8	100.5	40.8
1994	67.9	54.4	19.6	19.7	19.1	29.7	104.5	41.9
1995	70.7	53.8	23.8	26.3	29.7	37.5	99.0	43.2
1996	70.0	51.9	29.2	27.9	32.7	41.8	104.5	44.2
1997	64.7	48.8	34.8	30.6	32.4	42.3	104.6	43.8
1998	60.8	44.9	46.2	32.6	36.2	40.5	107.0	43.9
1999	55.8	40.2	53.8	29.0	34.7	33.5	101.1	41.4
2000	46.2	35.3	60.4	26.8	33.9	35.1	95.6	39.3
2001	44.3	34.6	66.3	23.2	36.2	36.7	96.3	39.7
2002	42.6	37.2	72.6	23.7	40.3	41.8	95.7	42.1
2003	38.7	40.5	76.5	23.9	43.1	44.2	92.7	44.1
2004	35.2	42.1	82.7	25.9	47.2	45.3	92.5	45.9
2005	31.0	42.5	84.6	27.1	49.3	43.2	93.8	46.2
2006	26.3	41.7	84.3	27.5	47.4	37.2	90.7	44.9
2007	22.9	42.6	81.5	28.5	42.2	34.8	87.1	44.4
2008	22.4	48.2	96.5	33.0	43.9	42.7	89.9	50.3
2009	28.4	59.8	110.0	44.0	47.9	49.3	100.5	60.1
2010	30.4	67.3	116.3	56.3	50.1	56.6	99.1	66.2

Source: *OECD Economic Outlook*, No. 89 (May 2011).

Table 56

G-7 general government gross financial liabilities

National Accounts basis

Year	Canada	United States	Japan	United Kingdom	Germany	France	Italy	G-7 average
				(per cent of GDP)				
1970	54.3	46.4	11.2	69.5	-	40.4	55.2	43.7
1971	55.3	47.0	12.5	71.9	-	37.9	59.5	44.6
1972	53.5	45.4	16.6	63.2	-	35.5	65.9	43.6
1973	48.0	42.6	16.1	58.3	-	32.6	70.4	41.4
1974	45.8	41.4	12.7	54.5	-	30.6	70.0	39.7
1975	45.2	44.6	20.1	53.8	-	30.9	82.4	43.4
1976	43.6	44.8	27.0	51.8	-	29.3	82.1	44.2
1977	45.1	43.6	32.4	58.3	-	28.8	85.7	45.4
1978	48.0	42.5	41.0	51.9	-	29.9	90.9	46.4
1979	45.3	41.2	45.5	49.4	-	30.1	89.5	46.1
1980	45.6	41.9	47.1	48.7	-	29.7	86.8	46.5
1981	46.9	41.1	52.8	46.6	-	29.0	91.2	47.3
1982	52.7	45.9	58.8	50.8	-	32.9	95.0	52.2
1983	58.4	48.9	65.0	50.5	-	33.9	79.5	53.8
1984	61.7	50.6	67.0	50.6	-	35.6	82.4	55.5
1985	66.9	55.4	69.4	49.2	-	37.1	88.9	59.3
1986	71.0	58.9	75.1	48.6	-	37.9	92.8	62.6
1987	71.4	60.6	76.8	47.8	-	39.2	96.5	64.2
1988	71.1	61.3	72.8	41.8	-	39.0	98.8	63.5
1989	72.2	61.6	66.7	36.0	-	38.9	95.5	61.7
1990	75.2	63.1	63.9	32.3	-	38.6	97.6	62.0
1991	82.3	67.9	63.2	32.8	37.7	39.5	100.4	57.3
1992	90.2	70.3	67.6	39.0	40.8	43.9	106.9	60.8
1993	96.3	71.9	73.9	48.7	46.2	51.0	116.3	64.9
1994	98.0	71.1	79.0	46.8	46.5	60.2	120.9	66.4
1995	101.6	70.7	86.2	51.6	55.7	62.7	122.5	68.3
1996	101.7	69.9	93.8	51.2	58.8	66.3	128.9	70.0
1997	96.3	67.4	100.5	52.0	60.3	68.8	130.3	70.1
1998	95.2	64.2	113.2	52.5	62.2	70.3	132.6	70.7
1999	91.4	60.5	127.0	47.4	61.5	66.8	126.4	69.6
2000	82.1	54.5	135.4	45.1	60.4	65.6	121.6	67.0
2001	82.7	54.4	143.7	40.4	59.8	64.3	120.8	67.7
2002	80.6	56.8	152.3	40.8	62.2	67.3	119.4	70.1
2003	76.6	60.2	158.0	41.5	65.4	71.4	116.8	72.6
2004	72.6	61.2	165.5	43.8	68.8	73.9	117.3	74.5
2005	71.6	61.4	175.3	46.4	71.2	75.7	120.0	76.5
2006	70.3	60.8	172.1	46.1	69.3	70.9	117.4	74.9
2007	66.5	62.0	167.0	47.2	65.3	72.3	112.8	74.4
2008	71.3	71.0	174.1	57.0	69.3	77.8	115.2	81.2
2009	83.4	84.3	194.1	72.4	76.4	89.2	127.8	93.7
2010	84.2	93.6	199.7	82.4	87.0	94.1	126.8	100.3

Source: *OECD Economic Outlook*, No. 89 (May 2011).

Advisory Committee

on Senior Level Retention *and* Compensation

Third Report: December 2000

Prepared for the President of the Treasury Board

Advisory Committee

on Senior Level Retention *and* Compensation

Third Report: December 2000

Prepared for the President of the Treasury Board

Copies may be obtained from the Distribution Centre
Treasury Board of Canada
Ottawa, Ontario K1A 0R5

Tel: (613) 995-2855

This publication is available via the TBS web site
and HR CONNEXIONS.

To access these sites, type one of the following in the address section of your World Wide Web browser:

TBS website:
http://www.tbs-sct.gc.ca/

HR CONNEXIONS:
http://www.tbs-sct.gc.ca/hr_connexions_rh/

Third Report of the Advisory Committee on Senior Level Retention and Compensation

ISBN No.: 0-662-65319-X

Catalogue No.: BT43-104/2000

Table of Contents

Appendices

Illustrations

Preface

The Advisory Committee on Senior Level Retention and Compensation was established in 1997 with a three year mandate to provide the Treasury Board President with independent advice about senior-level human resource strategies and policies for the federal Public Service. The Committee's mandate identified three priorities:

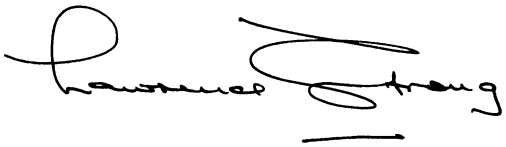
(i) long-term human resource strategies;
(ii) compensation strategies and principles; and
(iii) specific aspects of human resource management, including rates of pay and terms and conditions of employment.

The Committee's First Report raised serious concerns about the federal Public Service of the future and made numerous proposals for dealing with what we judged to be the most pressing issues: the Public Service vision going forward, the need for cultural and human resource renewal, and compensation. The Second Report outlined progress in implementing the earlier recommendations, made specific proposals regarding compensation for the Chief Executive Officers of Crown corporations and reaffirmed the key challenge of Public Service renewal.

While this Third Report makes some further specific proposals on compensation, our major focus is on long-term human resource strategy. It is the Committee's view that the government faces a human capital crisis. As the Public Service talent pool diminishes over the next decade due to the retirement of many long-service public servants, the government must seek to replace them in an increasingly competitive labour market. This demands above all a revitalised workplace which offers challenging work. Ironically, though, the very forces creating the crisis also provide the government with a truly unique opportunity to renew the Public Service, thereby ensuring its continued meaningful contribution to a better quality of life for all Canadians. Achieving this renewal will require some bold actions.

Since the mandate of this Committee concludes with this report, we have one final comment about the possible future role of a similar committee. At the very least, we believe that an independent group should be established for a specific term to make annual recommendations on compensation. This removes from public servants the potential conflict of interest associated with making recommendations that affect their own pay. For simplicity, we have made the assumption of a future committee when writing this report.

Yours sincerely,



Lawrence F. Strong

Long-Term Human Resource Strategy

The Process for Developing Human Resource Strategy

Arguably, the most challenging aspect of the Advisory Committee's mandate has been to make recommendations with respect to the long-term human resource strategy for the senior level Public Service. To do this meaningfully requires a clear understanding of the overall vision of the Public Service as well as its values, the desired mindset of its people, the desired future culture of the organization and the business plans of the government.

This knowledge, supplemented by an understanding of external trends and an objective scrutiny of the Public Service itself, enables the creation of a human resource strategy which is aligned with what the government wants to achieve.

The strategy will establish a human resource vision, set objectives and then identify a series of strategic initiatives designed to meet the objectives and deliver the vision. These initiatives will drive specific implementation plans and the allocation of resources. The suggested process for developing a long-term human resource strategy is shown in the illustration below.

Arguably, the most challenging aspect of the Advisory Committee's mandate has been to make recommendations with respect to the long-term human resource strategy for the senior level Public Service.

The Suggested Process for Developing Human Resource Strategy

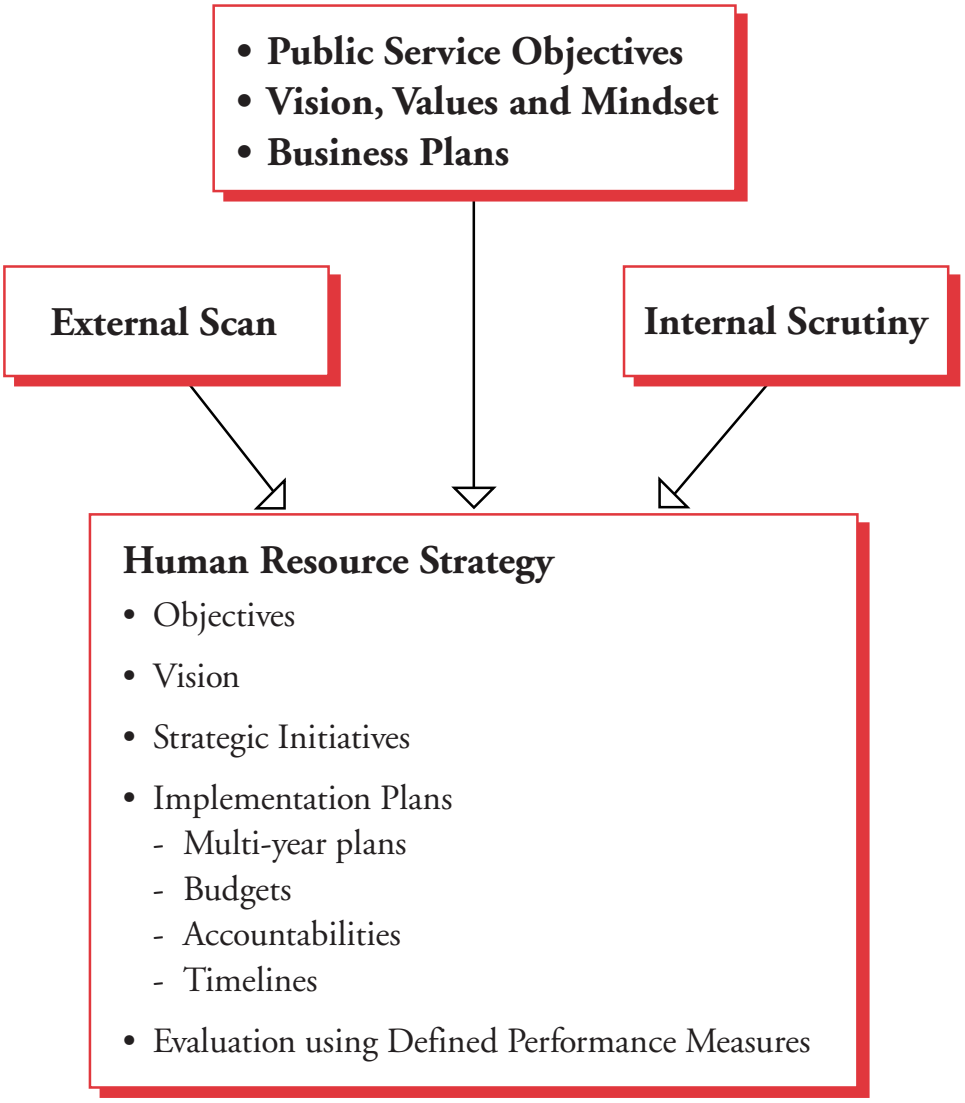


Illustration 1

Public Service Purpose, Values, Vision and Mindset

The Committee in both its First and Second Reports discussed the importance of articulating a vision for the Public Service entering the new millennium. The rationale behind this recommendation was quite simple. Following the fundamental changes in government operation that took place in the 1990s, there was a need to:

(i) ensure clarity and consistency of purpose going forward;

(ii) inspire and re-energize the leadership of the federal Public Service; and

(iii) communicate to outsiders what the federal Public Service is about and to enlist their support.

As noted in the previous section, however, such a statement of vision and values is also a necessary pre-cursor to a long-term human resource strategy.

The Seventh Annual Report to the Prime Minister on the Public Service of Canada by Mel Cappe, Clerk of the Privy Council and Secretary to the Cabinet, provides the most comprehensive view seen by the Committee of where the federal Public Service is going in the future. Using this, coupled with a Treasury Board publication entitled *Results for Canadians – A Management Framework for the Government of Canada*, the Committee has prepared the following summary to serve as a building block for the human resource strategy discussion which follows.

The purpose of the federal Public Service is:

(i) to help ministers under law and the Constitution to serve the public interest;

(ii) to provide high quality, impartial advice to the Government on policy issues; and

(iii) to design and deliver programmes and services to Canadians.

Despite changes in many aspects of how the government does business, the four core values (respect for democracy, professional values, ethical values and people values) have remained unchanged and will continue to serve as the bedrock of the organization into the future.

At the heart of striving to achieve these objectives are a set of four core values embraced by the entire federal Public Service. Despite changes in many aspects of how the government does business, these values have remained unchanged and will continue to serve as the bedrock of the organization into the future.

Respect for democracy recognizes that authority rests with democratically elected officials who are accountable to Parliament, and thereby to the Canadian people. A well-performing public service takes its democratic responsibilities seriously, constantly providing ministers, Parliament and the public with full and accurate information on the results of its work.

Professional values reinforce an unwavering commitment to excellence, merit and, above all, to objective and impartial advice to the Government and service to Canadians.

Ethical values (integrity, trust and honesty) are the personal cornerstone of good governance and democracy. They require public servants to support the common good at all times and recognize the need for openness, transparency and accountability in what they do and how they do it.

People values include courage, decency, responsibility and humanity. In a well-performing workplace they show themselves in respect, civility, fairness and caring. Values-driven organizations support learning and are led through participation, teamwork, openness, communication and a respect for diversity.

These values, which it can be argued, help define Canadian society, influence how the Public Service behaves as well as the actions it takes.

The emerging vision of the Public Service of the future is an exciting one. The following examples of statements have been developed by the Committee from existing government documents and provide an excellent flavour for this:

- be known around the world as the government most connected to its citizens;
- a citizen-focused Public Service concentrating on outcomes and accounting for results;
- a Public Service which promotes value for money in the use of public funds;

- a Public Service which develops innovative policies that contribute to Canada's global competitiveness;
- a Public Service which has the respect of the citizens it serves.

The leadership of the federal Public Service plays a critical role in the delivery of this vision, and has already identified the changes in culture that will be required to achieve the revitalized operating climate necessary for success. These changes in mindset and behaviour are summarized in Illustration 2.

The emerging vision of the Public Service of the future is an exciting one. The leadership of the federal Public Service plays a critical role in the delivery of this vision, and has already identified the changes in culture that will be required to achieve the revitalized operating climate necessary for success.

Changing Public Service Mindset*

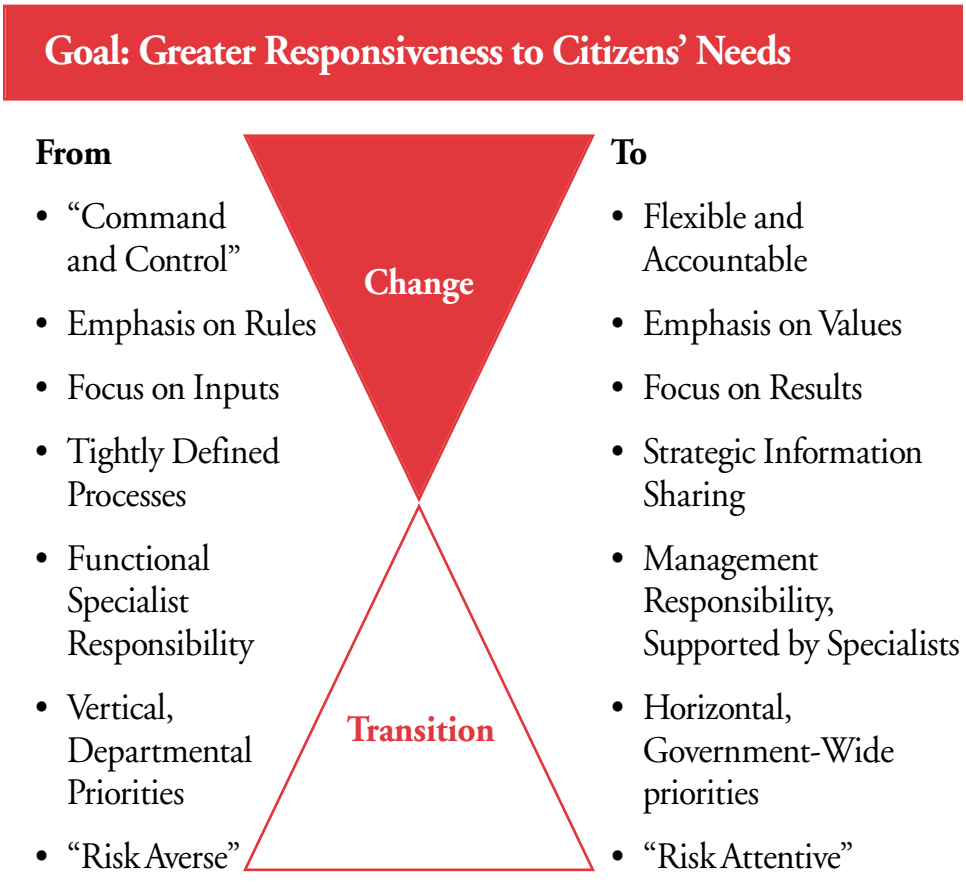


Illustration 2

* Source: Extracted from a presentation made to the Committee by the Public Service Commission.

External Scan

As noted earlier, human resource strategy must reflect not just the business plans of the organization but also the external realities it faces. These are discussed to some degree in the sections which follow but there is one influence which the Committee believes has particular relevance to all aspects of future strategy.

The explosion in technology and the new economics of information will impact the federal Public Service significantly over the next decade.

The explosion in technology and the new economics of information will impact the federal Public Service significantly over the next decade. Specifically:

- they are stimulating, and assisting in, the development of 'electronic government' (e-government);
- traditional concepts of time and distance are collapsing; and
- as connectivity increases, there will be an ever-widening availability of detailed information.

Hierarchies will flatten and decision making will be pushed down lower than in the past, thanks to the ready availability of information.

One consequence of these trends is that the multi-layer organization operating vertically, with span of control (the number of direct reports) primarily a function of the limitations surrounding information flow, will disappear. Hierarchies will flatten and decision making will be pushed down lower than in the past, thanks to the ready availability of information. Management's role in information sharing and decision making will diminish, while the need for steering and coaching will increase.

Internal Scrutiny

Again, most of the Committee's comments on the current strengths and weaknesses of the Public Service are incorporated into later sections which discuss specific areas of human resource management. There is, however, one which is overarching and we believe of critical importance.

In its First Report, the Committee identified that responsibilities for managing human resources were organized in an unnecessarily complex way, a view shared by the Auditor General in his April 2000 report. (See Chapter 9 of that report). According to the Auditor General this has led to inefficiency and lack of clear accountability in the current framework for managing human resources.

The Role of Human Resource Strategy in Delivering the Public Service Vision

The Advisory Committee mandate covers a very broad range of senior level public servants. As a consequence, the Committee has segregated this constituency into three:

(i) the deputy minister and executive community;

(ii) CEOs of Crown corporations; and

(iii) other Governor in Council (GIC) appointees.

The lack of homogeneity amongst this total group, coupled with an incredibly complex framework for managing human resources, makes it very challenging to formulate an integrated and coherent human resource strategy. Thus, this Report focuses primarily on human resource strategy for the executive and deputy minister community where considerable progress has been made since our First Report. Once this human resource strategy is complete, its relevance beyond compensation to the other two groups can be established. In the case of the Crown corporations, this may be restricted to sharing of best practices, since each Crown presumably has in place its own human resource strategy. In the case of the other GIC appointees, it may well be possible to adapt some of the initiatives, although we are once again dealing with many independent organizations – commissions and tribunals – each of which has different circumstances and needs, and will likely need to be treated separately.

This Report focuses primarily on human resource strategy for the executive and deputy minister community where considerable progress has been made since our First Report.

The Committee believes that the role of human resources is best described in such statements as:

- helping the federal Public Service meet its goals;
- ensuring the right calibre of leadership to achieve the Public Service vision; and
- improving the organizational effectiveness of the Public Service through people.

What is critical is that these statements are results oriented rather than activity focussed. The Committee believes that human resources should be integrated into the implementation of the government's mainstream business plans to help achieve the desired results. In the absence of a focus on results, there is the potential for some human resource activities to become ends in themselves.

The Committee believes that human resources should be integrated into the implementation of the government's mainstream business plans to help achieve the desired results.

The Clerk of the Privy Council and Secretary to the Cabinet is also the Head of the Public Service and once again it is the Clerk's Seventh Annual Report that has identified a number of the human resource goals, if the Public Service is to achieve its objectives in the new millennium. These include:

- creating a workforce fully representative of the population it serves;
- becoming a learning organization focussed on continuous improvement;
- ensuring decision making authority is located at the right level to achieve results;
- attracting and retaining Canada's best and brightest minds to ensure strengthened policy capacity;
- becoming an employer of choice;
- removing unnecessary bureaucracy from work processes with a focus on outcomes and accounting for results; and
- creating a culture which is innovative and open to new ideas.

The Committee wholeheartedly supports these ambitions and is particularly pleased to note the following paragraph in the Seventh Annual Report:

> *"As Head of the Public Service, it is my responsibility to set out the direction for the future, and my challenge is to motivate and inspire public servants in that direction".*

The federal Public Service, like many other organizations, is operating in a complex, ever changing and uncertain environment.

Recommended Strategic Initiatives

While developing the strategic initiatives must necessarily be done by the current leadership, the Committee, using a mixture of current Public Service initiatives plus its own input, wishes to suggest some areas for inclusion.

The federal Public Service, like many other organizations, is operating in a complex, ever changing and uncertain environment. However, Human Resource's basic responsibilities remain unchanged – planning, staffing, rewarding, developing and retaining the human capital of the organization. Although these

are identified as discrete, there is a high degree of interdependence among these responsibilities. The Committee believes that the future strategy must, at a minimum, set direction for each of these areas. General comments on each follow.

Planning

It is understandable that during the downsizing of the nineties, little attention was paid to workforce planning. However, the Committee sees it as a critical requirement over the next decade. It will require collecting a vast amount of data on the skills and competencies of the current management cadre as well as identifying the skills and competencies which will be required over the next decade. And make no mistake, these will be different from the past. Finally, there is the need to identify the impact of the expected retirements on the experience base.

It is understandable that during the downsizing of the nineties, little attention was paid to workforce planning. However, the Committee sees it as a critical requirement over the next decade.

Done thoroughly, workforce planning can be time consuming, even tedious. And it is all too easy to become embroiled in a debate about definitions. While the core Public Service is not quite at the point of having a system to roll out, there are pockets of best practice that exist today and, with commitment, the necessary tools can be quickly adopted and implemented.

The Committee therefore suggests that the planning initiative needs:

- an agreed definition of future skills and competencies to use throughout the core Public Service;
- a regime for evaluation of all incumbents;
- a Human Resource Information System to ensure that the information can be effectively collected and used; and
- agreed future needs.

The senior level federal Public Service faces a human capital crisis as the demographics of today's managers suggest that retirements alone will create a significant resource gap.

Staffing

The senior level federal Public Service faces a human capital crisis as the demographics of today's managers suggest that retirements alone will create a significant resource gap. By the year 2010, just over 80% of today's executive community will be eligible to retire without actuarial reduction of their pension.

Cumulative Executive Retirement Potential 1999 to 2010

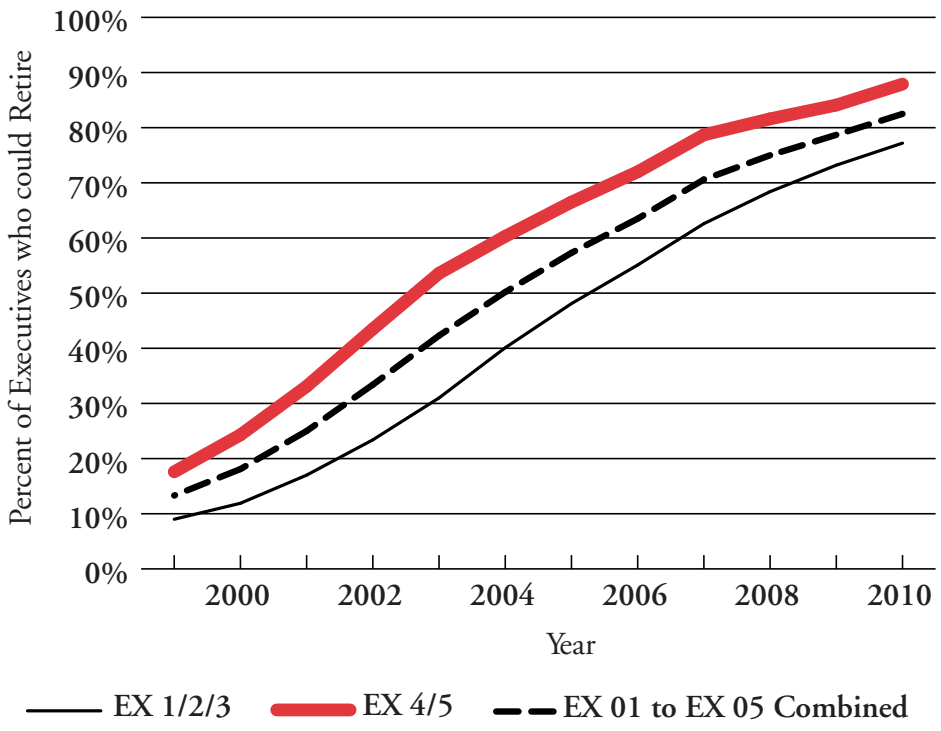
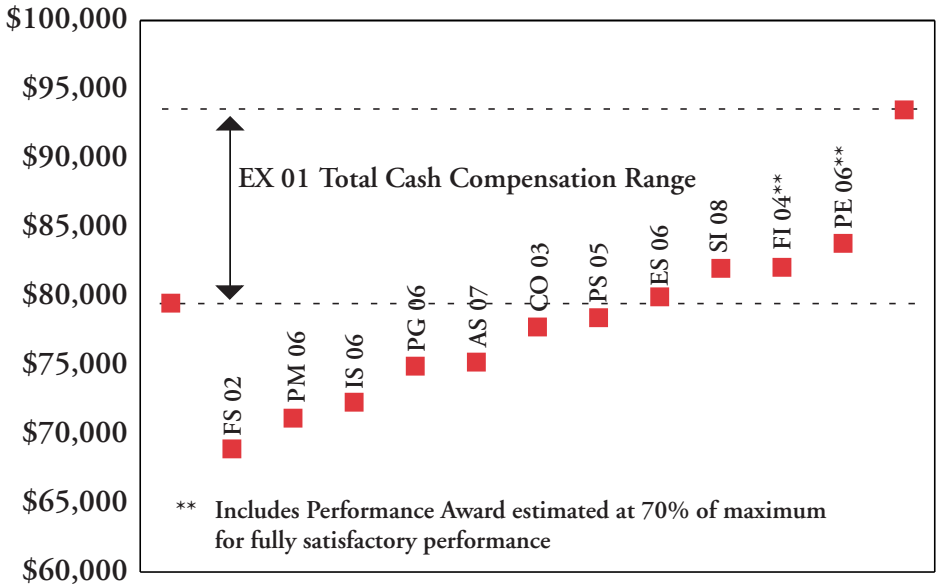


Illustration 3

To aggravate matters, the traditional 'feeder' groups for EX 01 positions have an identical demographic profile. Further, even if that were not so, they have little financial incentive currently to seek promotion. The illustration below shows that

the total cash compensation for several of these feeder groups falls within the current EX 01 range. In addition, some also have access to rewards not available to executives, such as pay for overtime, longer vacation leaves, and bilingualism bonuses. Salary ranges plus at risk pay for the EX 01 level must, we feel, be sufficiently higher than cash compensation of traditional feeder groups to offer an inducement to work towards promotion. This is addressed later in the report under compensation in the context of ensuring internal equity.

Estimated Total Cash Compensation for Feeder Groups versus EX 01



Traditional Feeder Groups to EX 01 Positions – Key to Occupational Groups

AS	Administrative Services	PE	Personnel Administration
CO	Commerce Officer	PG	Purchasing and Supply
ES	Economics, Sociology and Statistics	PM	Program Administration
FI	Financial Management	PS	Psychology
FS	Foreign Service	SI	Social Science
IS	Information Services		

Illustration 4

As the federal Public Service moves to address its resource shortages, it can expect to find itself in a talent war with aggressive private sector and broader public sector competition.

Clearly, given the current demographics of the executive cadre and the traditional feeder groups, there needs to be a major recruitment initiative. However, it is important to recognize that the environment for hiring in the years ahead will be very different from the seventies and eighties when there was a labour surplus. In the emerging knowledge economy, people – talented people – will become an increasingly vital resource. Consequently, as the federal Public Service moves to address its resource shortages, it can expect to find itself in a talent war with aggressive private sector and broader public sector competition.

The Committee again wishes to draw to the government's attention that the most significant under representation amongst the management cadre in purely numerical terms is younger Canadians.

It is no surprise, then, that staffing – recruiting – is one of the three areas in which the Committee of Senior Officials (COSO), a committee of deputy ministers, is currently drawing up plans for the future. In addition to providing the skills and competencies required to meet the goals of the federal Public Service, the Clerk of the Privy Council stresses the importance of ensuring that the work-force is representative of all Canadians and specific reference is made to focussing on women, visible minorities, people with disabilities and aboriginal peoples. Clearly, these initiatives are critical and have been comprehensively reviewed with respect to visible minorities by the Task Force on the Participation of Visible Minorities in the Federal Public Service. (See report entitled *Embracing Change in the Federal Public Service – March 2000*). However, the Committee again wishes to draw to the government's attention that the most significant under-representation amongst the management cadre in purely numerical terms is younger Canadians. This imbalance must also be addressed as part of the strategy.

Age Distribution of Public Service Senior Management vs Canadian Labour Force Senior Management (1996 Census)

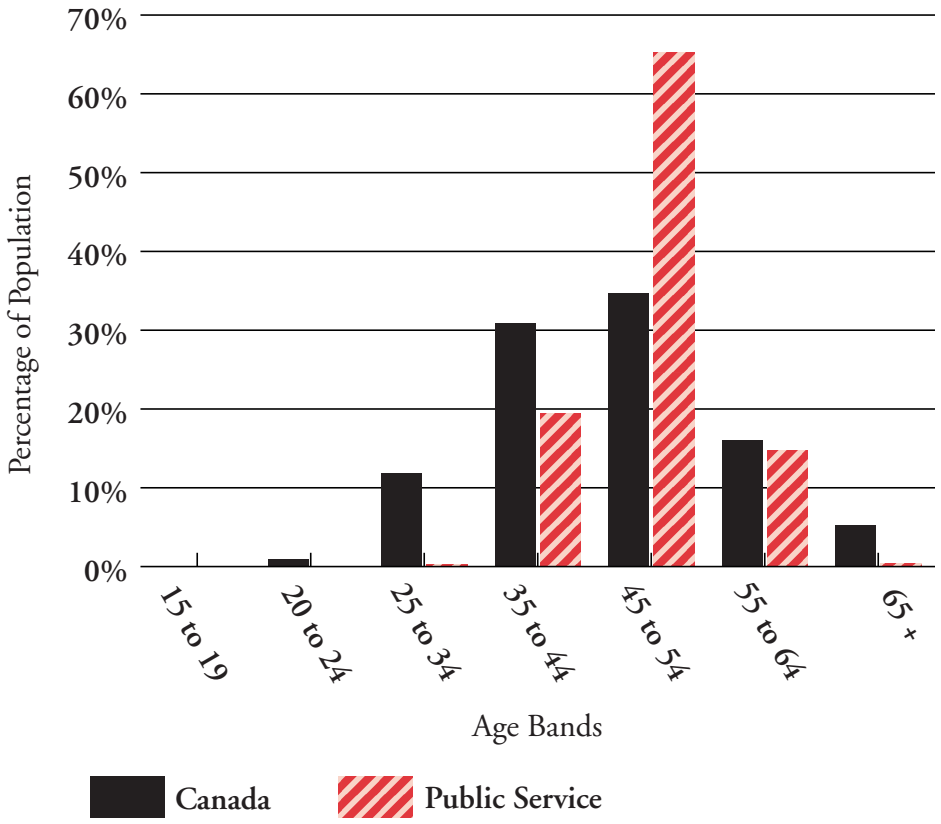


Illustration 5

The Clerk's Seventh Annual Report reiterated that merit will remain central to the Public Service recruitment strategy and that the guardian of merit will remain the Public Service Commission. This is obviously sound. However, the Committee believes that the role of the Commission in staffing operations should be reconsidered. Users consider the existing system complex and inefficient, a view with which the Committee concurs, and there appears to be an inherent conflict between the role of choosing candidates and involvement in the audit and recourse processes. And finally there needs to be a direct link between the authority to choose/hire managers and the accountability for their performance.

There needs to be a direct link between the authority to choose/hire managers and the accountability for their performance.

One of the challenges facing the government is how to become an employer of choice. Interestingly, the Committee does not believe the key issue is about higher pay, although salaries must always be fair and reasonable. Nor is it about job security as part of a massive bureaucracy. It's about challenging work; it's about learning opportunities; it's about the ability to make a difference through their work and it's about Canadians respecting the job done. The government must deliver or people will simply choose to work elsewhere.

Clearly, one of the challenges facing the government is how to become an employer of choice in an environment where competition for talent is increasing and it is here that understanding the attitudes and aspirations of younger Canadians is so critical. Interestingly, the Committee does not believe the key issue is about higher pay, although salaries must always be fair and reasonable. Nor is it about job security as part of a massive bureaucracy. It's about challenging work; it's about learning opportunities; it's about the ability to make a difference through their work and it's about Canadians respecting the job done. Of course, there's nothing new about these thoughts. What is new is that the government must deliver or people will simply choose to work elsewhere. Not only will the next decade be characterized by a shortage of talented managers, but it is estimated that 95% of all professional and management jobs will be posted on the Web. This means that everyone will have easy access to job opportunities and will have detailed information about these jobs. As a consequence, people will be much better informed about their marketability. This will inevitably result in much greater job mobility.

The Committee also believes that the government must become more aggressive at middle and upper-level recruiting into the Public Service. This represents a significant change from the past where promotions have largely been reserved for internal candidates. This change is driven primarily by the need for different skills and competencies than exist in the Public Service today.

In the increasingly complex and rapidly changing environment, the government must access private sector resources more effectively. The Committee therefore recommends that the government find ways to promote two to three year exchanges into the Public Service from the private and broader public sectors.

The Committee's final recommendation in the area of staffing is that a formal policy be established for dealing with poor performers. No matter how many safeguards are built into the recruitment process, there will be managers who fail to meet performance expectations. When taking action in such situations, a clear, fair and overt policy is needed to guide managers and human resource departments.

Rewarding

Compensation, primarily pay and benefits, is at the centre of the rewards strategy. Effective compensation strategy will help the Public Service:

- attract and retain appropriate talent;
- reward superior performers;
- motivate improved performance;
- reinforce core values;
- focus individuals on what they need to deliver.

The Committee's First Report identified key aspects of compensation strategy. First, the total compensation package for the executive and deputy minister cadre should be quite distinct from that offered to unionized employees. Second, this programme needs to support and reward the results and the behaviours necessary for the success of the Public Service. This alignment is critical as the federal government moves to a results oriented management approach. Third, the Committee believes it important to have in place to the greatest extent possible, processes which remove the year-to-year administration of senior level Public Service compensation from the political arena. Establishing clearly defined criteria for assessing market competitiveness and then maintaining appropriate compensation will go a long way to achieving this. Finally, the Committee believes that it will become increasingly important to ensure that there is a meaningful link between results and rewards.

Since compensation strategy is an important part of the Committee's mandate, more detailed recommendations are found in the second Chapter of this report.

Developing

The Committee believes that the development of effective leaders for the future is absolutely critical if the Public Service is to achieve its vision. As a consequence, we are again pleased to see that the Clerk has established a COSO Sub-Committee on learning and development, and that this Committee has completed its First Report in July 2000.

The Committee believes that the development of effective leaders for the future is absolutely critical if the Public Service is to achieve its vision.

Without judging the output from the Sub-Committee, we would make the following observations:

- the principle that managers are responsible for managing their own careers but with proper support from human resources is key;
- meaningful learning and development opportunities represent an important tool for attracting and retaining managers, as well as achieving desired results;
- the expected shortage of talent generally means that management development is mandatory;
- the scale and uniqueness of the Public Service, coupled with its desire for cultural change, reinforces the importance of having leading-edge management development programmes;
- development must focus on the future needs of the knowledge age;
- the goal of creating an organization which looks for best practice, celebrates its successes, and learns from its mistakes is an ambitious one. Whatever the Sub-Committee recommends must be supported by behavioural change at the top of the organization; and
- one of the building blocks of continuous improvement is measurement of outcomes. What to measure depends, of course, on what is important. In the area of human resources, and we suspect elsewhere, such measurement has not always been commonplace. We recommend that COSO agree on and define a common set of measures in human resources. Possible examples are cost per hire, turnover rate, time to fill jobs, days per manager invested in training and development, and so on.

The scale and uniqueness of the Public Service, coupled with its desire for cultural change, reinforces the importance of having leading-edge management development programmes.

Retaining

As the supply of talented people shrinks over the next decade, it is clearly wise to keep those people who are adding value today. As a result, work place well being and retention is the third area being studied by a sub-committee of deputy ministers.

As the supply of talented people shrinks over the next decade, it is clearly wise to keep those people who are adding value today.

Interestingly, there is considerable evidence to suggest that compensation or even opportunity elsewhere are not the major causes of people leaving any organization, although they often tip the scales in that direction. The reasons tend to be problems with one's boss, lack of career or development opportunities, and working conditions. This, in a general sense, was supported by last year's survey of federal public servants which resulted in the establishment of priorities of reducing harassment and discrimination, managing workload, ensuring fairness in the selection process and enhancing career development and learning. The Advisory Committee, looking forward, would add the need for greater flexibility in recognizing the needs of individual managers. We believe that this flexibility will be very important in attracting and retaining young managers.

In addition to these five generic areas of human resource strategy, the Committee recommends including at least two other initiatives, namely:

(i) clarifying accountabilities for human resource management; and

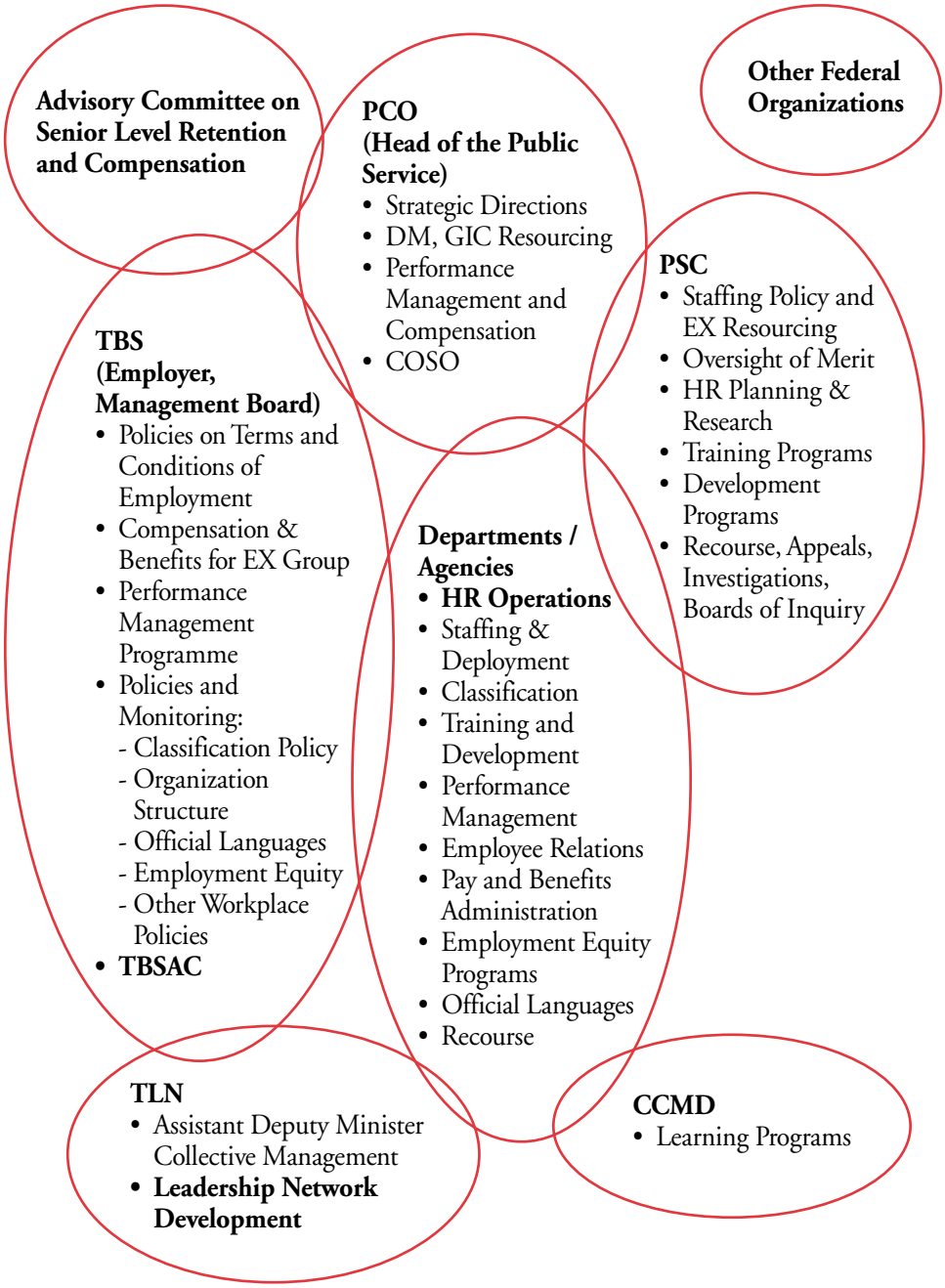
(ii) making it happen.

A discussion of each follows.

Clarifying Accountabilities

In its First Report, the Committee noted that "responsibilities for managing human resources appear to be organized in a way that is unnecessarily complex and administration seems to be overly burdensome. We suspect that one of the reasons behind this lies in the patchwork quilt of historical regulation that impacts human resource management in the public service." If anything, our concerns in this area have grown, as has our understanding of the challenges of making changes. The key players in the human resource management of senior levels form a complex picture.

Key Players in Human Resources Management of Senior Levels (DM, GIC, EX)



TBS: Treasury Board Secretariat

PSC: Public Service Commission

PCO: Privy Council Office

CCMD: Canadian Centre for Management Development

TLN: The Leadership Network

COSO: Committee of Senior Officials

TBSAC: Treasury Board Secretariat Advisory Committee

Illustration 6

To further underline our point, included as Appendix C is an excerpt from the Auditor General's April 2000 Report which provides a more formal review of the framework for all federal public servants.

It is the Committee's view that there is an urgent need for clear accountabilities, matching authorities and a general streamlining of human resource processes if the Public Service is to deliver on its ambitious goals. In this respect, we support the Auditor General's recommendation that the government address the long-standing structural and systemic issues immediately.

However, given that a fundamental review of these issues will inevitably take some time, the Committee also recommends that an interim exercise be undertaken by the government to clarify accountabilities and streamline processes to the greatest extent possible within the context of the current framework.

From a purely pragmatic viewpoint, we are pleased to note that the Head of the federal Public Service, the Clerk of the Privy Council, has assumed the responsibility for development of an overall, integrated human resource strategy for the Public Service. He has sensibly chosen to involve the Treasury Board Secretariat and the Committee of Senior Officials (COSO), and has established three teams to make recommendations in the areas of recruitment, workplace well-being and retention, and learning and development. Compensation strategy is the responsibility of the Treasury Board Secretariat and the Privy Council Office (PCO), and is being developed working primarily through our Committee. Providing everyone is committed to developing a long-term human resource strategy, this structure can work.

Making It Happen

Although the purpose and core values of the Public Service remain unchanged, it is increasingly clear that tomorrow's leaders will behave quite differently from the past. New skills and competencies will be required to become more citizen focused and results oriented. New mindsets will be needed to deliver the exciting vision which is emerging.

It is the Committee's view that there is an urgent need for clear accountabilities, matching authorities and a general streamlining of human resource processes if the Public Service is to deliver on its ambitious goals.

Although the purpose and core values of the Public Service remain unchanged, it is increasingly clear that tomorrow's leaders will behave quite differently from the past. New skills and competencies will be required to become more citizen focused and results oriented. New mindsets will be needed to deliver the exciting vision which is emerging.

Understanding where the Public Service wishes to be in ten years is the vital first step. Making it happen, driving the necessary changes through the organization, is a massive task given both its size and complexity as well as its historical culture. For this reason, the Committee recommends that the Clerk of the Privy Council consider requesting that COSO develop implementation plans to achieve the desired changes in operating climate, mindset and culture. Commitment from the top of the organization as well as "walking the talk" are critical to the success of "making it happen".

The opportunity that exists today is truly unique as the Public Service begins to staff itself with a new generation of managers replacing the many retirees expected over the next decade. New skills and competencies can be added, new flatter structures introduced with minimal threat and disruption and, above all, a new culture created.

Conclusion

Since the Advisory Committee began its work three years ago, considerable progress has been made in formulating an integrated and comprehensive human resource strategy for leading the Public Service into the new millennium. This work must be completed by the government and the new directions clearly agreed. The strategy will then guide the preparation of policies, programmes and implementation plans and will drive questions of resource allocation with respect to human resource management in the senior level federal Public Service. We also recommend that once the strategy is finished, it is widely communicated throughout the Public Service.

The opportunity that exists today is truly unique as the Public Service begins to staff itself with a new generation of managers, replacing the many retirees expected over the next decade. New skills and competencies can be added, new flatter structures introduced with minimal threat and disruption and, above all, a new culture created.

Our Committee has reaffirmed many times our belief in the importance of an effective and efficient Public Service to the well being of all Canadians. Now is the time to invest in the Public Service in terms of its human capital.

Compensation Strategies and Principles

In its Second Report, the Committee identified three discrete populations within the federal Public Service management cadre for purposes of setting compensation. These were:

- *the executive and deputy minister community;*
- *CEOs of Crown corporations: and*
- *other full time Governor in Council appointees.*

Detailed recommendations have been made with respect to cash compensation structures for all three, although the PCO is now leading a review of the remaining GIC positions to test the adequacy of the current structure as well as our proposals. This review will cover approximately 120 different jobs within some 70 organizations (see Appendix D) and will not be complete until early in 2001. The study will include updating the method for evaluating job responsibilities, conducting actual evaluations and then developing an appropriate compensation structure.

In our First Report, the Committee identified that compensation policy needs to be internally equitable, to be responsive to the economic and social environment, and to encourage and reward outstanding performance. Two critical building blocks are therefore:

- the system used to evaluate job responsibilities; and
- the process for external benchmarking.

The following sections make recommendations for addressing each of these.

System for Evaluation of Job Responsibilities

Earlier this year, Treasury Board Secretariat engaged KPMG to make recommendations as to the optimal job evaluation plan for the senior level federal Public Service. A summary of this report is included as Appendix E.

In order to have a basis for comparing plans, KPMG developed through consultation with senior public servants and academics, a list of characteristics and criteria of an ideal job evaluation plan. They also conducted a survey to identify the plans used to evaluate executive positions in other organizations including provincial public sectors, Crown corporations, a select number of private sector organizations in Canada and the public services of the United Kingdom, Australia and the United States.

The Advisory Committee recommends that the current Hay-based position evaluation plan, with the addition of a Working Conditions factor, be used for all senior level federal public servants.

The Advisory Committee recommends that the current Hay-based position evaluation plan, with the addition of a Working Conditions factor, be used for all senior level federal public servants. The reasoning behind this recommendation is as follows:

(i) the current executive group position evaluation plan essentially meets all the criteria established for an ideal plan, except for Working Conditions and up-to-date benchmarks;

(ii) Hay has well-established versions of the plan with a Working Conditions factor measuring physical effort, physical environment, sensory attention and mental stress;

(iii) adopting the Working Conditions factor ensures that the government meets the requirements of the Canadian Human Rights Act;

(iv) there is no other readily available job evaluation system that would do a better job than the Hay Plan;

(v) the benchmark positions can (and should) be updated.

The negative to this recommendation is the work involved in rewriting and evaluating over 4000 positions, especially when it is KPMG's view that it is unlikely to change the classification of the positions significantly. However, including Working Conditions is the right thing to do and the entire exercise,

which can be spread over time, can also be used to update the benchmark positions and to ensure that changes discussed elsewhere in this report are properly incorporated, including clarified accountability for human resource management.

KPMG also proposed that the Treasury Board Secretariat consider the collapse of the executive group into three classification levels. The Committee believes this has merit and should be studied further.

Process for Comparing Compensation Externally

Understanding where senior-level Public Service compensation stands in relation to external benchmarks is critical if the government is to have an appropriate compensation strategy. Over the past two years, the Committee's recommendations have focussed on restoring internal equity, introducing a new concept of " at risk" pay together with a new regime for performance management, and improving the competitiveness of cash compensation.

Understanding where senior-level Public Service compensation stands in relation to external benchmarks is critical if the government is to have an appropriate compensation strategy.

Over the course of the next decade, the competition for talented people will increase and will undoubtedly bring upward pressure on compensation. As a result, commencing in the fall of the year 2000, the Committee recommends:

Over the course of the next decade, the competition for talented people will increase and will undoubtedly bring upward pressure on compensation.

(i) the government survey cash compensation amongst the private sector and the broader public sector annually;

(ii) given our earlier recommendations to adopt the Hay job evaluation plan, one of the sources of compensation data should be Hay although at least one other survey should also be used as a cross-check;

(iii) prior to April 1 of each year following, the salary and "at risk" pay structure be adjusted to maintain competitiveness as defined later;

(iv) every third year and commencing in 2000, one of the surveys be expanded to include total compensation; and

(v) to the greatest extent possible, the scope and methodology of these surveys be consistent from year to year.

This annual review process will cover all three senior level populations i.e. executive and deputy minister cadre, CEOs of Crown corporations and other GIC appointees.

While this approach means that the Public Service is lagging their benchmarks by up to a year, it should ensure that government increases are not fuelling inflation. This fact, coupled with the transparent process for arriving at future adjustments and their routine annual nature, will hopefully depoliticize the process of establishing senior level public servants' pay structures.

It should be noted that this proposal covers structure and not annual budgets. Annual budgets are more complex and are a function of movement within the structure, turnover, adding or subtracting managers and so on.

Ensuring Internal Equity

The adoption of a single system for evaluating the positions of all senior level federal public servants, coupled with its rigorous and timely application, should guarantee internal equity within the management cadre. However, there is another factor which must be considered in setting the compensation of EX 01 managers and CEOs of Crown corporations. It is ensuring that there is an appropriate salary difference between a manager and the employees he or she is managing. This is an issue for EX 01s because pay for their direct reports is set as part of the bargaining process and is quite separate from the recommendations of this Committee. Similarly, as noted in our Second Report, the Crown corporations pursue independent compensation policies for managers below the CEO level.

The Committee believes that there should, in principle, be a discernible difference between the EX 01 pay and that of the various groups of typical direct reports.

Thus, when establishing the pay structure for EX 01s and CEOs of Crowns we must test for compression, i.e. where pay for direct reports is very close, typically within 10%, and inversion, i.e. where a subordinate earns more than his or her boss. In the case of EX 01s, the Committee believes that there should, in principle, be a discernible difference between the EX 01 pay and that of the various groups of typical direct reports. Given that there is a clear difference in level of responsibility, we recommend that, in future, consideration be given to this principle. More discussion of the compression/inversion issue is provided in Chapter Three, which deals with specific compensation issues.

In the case of the CEOs of Crown corporations, a similar comparison is appropriate but should be done in the context of total compensation.

Defining Compensation Competitiveness

As part of establishing a framework for managing compensation, any organization needs to define where it wishes to position itself versus its "competitors" in terms of compensation. At present, executive and deputy minister compensation is defined by setting EX 01 total compensation comparable to an external benchmark and then using internal relativities, defined in terms of job responsibilities, to establish compensation for the higher management levels. This same approach (i.e. setting EX 01 total compensation equal to the median total compensation of a defined benchmark) is recommended going forward, with the external benchmark defined as a representative sample of private sector and broader public sector organizations combined. The Committee believes that such a sample is the best starting point for defining the organizations with which the federal Public Service competes in terms of attracting people. This recommendation also has the advantage that most compensation consultants provide such data routinely and it is widely used.

Given the Committee's earlier recommendation to use the Hay-based position evaluation plan, we also recommend that one of the sources for benchmark data is the Hay All Organizations sample. This sample consists of approximately 250 industrial organizations, some 60 financial organizations and about 50 organizations from the public sector. However, a second source of benchmark data should also be used to check competitive positioning.

It is very important that the government analyse its experience recruiting people and quantify where people go when they leave the Public Service in mid-career. This will be input to test the validity of the assumption about the government's competitors for talent. While this policy gives reasonable competitiveness at the management entry level, there will be a widening compensation gap with the predominantly private sector sample as responsibility grows. This has been discussed elsewhere in the report but, again, serves to underline the significance of the nature of the work and the workplace as important factors in attracting and retaining talent.

It is very important that the government analyse its experience recruiting people and quantify where people go when they leave the Public Service in mid-career. This will be input to test the validity of the assumption about the government's competitors for talent.

The competitive positioning for the CEOs of Crown corporations is less clear since the Committee needed to balance a number of competing factors in setting their structure. Thus, the Group 1 job rate recommended in our Second Report equalled the first quartile cash compensation in the Hay All Organizations sample, with bigger jobs based upon internal relativities. This competitive positioning will be revisited in the light of actual experience in recruiting qualified candidates for these CEO positions and following a review of competitiveness based on total compensation. It is also discussed later in this report.

Compensation policies for the balance of the Governor in Council group may need to be re-examined once the study of this group is complete. If required, recommendations should be made prior to April 2001.

Cash Compensation Structures

Following the Committee's first two reports, revised cash compensation structures are now in place as follows.

Executives and Deputy Ministers: 8 salary job rates plus "at risk" pay ranging from a maximum of 10% to a maximum of 20% to be paid annually based upon results.

CEOs of Crown corporations: 10 salary job rates plus "at risk" pay ranging from a maximum of 10% to a maximum of 25% to be paid annually based upon results (Governor of Bank of Canada excepted).

Other GIC appointees: 11 salary job ranges but often no "at risk" pay as this was judged inappropriate to the quasi-judicial/regulatory nature of many of the positions.

As noted earlier, this third group is being reviewed and there may be changes recommended in 2001.

Along with the introduction of "at risk" pay came the introduction of a new performance management regime, with emphasis on target setting and performance assessment. This is in the process of being implemented and will be an important contributor to the government's emphasis on becoming more results

oriented. Although it is premature to recommend further changes just yet, it is important to signal that changes are to be expected as compensation strategies increasingly focus public servants on delivering key results and demonstrating key behaviours.

Performance Management

An effective process of performance management is critical to any learning organization seeking to improve continuously. First, there is a need to identify executives' skills and competencies in order to inventory them for the Public Service workforce planning and to identify specific training needs or development opportunities. Second, there is a need to evaluate how each manager is performing overall in his/her position usually based upon the most recent 12 months – this impacts on the speed with which salary movement through the job-range takes place. Third, there is the process of setting specific short term objectives and then measuring achievements – this determines the degree of pay-out in the incentive or "at risk" pay.

An effective process of performance management is critical to any learning organization seeking to improve continuously.

Common processes for each of these steps should be used throughout the senior management cadre and every effort should be made to ensure consistent and regular application throughout all departments and regions. The deputy minister community must lead these initiatives.

As the federal Public Service moves to an increased focus on results, these processes will adapt and grow in importance. It is critical that there is a sharper focus on individual accountability. There needs to be an on-going drive to ensure that objectives – whether corporate, team or personal – are clearly expressed, are quantified where feasible, and are mutually agreed between boss and subordinate. The incentive pay component is designed to reward the desired results and behaviours. This link needs to be as transparent as possible and the application of the programme must be equitable across the senior management cadre.

It is critical that there is a sharper focus on individual accountability.

Benefits

The Committee's First Report recommended that a study of flexible benefits be undertaken. The Committee felt that adopting a 'cafeteria' style approach to non-cash portions of the compensation package would reinforce that the leadership group was being treated as distinct. From a strategic human resources viewpoint, this approach also enables employees the flexibility to design programmes that best fit their individual needs. This, in turn, provides the employer – the government – with a maximum return on its benefit dollars.

The Committee has increasingly come to the view that flexible benefits can be a very positive contributor to the government's strategies to attract and retain the best.

A major survey conducted earlier this year by Watson Wyatt has confirmed the desirability of the notion of flexible benefits. While the specific findings are summarized in Appendix F, the Committee has increasingly come to the view that flexible benefits can be a very positive contributor to the government's strategies to attract and retain the best. We believe that the key is to design a programme that will not only meet the needs of today's management cadre but will also be attractive to the managers of the future.

Although the Committee had originally thought of such a change as broadly cost-neutral, it is highly likely that investment in this area will yield considerable value in contributing to recruitment and retention strategies. As such, the Committee is prepared to consider and recommend options which increase cost. We also recommend that the government investigate ways of introducing greater flexibility in the pension area which we had previously excluded from consideration.

Conclusion

The Committee believes that good progress has been made in the area of compensation. Strategies are evolving, principles are well established and the specifics have been addressed in a completely transparent manner.

The Committee believes that good progress has been made in the area of compensation. Strategies are evolving, principles are well established and the specifics have been addressed in a completely transparent manner. However, there are more recommendations in Chapter 3 which we believe are necessary to maintain competitiveness. And then in the next eighteen months, we would expect more structural recommendations primarily dealing with other GIC appointees and Crown corporations.

Specific Human Resource Matters

This section of our Third Report deals with a series of specific recommendations and reports on progress with respect to certain of our previous recommendations. We revisit pay, following an external benchmarking survey completed early this year, recommend more specifically how to move forward with flexible benefits, address the creation of another Deputy Minister level, provide updates on performance management and job evaluations, provide comment on certain workplace policies and, finally, suggest one approach to the issue of work load.

What is encouraging to the Committee is that we are able to address these specific matters of human resource management against the backdrop of an increasingly well-defined long-term strategy. As a consequence, the Committee is comfortable that our recommendations are fully consistent with the evolving strategy.

What is encouraging to the Committee is that we are able to address these specific matters of human resource management against the backdrop of an increasingly well-defined long-term strategy.

Pay

As indicated in our First and Second Reports, the Committee has again compared Public Service cash compensation externally. Consistent with the recommendations in the previous chapter, the benchmark data was sourced from Hay Management Consultants (All Organizations sample) and a special survey conducted by William M. Mercer Limited amongst 320 private and public sector organizations. The external data was as of December 1999 whereas the Public Service data reflects the April 2000 structure. The implications of this most recent data are now analysed for each of three discrete federal Public Service management communities – executives and deputy ministers, CEOs of Crown corporations and other GIC appointees.

(a) Executives and Deputy Ministers

The illustration below compares federal Public Service total cash compensation (defined as salary job rate plus 70% of the maximum available "at risk" pay) at April 2000 with the 1999 actual cash compensation for equivalent positions in the two benchmark samples. The following conclusions can be drawn:

(i) as would be expected, there are some differences between the two sources of comparative data – both are based upon samples and different methods are used for establishing the equivalency of jobs. However, directionally the external data are largely consistent and show similar pictures;

(ii) the Public Service is behind the benchmarks in both samples at all levels of job responsibility;

(iii) the shortfalls in both absolute and relative terms increase as job responsibility grows. This is consistent with all previous findings.

The disquieting fact about the comparisons is the quite significant shortfall at the EX 01 level, which, only two years ago, was set equivalent to the median of a similarly-defined external benchmark.

The disquieting fact about the comparisons is the quite significant shortfall at the EX 01 level, which, only two years ago, was set equivalent to the median of a similarly defined external benchmark. This is particularly important since the entire executive and deputy minister salary structure is built upon the compensation for an EX 01. In 1998, we set total EX 01 compensation and then created a structure based upon internal relativities in job responsibilities.

Public Service Total Cash Compensation vs Mercer and Hay Medians

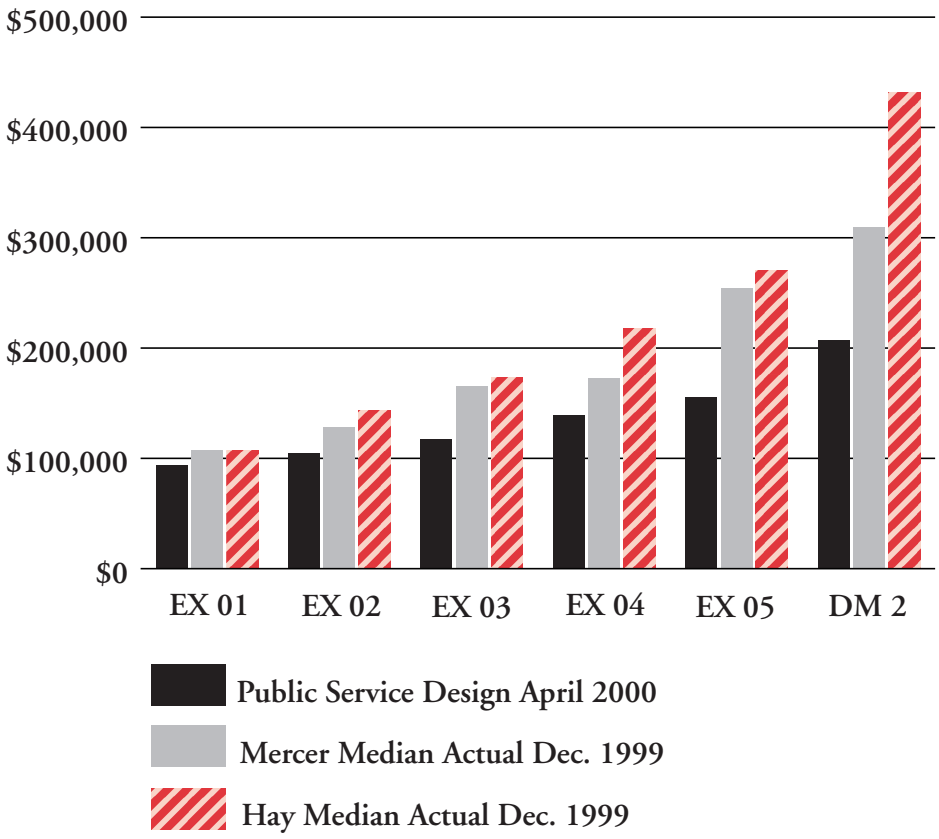


Illustration 7

The results of the external benchmarking have led the Committee to revisit cash compensation. Consistent with the principles outlined in the previous chapter, we first investigated whether there were problems of compression or inversion. The Committee therefore requested that Treasury Board Secretariat conduct a study of actual compression. Based upon a significant sample of EX 01s from 11 of the largest employing departments, salary compression exists for 9% of the positions. In other words 9% of EX 01s have direct reports earning greater than 90% of their own total cash compensation. However, based on a conservative estimate of what might happen in collective bargaining over the balance

of this year, the incidence of compression will rise to 21 % by year-end. It is the Committee's view that this is not acceptable. In order to substantially eliminate the problem of salary compression by this year-end, the EX 01 job rate would need to increase by 10%.

Clearly, the market has risen more sharply than anticipated in late 1997. Three factors appear to have caused this – the impact of the new economy, the significant number of mergers and consolidations, and the early stages of the supply shortage.

The Treasury Board Secretariat study also showed evidence of salary inversion. However, the incidence is low, and occurs generally where the direct reports are senior professionals, such as medical officers.

Next, the Committee focused on a more detailed analysis of the benchmark results and, in particular, sought to understand why EX 01 cash compensation had fallen behind.

We started by looking at salaries. The current EX 01 job rate of $87,400 was set using data from a 1997 Mercer Survey adjusted to reflect an estimated movement in 1998. Clearly, the market has risen more sharply than anticipated in late 1997. Three factors appear to have caused this – the impact of the new economy, the significant number of mergers and consolidations, and the early stages of the supply shortage discussed earlier in this report.

The illustration below summarizes salary data from both external surveys. In both cases, the survey data used is the median of the sample.

Public Service Salary Job Rates vs. Median Benchmark Salaries

	Mercer Actual	**Hay** Actual
Salaries at December 1999	$95,000	$97,800
Difference from EX 01	– $7,600	– $10,400
Job Rate at April 2000	– 8.7%	– 11.9%

Illustration 8

Both Mercer and Hay showed the median Total Cash Compensation for the EX 01 benchmark as $107,000, with the compensation above salary deriving from "at risk" or incentive pay. Consequently, the Committee reviewed the variable pay situation with respect to EX 01s. As noted earlier, an EX 01 can earn between 0 and 10% of salary in incentive pay. A reasonable expectation of average payout in a typical year would be 70% of the maximum or 7% of salary. 7% of even the higher Hay salary benchmark would still leave the Public Service total cash below $107,000, indicating that the "at risk" pay in the Public Service also trails where it should be.

Based upon this analysis, the Committee has concluded that an upward adjustment to salary job rates is needed. Before deciding the precise amount of this increase, the Committee reviewed other elements of total compensation and noted:

(a) the total cash compensation reported earlier does not include long-term incentives such as stock options or performance unit plans. This form of reward has been growing in the private sector, as focus on creating shareholder value has increased. Thus, the difference in total compensation between the Public Service and the benchmarks would be even greater than shown, especially in the jobs with more responsibilities.

(b) we believe there are few material differences in fringe benefits and perquisites between the Public Service and the benchmarks. The only exception is the pension plan for deputy ministers which is likely more valuable than the sample median. However, it is also at these most senior levels that the differences in salary and incentive pay (both short and long-term) are the greatest.

Thus, the Committee is satisfied that the shortfalls in cash compensation carry through to total compensation. The Committee therefore recommends an increase of 8.7% in the job rates structure for all EX and DM levels to be effective April 1, 2000. No changes are recommended to the incentive pay structure at this time. This recommendation:

(1) in large measure eliminates the compression problems noted earlier, although this issue will need to be revisited on a regular basis;

(2) equates the EX 01 salary job rate to the "actual" median salary of the lower of the two benchmark samples;

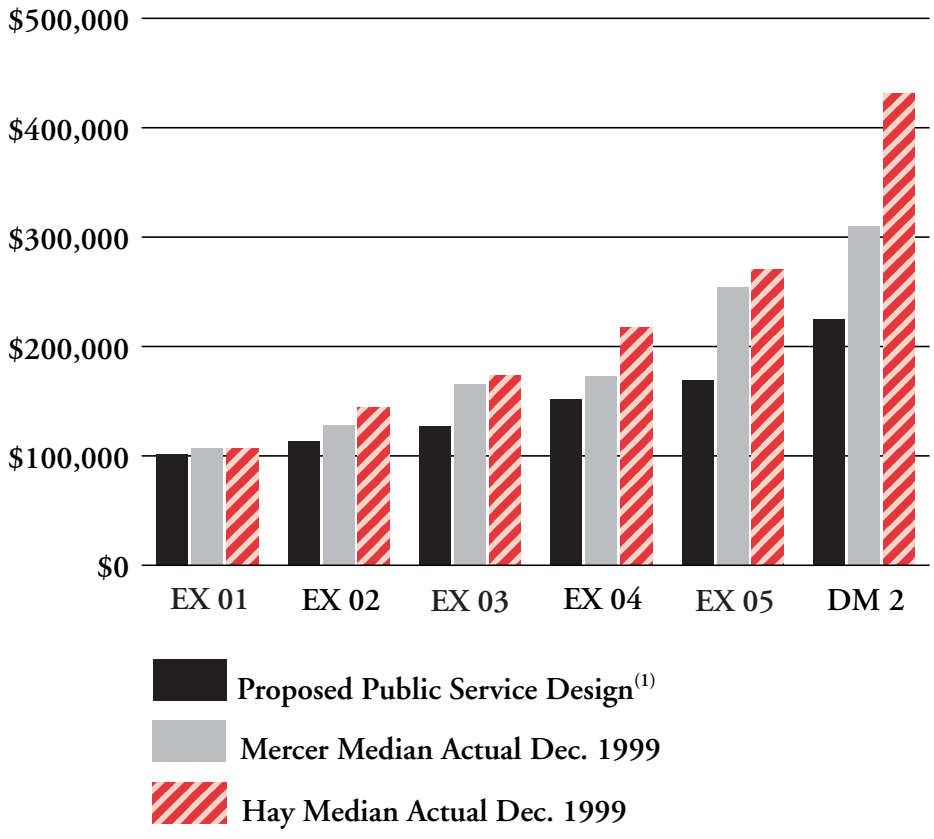
The Committee recommends an increase of 8.7% in the job rates structure for all EX and DM levels to be effective April 1, 2000. No changes are recommended to the incentive pay structure at this time.

(3) moves the salary structure closer to the desired long-term positioning;

(4) leaves a shortfall in incentive and total cash compensation. Given that this is the first year of full implementation of at risk pay, the Committee feels possible adjustments are best considered when this experience has been fully analysed.

The illustration below demonstrates the impact of this proposal. It significantly narrows the gap compared to our benchmark at the EX 01 positioning but it does not address the now familiar widening gap in compensation as job responsibility increases.

Proposed Public Service Total Cash Compensation vs Hay and Mercer Medians



(1) At risk pay included at 70% of maximum

Illustration 9

Given the magnitude of the recommended change to the job rates, the Committee also discussed implementation options. In other words, how quickly should actual salaries be adjusted? Here, the government needs to weigh the cost implications to its various departmental budgets with the human resource risks of slow implementation (poor morale, and impact on attracting and retaining key people). It should also be pointed out that it is highly probable that, following the proposed benchmark surveys, a further adjustment to job rates is likely for April 2001. This is currently estimated in the 3-4% range. Without being overly prescriptive with respect to implementation, the Committee therefore recommends that the government target to have full integrity restored to actual salaries by no later than April 1, 2001.

One final set of comments on the implementation of the "at risk" pay programme. Firstly, its intent is to reward the achievement of results and as a consequence, the Committee would expect to see a well-dispersed distribution of awards ranging from the minimum (no payment) to the maximum (10% or 15% or 20% of salary). In an organization as large and diverse as the federal Public Service there will necessarily be some departments or individuals who have been severely challenged in any given year, while there will be others who have had great success. A heavy concentration of average payouts would suggest that the programme is not working as intended. However, the initial feedback received by the Committee is promising with respect to the distribution of payouts.

Secondly, an observation about budgeting for this at risk pay programme: unlike salary budgets which can be easily prescribed in any year, the "at risk" component is a consequence of results achieved compared to an objective. Thus, while guidance can be given to departments on how best to budget for "at risk" pay, actual payouts should be determined after the year-end on the basis of a rigorous assessment of results achieved. These results cannot, with integrity, be forced to comply with some pre-determined budget number.

It is highly probable that, following the proposed benchmark surveys, a further adjustment to job rates is likely for April 2001. … The committee therefore recommends that the government target to have full integrity restored to actual salaries by no later than April 1, 2001.

While guidance can be given to departments on how best to budget for "at risk" pay, actual payouts should be determined after the year-end on the basis of a rigorous assessment of results achieved.

(B) CEOs OF CROWN CORPORATIONS

The Advisory Committee's Second Report, published in March 2000, recommended a new structure for salary and "at risk" pay of Crown corporation CEOs and was based upon Hay 1999 data. As a consequence, the Committee is not making any further recommendations for changes. We have looked at broad compatibility with this report's proposals and are satisfied that the equity across the Public Sector has, in fact, been enhanced. That said, the Committee proposes a series of actions to be completed over the next eighteen months:

(i) continue to monitor whether the larger Crowns are sufficiently competitive to attract qualified candidates;

(ii) based upon the proposed benchmark survey, adjust the current salary structure for April 1, 2001;

(iii) measure each CEO position in terms of total compensation and test rigorously for compression;

(iv) use the input from (i) and (iii) plus the findings from the proposed survey of total compensation to make changes, if warranted, to the salary structure and "at risk" pay for April 1, 2002. Given the relatively independent nature of the Crowns, special attention should be given to the possibility of increasing the "at risk" component of total cash compensation.

(C) OTHER GOVERNOR IN COUNCIL APPOINTEES

The Committee recommends that the existing GIC job rates be increased by 8.7%. This is consistent with the approach taken in our First Report which tied GIC appointees into the executive/deputy minister structure. Any further changes should await the currently underway Privy Council Office review of this entire group. Implementation should follow the proposals made for Executives and Deputy Ministers.

Benefits

The survey carried out in February by Watson Wyatt confirms a high level of support for the notion of flexible benefits. Interest is particularly high amongst younger managers. A summary of the survey results is included in Appendix F.

As already discussed in the previous chapter, the Committee believes that such a programme will play an important role in attracting and retaining good people in the Public Service and offers the government excellent potential value for dollars invested. The Committee therefore recommends that the government proceed with a full feasibility study including developing and costing a suitable programme.

The Committee believes that a programme of Flexible Benefits … offers the government excellent potential value for dollars invested.

The Committee favours a programme which has a set of core benefits which all executives receive automatically plus a series of optional benefits from which executives may choose to meet their individual needs and lifestyles. Directionally, the core programme should be as narrowly defined as possible while the optional programme should be as broadly defined as possible. The programme should also offer a choice of coverage level – executive only, executive plus one dependant, and executive plus two or more dependants. Managers of the future will want a significant degree of flexibility.

As part of the new flexible benefits programme, the Committee recommends that the government consider phasing out the current sick leave provisions for executives and moving to a regime of short-term salary continuance plus long-term disability coverage. Such programmes are common practice in the private sector and have two major advantages. Firstly, such an approach is more effective and equitable in providing salary protection when a manager is sick and does not tie coverage entitlement to length of service. Secondly, it enables outsourcing the administration, particularly the adjudication of claims. The Committee recognizes that some transition rules may be required.

During the course of our discussions on benefits, it came to the Committee's attention that executives were irritated by the fact that their vacation entitlement was inferior to that of their unionized staff. The Committee therefore investigated the adequacy of the current entitlement. The following chart shows current vacation policy for executives and compares this with current practices as measured in the Hay Group Report on Prevalence of Benefits Practices 1999-2000.

SERVICE NEEDED TO QUALIFY FOR VACATION ENTITLEMENTS PUBLIC SERVICE VS. BENCHMARK

	Required Years of Service		
Weeks of Vacation	**Public Service Executives**	**Benchmark[1]**	**Incidence Amongst Benchmark[2]**
3	–	2-5 years	100%
4	On appointment	10-15 years	99%
5	20 years[3]	20 years	92%
6	No provision	25-30 years	60%
7	No provision	30 years	8%

(1) These ranges represent the most common service requirements to earn the vacation amongst those organizations offering that vacation. However, it is based upon all employees, not just executives.

(2) The percentage of organizations offering each vacation. For example, 92% of all organizations in the benchmark sample offer 5 weeks of vacation subject to defined service requirements.

(3) This is the most common criterion – other options do, however, exist which accelerate the entitlement.

ILLUSTRATION 10

As can be seen from Illustration 10 above, 60% of organizations in the benchmark sample do offer a vacation entitlement of six or more weeks. This incidence rises to 77% of public sector organizations in the sample. The Committee has therefore concluded that the addition of a 6 week entitlement for vacation is consistent with the majority practice in our benchmark sample. The remaining issue, then, is the service requirement to earn this vacation. 85% of organizations offering six weeks of vacation have a requirement falling within the 25-30 years of service range, with 25 the most popular. However, as noted above, this needs

to be weighed against the fact that there are 40% of organizations which do not offer this entitlement. The Committee therefore recommends that the deputy minister, executive and Governor in Council communities be entitled to 6 weeks of paid vacation after 28 years of service.

However, the Committee also recommends that the proposed total compensation benchmark review study executive vacation entitlements in more detail.

The Committee has also had a lot of discussion about work/life balance and workload. While the Public Service is by no means alone in facing these challenges, the government needs to create a climate in which it is acceptable to take vacation! We propose, therefore, that the government ensure rigorous and consistent application of vacation policy. This will hopefully go some distance to restoring a proper work/life balance. But it is also important for the employer, since vacations are an opportunity to "recharge the batteries", to relax and relieve the stresses of the job. Without them, there is substantial evidence that productivity and managerial effectiveness steadily decline.

The Committee recommends that the deputy minister, executive and Governor in Council communities be entitled to 6 weeks of paid vacation after 28 years of service.

The Committee has had a lot of discussion about work/life balance and workload. While the Public Service is by no means alone in facing these challenges, the government needs to create a climate in which it is acceptable to take vacation!

Deputy Ministers

At the request of the Committee, the Privy Council Office evaluated Deputy Minister responsibilities. This confirmed that certain positions are larger in scope than others.

Recognizing the value and flexibility of the current appointment to level system, the Committee recommends the creation of a DM 4 level. The salary job rate would be 12% higher that DM 3 and the "at risk" pay would be a maximum of 25%. If the earlier changes in structure are accepted by the government this would equate to a job rate of $247,700 with maximum "at risk" pay of $61,900. Even though the number of people impacted by from this proposal (and hence its cost) is small, this recommendation:

- ensures greater equity between the most senior deputy ministers and the CEOs of some of the larger Crowns; and
- sends an important message in terms of the government's willingness to attract and retain qualified and experienced staff.

Performance Management

Indications are that the Performance Management Programme has got off to a good start. Importantly, it is clearly being led from the top.

Indications are that the Performance Management Programme has got off to a good start. Importantly, it is clearly being led from the top. The Committee has had the opportunity to review the Treasury Board Secretariat preliminary evaluation of the 1999-2000 process (see Appendix G for the summary). We were encouraged to see good practices identified as well as a list of lessons learned. Stemming from this review were numerous recommendations for improving the 2000-2001 cycle. We hope that this process for continuous improvement will be institutionalized.

The Committee believes this programme, which supports the "at risk" compensation, is a critical factor in the drive to become more results oriented. From our viewpoint, the key factors in success are:

- continued top management support;
- clear objectives and priorities, quantified where feasible; and
- focus on fewer rather than more key commitments.

Job Evaluation

Job evaluations have now been completed for all executive positions. However, with the adoption of a revised Hay plan incorporating Working Conditions, all positions will need to be revisited.

A fundamental review of all "other" Governor in Council positions, as referenced earlier, is currently commencing.

Work Place Policies

The Committee is pleased to note that the Treasury Board Secretariat is beginning to update a number of workplace policies.

(a) **Travel:** The purpose of this initiative is to modernize the structures and processes governing travel by federal public servants. Overall recommendations are expected by February 2001 and will focus on streamlining processes and reflecting recent structural and technological changes in the travel industry. While the primary goal should be to leverage the scale of the government to minimize costs, important secondary goals are reducing the administrative burden for travellers and providing public servants more flexibility in areas such as spousal/dependent travel providing the option is cost neutral to the Crown.

(b) **Integrated Relocation Programme:** An equitable relocation programme for executives will likely become increasingly important as mobility and transfers grow. A revised policy came into effect April 1, 2000 and should continue to be monitored for simplification and modification.

(c) **Harassment in the Workplace:** Treasury Board Secretariat is currently engaged in a substantive review of the existing Harassment Policy. There are current executive concerns about inconsistent application, the lengthy resolution process and inadequate resources. The only recommendation the Committee would put forward is that Treasury Board Secretariat ensures that any changes are tested for consistency with the new culture which the Public Service is seeking to create.

(d) **Legal Representation and Recourse:** Executives have expressed concerns about the adequacy of existing policies on legal representation and recourse. While the Committee has not studied this complex area of human resource policy, we believe there is merit in a review by Treasury Board Secretariat. As the Public Service moves to give managers more authority to make decisions and to take risks, it is important that executives feel confident that they have the support of their organization, providing, of course, they have not acted illegally or improperly.

Work Load

Following the downsizing of the early nineties, the Public Service leadership feels they have too much work and too little time to do it. While it probably does not serve as much comfort, the Committee would add that there are many private sector organizations which feel exactly the same.

The Committee has one suggestion for a pilot study, probably in one of the smaller departments. It builds upon the Public Service commitment to continuous improvement and utilizes some well-established techniques used by many private sector organizations. Basically, the approach focuses on analysing the work done and the work processes used. We would recommend working with an outside consultant so that the government can use an established set of tools and measurements.

The results from such studies usually indicate a lot of wasted time doing unnecessary tasks, redoing activities and so on. We have certainly heard enough complaints about bureaucratic processes to know that an opportunity for gain certainly exists. There is also the opportunity to use information technology more effectively to upgrade processes. And finally, as the government becomes more citizen focused, it will be important to test that work done adds value for citizens.

Summary

Over the past three years, our Committee has learned a great deal about the senior levels of the federal Public Service. Despite our private sector roots, we have become more committed than ever to the importance of ensuring that the Public Service of Canada remains strong, representative, professional and non-partisan. But this will not happen, unless the Government takes some bold actions now, and it will not happen unless today's Public Service leaders commit to making significant changes in how human resources are managed and in the culture of the organization going forward.

The Committee is not talking about changing the core values of the Public Service. These have served as the bedrock of the Public Service for decades and will continue to do so for many years to come. However, if the Public Service is to meet the expectations of Canadians, there is a need to develop new mindsets, new skills and new abilities.

First, it is critical that the government recognize that the senior level federal Public Service is facing a human capital crisis. Retirements alone over the next decade could result in the loss of just over 80% of today's cadre. Filling this void will be immensely challenging since we are entering a period where the demand for talented people will exceed the supply.

It is critical that the government recognize that the senior level federal Public Service is facing a human capital crisis.

In order to successfully compete for the high calibre people it requires, the Committee believes that the government needs a clearly articulated human resource strategy. The good news is that in the traditional human resource areas of workforce planning, recruiting, developing and retaining, very good progress is being made, led by the Clerk of the Privy Council and the Committee of

If our proposals in this Third Report are accepted, considerable progress will have been made in the past three years – restored integrity, a transparent policy, improved competitive standing and a start on aligning rewards and performance.

Senior Officials. This strategic work needs to be completed and rigorous implementation plans developed. The fifth basic function of human resources is paying, recommendations for which are part of our Committee's mandate. Again, if our proposals in this Third Report are accepted, considerable progress will have been made in the past three years – restored integrity, a transparent policy, improved competitive standing and a start on aligning rewards and performance. What is important to note, however, is that the Committee does not believe that the government will win the recruiting battle with higher pay alone. Of course, pay must be adequate but we do not believe it is practical, in the short term, to match the private sector at the most senior levels. Given this reality, how will the government become an employer of choice?

The Committee believes the answer lies in the nature of the work and the workplace that the Public Service can offer. Talented managers of the future will want challenging and interesting work; they will want to feel that the results they achieve will make a difference; they want to be pro-active with the freedom to make decisions; they want to work in an innovative and flexible environment. The federal Public Service can offer all of these things but only if there are some significant changes in the organization and culture.

The Committee has therefore recommended that the government add two initiatives to its core human resource strategies. The first is to focus on streamlining the framework for managing human resources. This is by no means a new recommendation as this area has been the subject of numerous studies in the past. However, now is the time for action. The leaders of tomorrow do not want to be part of a slow moving, inefficient bureaucracy. Without reform, the Committee does not believe the Public Service can become an employer of choice.

The second strategic initiative recommended by the Committee addresses cultural renewal – ensuring that the desired mindsets and behaviours become the norm. The Committee is pleased to note that an exciting vision for the Public Service is basically in place. However, the challenge of changing the culture of any organization the size of the federal Public Service is immense. The Committee believes that specific implementation plans covering a broad range of initiatives will be necessary to be successful. Further, the Committee urges the Clerk to establish an aggressive timetable for this implementation.

In closing, the Committee believes that the federal Public Service has reached a unique point in its long and distinguished history. The convergence of a number of factors – workforce demographics, information technology, citizen expectations – demands change. With these changes comes an immense opportunity to modernize and revitalize the Public Service and to ensure that all Canadians continue to be well served both domestically and internationally.

The Committee believes that the federal Public Service has reached a unique point in its long and distinguished history. The convergence of a number of factors – workforce demographics, information technology, citizen expectations – demands change. With these changes comes an immense opportunity to modernize and revitalize the Public Service.

Appendices

Appendix A

Committee Members

Lawrence F. Strong, B.Sc. – Chair
Director, Unilever Canada Limited

Past President and Chief Executive Officer, Unilever Canada Limited. Past President and COO, Unilever Canada. Past Vice-President, Finance, Unilever Canada. Past President, Monarch Fine Foods and Chesebrough-Pond's (Canada). Past Chair, Food and Consumer Products Manufacturers of Canada (FCPMC), Public Policy Forum (PPF) and Electronic Commerce Council of Canada (ECCC). Trustee, Grocery Industry Foundation Together (GIFT) and the Invest in Kids Foundation. Director, Canadian Council of Christians and Jews (CCCJ), Public Policy Forum and Electronic Commerce Council of Canada.

John L. Fryer, C.M., B.Sc.(Econ.), M.A.
Chair, Advisory Committee on Labour Management Relations in the Federal Public Service

Adjunct Professor, School of Public Administration, University of Victoria. President Emeritus, National Union of Public and General Employees (NUPGE).

Marilyn H. Knox, B.Sc., RD
President, Nutrition, Nestlé Canada Inc.

Past Deputy Minister, Tourism and Recreation, Government of Ontario. Past Assistant Deputy Minister, Ministry of Agriculture and Food, Government of Ontario. Past Executive Director, Ontario Premier's Council on Health Strategy. Past Vice-President, Grocery Products Manufacturers of Canada. Former consultant, Health Protection Branch, Health and Welfare Canada.

Gaétan Lussier, O.C., B.Sc. (Agr.), M.Sc., Ph.D.
President, Gaétan Lussier and Associates

Past Assistant Deputy Minister and Deputy Minister, Quebec Ministry of Agriculture. Past Deputy Minister of Agriculture Canada. Past Deputy Minister and Chairman, Employment and Immigration Canada. Past President, Les Boulangeries Weston Québec Inc. Past President and Chief Executive Officer, Culinar Inc.

Judith Maxwell, C.M., B.Com., D.Com.
President, Canadian Policy Research Networks

Past Director, Policy Studies, C.D. Howe Institute. Former consultant, Esso Europe Inc. Former consultant, Economics, Coopers & Lybrand. Past Chairman, Economic Council of Canada. Past Associate Director, School of Policy Studies, Queen's University. Past Executive Director, Queen's University of Ottawa Economic Projects. Director, BCE Inc. and Clarica (formerly Mutual Life Assurance of Canada).

Courtney Pratt, C.M., B.A., LLD (Hon)
President and Chief Executive Officer, Hydro One Networks Inc.

Past Chairman and Director, Noranda Inc. Director, The Empire Company and Moosehead Breweries. Chairman, Imagine and Director, The Learning Partnership, Career Edge and The University Health Network. Past Executive Vice-President and Past President, Noranda Inc. Past Senior Vice-President, Human Resources and Administration, Royal Trust Company. Member, Advisory Group on Executive Compensation in the Public Service (Burns Committee). Member, Ontario Advisory Committee on Deputy Minister and Senior Management Compensation.

Appendix B

Committee Mandate

To provide independent advice and recommendations to the President of the Treasury Board concerning executives, deputy ministers and other Governor-in-Council appointees of the federal Public Service and Public sector on:

- developing a long-term strategy for the senior levels of the Public Service that will support the human resource management needs of the next decade,
- compensation strategies and principles, and
- overall management matters comprising among other things human resource policies and programmes, terms and conditions of employment, classification and compensation issues including rates of pay, rewards and recognition.

To present recommendations in a report to the President of the Treasury Board. The report will be made public by the President of the Treasury Board.

Appendix C

Extract from Auditor General of Canada's April 2000 Report Outlining the Basic Legislative Framework for Managing Public Servants*

- The basic framework for managing people in the 20 departments and some 60 agencies that form the "core" public service comprises three pieces of legislation enacted in 1967: the *Public Service Staff Relations Act*, the *Financial Administration Act*, and the *Public Service Employment Act*. A fourth Act, the *Public Service Superannuation Act*, provides for pensions for the public service of Canada. The legislative framework is designed to uphold basic public service values and to provide for the protection and monitoring of merit.
- The *Public Service Staff Relations Act* introduced collective bargaining, to which about 85 percent of employees are now subject. In general, the design of the collective bargaining regime adheres to principles and processes established in law to govern relations between other employers and their employees. An important exception in the public service is the exclusion of job classification and staffing from collective bargaining.
- Since 1967, several pieces of legislation have been added to the governing framework. Notable among these are the *Official Languages Act*, the *Canadian Human Rights Act*, the *Canadian Charter of Rights and Freedoms*, the *Access to Information Act*, the *Privacy Act*, and the *Employment Equity Act*.

* Source: The April 2000 Report of the Auditor General of Canada – Chapter 9

THE MAIN MANAGEMENT PLAYERS

- Today, key roles in the management of human resources in the core public service are played by Treasury Board, the Privy Council Office, the Public Service Commission and line departments. Federal public sector entities outside the "core" have greater autonomy in managing their people.

- **Treasury Board.** Under the *Public Service Staff Relations Act*, the Board acts on behalf of the government as the "employer" for the core public service. The Treasury Board is a Cabinet committee with a number of statutory authorities in the areas of expenditure and financial management, service and innovation, information technology and human resource management. In this domain, Treasury Board ministers are concerned with maintaining a strong, competent and representative work force. Through the Treasury Board Secretariat, the Board consults and negotiates with the public service unions. The Treasury Board also has general responsibility under the *Financial Administration Act* for administrative policy and for financial and personnel management (except appointments, the domain of the Public Service Commission). Treasury Board, with the support of the Secretariat, sets out policies on such matters as job evaluation, compensation, terms and conditions of employment, training and development, labour relations, work force adjustment, pension programs, employee benefits and insurance, employment equity and official languages.

- **The Privy Council Office (PCO).** Headed by the Clerk of the Privy Council and Secretary to the Cabinet, the PCO is responsible for ensuring the satisfactory performance of the public service in support of the Prime Minister and Cabinet. This includes strategic management of senior people. The PCO provides advice and support in the selection of deputy ministers and other Governor-in-Council appointees, and in the related processes for performance review, compensation and termination. For deputy ministers, it also provides advice and support for career planning. The Clerk became the statutory Head of the Public Service in 1993, and plays a prominent role of leadership to deputy ministers and public servants generally, by establishing strategic direction and management priorities for the public service.

- **The Public Service Commission (PSC).** Under the *Public Service Employment Act*, the Commission is an independent parliamentary agent with exclusive statutory authority to appoint or provide for the appointment of "qualified persons" to and within the public service. It ensures that appointments are based on merit "as determined by the Commission." The Commission is also responsible for conducting investigations and audits of matters under its jurisdiction and for administering the staffing recourse mechanisms provided under the Act. It operates staff training and development programs, and assists deputy heads in operating such programs. It also has responsibilities for employment equity, and handles matters assigned to it by the Treasury Board or by the Governor in Council.

- **Departments.** Ministers are assigned broad powers over the organization and allocation of resources in their departments. Deputy ministers have responsibility and authority to manage the department in support of their ministers. Beyond this, deputy ministers have little statutory authority in human resource management. Instead, their authority is derived primarily from delegation instruments under which the Treasury Board and Public Service Commission delegate powers to them.

The many other players

- There are many other management players. The Canadian Centre for Management Development is responsible for developing a strong management cadre. The Leadership Network is responsible for supporting network development and promoting public service renewal, and for central management of the assistant deputy minister community. This reflects the notion that its members represent a vital corporate resource.

- Various management committees also play an important role. Most prominent are two standing committees of deputy ministers:

  - the Committee of Senior Officials (COSO), which advises the Clerk on senior appointments and other human resource management priorities and issues; and

  - the Treasury Board Secretariat Advisory Committee (TBSAC), which advises the Secretary of the Treasury Board on all administrative matters to be brought before the Board, including those related to "personnel management."

- Other bodies play a role in the co-ordination, debate or review of human resource management issues, or perform administrative functions (see Appendix A). These include various standing or ad hoc bodies, and oversight institutions – the Office of the Commissioner of Official Languages, the offices of the Information Commissioner and the Privacy Commissioner, the Canadian Human Rights Commission and the Public Service Staff Relations Board, which administers the *Public Service Staff Relations Act*. They also include the 16 unions and various forums for consultation among employer, employees and bargaining agents, such as the National Joint Council and the Public Service Commission Advisory Council.

Appendix A

A Summary of the Roles and Responsibilities of Some of the Many Players in Human Resource Management in the Public Service

The players whose roles are discussed in the chapter are the Treasury Board and its Secretariat, the Privy Council Office under the direction of the Clerk, the Public Service Commission, departments and their deputy ministers, and the two key deputy ministerial committees – the Committee of Senior Officials (COSO) and the Treasury Board Secretariat Advisory Committee (TBSAC). There are numerous others that influence the management of human resources in the core public service. Some are briefly described below.

The National Joint Council (NJC)

The Council is a "consultative" body comprising representatives of the Treasury Board (acting as the "employer" for the core public service), a number of "separate employers," and bargaining agents. Its recommendations must be approved by the appropriate executive body of government. Established before the advent of collective bargaining, the Council is a forum for regular consultation on issues bearing on the efficiency of the public service and the well-being of its employees. The NJC deals with matters on which consultation is more efficient across the public service than at each bargaining table. These matters may include any benefit or condition of work that applies service-wide. Examples include travel, relocation, isolated post allowances, foreign service, work force adjustment, and

benefit plans like health care and disability insurance. When the Council agrees to "consult" on a matter it is understood that, on approval, the matter either will be deemed to constitute a part of collective agreements or will result only in recommendations to the employer.

Bargaining Agents

Currently, 16 unions certified by the Public Service Staff Relations Board are authorized to represent particular groups of public servants in collective bargaining. The Public Service Alliance of Canada represents the largest number of public servants (approximately 116,000) and the Professional Institute of the Public Service of Canada represents another 31,000. No other bargaining agent represents more than 6,000 federal public servants, and most represent fewer than 1,000.

The Public Service Commission Advisory Council

Created in 1998, the Advisory Council provides a forum for Commissioners and senior Commission staff to discuss and consult on issues related to the *Public Service Employment Act* . The Council includes a representative of each of the public service bargaining agents and more than a dozen representatives of federal departments and agencies, with a Treasury Board observer. Meetings of the Council and its Steering Committee are co-chaired by a representative of the unions and of the departments. The Council has a number of working groups dealing with current issues such as mobility, recourse and merit.

Association of Professional Executives of the Public Services of Canada (APEX)

The Association represents the interests of executives and promotes management excellence and professionalism in the federal public service. It tracks current and emerging issues of concern to its members, gathers members' views and represents them to government decision makers. Membership in the Association is voluntary.

The Public Service Staff Relations Board

The Board is a quasi-judicial statutory tribunal, responsible for administration of the *Public Service Staff Relations Act*. Its responsibilities include such matters as determining bargaining units, unfair labour practices, certifying and decertifying of bargaining agents, adjudication of rights disputes (grievances not resolved satisfactorily in the employee's department) mediation services for grievances, complaints and collective bargaining disputes, and generally providing an administrative structure in which the rights and responsibilities of the employer and employees in the federal public service may be exercised and/or enforced.

The Commissioner of Official Languages

The Treasury Board is responsible for providing a policy framework to ensure that departments and agencies meet the requirements of the *Official Languages Act*. The Commissioner is an ombudsman, responsible under the *Official Languages Act* to protect:

- the rights of members of the public to communicate in either official language with federal institutions and to receive services from them as provided for in the Act and its regulations;
- the right of federal employees to work in the official language of their choice in designated regions; and
- the right of English-speaking and French-speaking Canadians to equal opportunities for employment and advancement in federal institutions.

Official language requirements must be established for positions in the public service, and the ability of public servants to meet them must be assessed. The Commissioner's office conducts audits and studies of performance in departments and agencies and investigates individual complaints. It makes recommendations for corrective action, appealing to the Federal Court on behalf of complainants when all other recourse has been exhausted.

The Privacy Commissioner of Canada

The Privacy Commissioner is an ombudsman, appointed by and accountable to Parliament, who monitors the government's collection, use and disclosure of the personal information of individuals, and its handling of individuals' requests to see their records. The *Privacy Act* gives the Commissioner powers to investigate individual complaints, to launch his own complaints, and to audit compliance with the Act.

The Information Commissioner

The Commissioner deals with complaints from people who believe they have been denied rights under the *Access to Information Act*. The Commissioner is an independent ombudsman with investigative powers, who mediates between complainants and government institutions. The head of a government institution may, in certain circumstances, refuse to disclose a record that contains plans related to the management of personnel or the administration of the institution. This does not apply to decisions made in exercising a discretionary power or an adjudicative function that affects the rights of a person.

The Canadian Human Rights Commission

The Commission was established as an agency reporting to Parliament to administer the *Canadian Human Rights Act* and deal with related complaints. An example of the latter is the 1999 pay equity decision, which found that the job classification and evaluation system in the federal public service was discriminatory on the basis of gender, and thus in contravention of the Act. The Commission is also mandated to ensure that the requirements of the *Employment Equity Act* are met by all federal departments and agencies as well as Crown corporations and federally regulated private sector companies. To that end, the Commission conducts audits of these entities.

The Canadian Centre for Management Development

The Centre was created in 1988 under an order-in-council, and became a departmental corporation under legislation passed in 1991.

Under its Act, the Centre's objectives include:

- encouraging pride and excellence in the management of the public service and fostering among managers a sense of the purposes, values and traditions of the public service; and
- helping to ensure the growth and development of managers and ensuring that they have the skills and knowledge required to manage staff effectively, including leadership, motivational and communications skills.

The minister responsible for the Centre is the Prime Minister. The Centre is managed by a President, having the rank and status of a deputy minister, under the direction of a board of governors. The board comprises up to 15 governors, including the Clerk of the Privy Council as the ex officio chair, and equal numbers of persons who are employed in the public service and persons who are not. The former include, as ex officio members, the President of the Centre, the Secretary of the Treasury Board, and the President of the Public Service Commission.

In developing the programs and studies of the Centre, the President is required to take government policies into consideration, along with public service management training needs and priorities as determined by the Treasury Board.

The Leadership Network

The Leadership Network was created by order-in-council in June 1998 to maintain the momentum of the public service renewal initiative, La Relève. It is included in the portfolio of the Prime Minister. The Head of The Leadership Network receives functional direction from the Committee of Senior Officials (COSO). It has three specific areas of responsibility:

- to facilitate the collective management of the community of assistant deputy ministers (ADMs) as a corporate resource (this includes providing career counselling and advisory services related to entry into the ADM ranks, assignments, personal and career development strategies, and learning and promotion opportunities);

- to facilitate internal communication and dialogue on renewal by promoting, developing and supporting networks of leaders at all levels in the public service (for example, networks of middle managers and of federal regional officials); and
- to help consolidate La Relève successes, share lessons learned and foster change initiatives of departments and agencies, functional communities and regions.

Federal Regional Councils

In the early 1980s, Regional Councils were formed primarily to facilitate coordination of federal economic programs at the regional level. These have evolved considerably, particularly in the last several years, and play a role at the regional level in communication and information sharing, in administrative and human resource management matters, and in liaison with provincial counterparts. Today, there is a Council of senior federal officials in each province. Their roles and the extent of their development vary, and continue to evolve. They now serve as sounding boards for proposed central agency policies. Most have established human resource management subcommittees to deal with work force adjustment and other issues. For example, some regions have created interdepartmental assignment programs, career centres, mentoring and middle managers' programs.

The Human Resources Council

The Council is mandated by the heads of human resources in departments and agencies to contribute to determining strategic direction for the management of human resources in the public service. It provides leadership on the renewal and development of the human resources community and on the development of innovative solutions to human resource management issues. The deputy minister "champion" who acts as spokesperson on human resources at senior management forums looks to the Council for advice, as do others such as the Chief Human Resources Officer of the Treasury Board Secretariat. The Council (formed in 1992 as the Personnel Renewal Council) comprises about 20 officials, including 12 heads of personnel and non-voting, ex officio representatives of the central agencies and other bodies. The members who are heads of personnel represent the interests of all departments and the human resource management community. Ex officio members represent the Treasury Board Secretariat, the Public Service

Commission, the Privy Council Office, the Canadian Centre for Management Development, The Leadership Network, the Human Resources Learning Advisory Panel and the Human Resources Community Secretariat (the latter two are described below). The Council relies for funding primarily on contributions by departments and agencies. Its members lead or participate in numerous other committees or working groups.

The Human Resources Community Secretariat

At 31 March 1998, the human resources community in the public service consisted of approximately 7,000 full-time staff (down from about 11,000 in 1990). Some 2,500 were human resource management specialists, supported by about 2,400 clerks and 1,300 administrative officers working in areas such as pay and benefits administration and staffing. A Human Resources Community Secretariat (HRCS) was formed in 1998 to play an advocacy role for the human resources community and to pursue implementation of the community's La Relève action plan. HRCS is a joint initiative of the Human Resources Council, the Treasury Board Secretariat and the Public Service Commission. It operates under the leadership of the Treasury Board Secretariat's Chief Human Resources Officer.

Learning Advisory Panels

Learning Advisory Panels were created as a result of a recommendation by the Treasury Board Secretariat Advisory Committee. The purpose of such panels is to focus on the learning needs of specific public service communities, such as the policy or the communications communities. A Learning Advisory Panel for the Human Resource Community was formed in 1997 to help guide the development of this group's corporate learning agenda. It comprises about a dozen senior officials with human resource management responsibilities in departments and central agencies. It is supported by a working group of more junior officials.

Advisory Committee on Senior Level Retention and Compensation

This Committee (the Strong Committee, named after its chair) comprises seven private sector senior executives. It was established in 1997 for a term of three years, to provide independent advice to the President of the Treasury Board on retention and compensation issues for executives, deputy ministers and other Governor-in-Council appointees in the federal public sector. The Committee is charged with providing reports (to be made public by the Minister) setting out a long-term strategy to meet senior-level human resource management needs, compensation strategies and principles, and recommendations on overall management. This includes such matters as human resource policies and programs, terms and conditions of employment, classification and compensation issues, including rates of pay and rewards and recognition.

Appendix D

Full-Time GIC Positions Being Reviewed

Agriculture and Agri-food

Administrative Monetary Penalties Review Tribunal
Chairperson

Canadian Grain Commission
Chief Commissioner
Commissioner
Assistant Chief Commissioner
Assistant Commissioner

National Farm Products Council
Chairman and Member
Vice-Chairman and Member

Canadian Heritage

Canadian Radio-Television and Telecommunications Commission
Chairman and Member
Vice-Chairman and Member
Member (Regional)

National Archives of Canada
National Archivist

National Battlefields Commission
Secretary

National Film Board
Chairman and Government Film Commissioner

National Library
National Librarian

Office of the Coordinator (Status of Women Canada)
Coordinator

Public Service Commission
Commissioner

Citizenship and Immigration

Citizenship Commission
Senior Judge
Judge

Immigration and Refugee Board
Chairperson
Executive Director
Deputy Chairperson and Member *(Convention Refugee Determination Division)*
Deputy Chairperson and Member *(Appeal Division)*
Assistant Deputy Chairperson *(Convention Refugee Determination Division)*
Assistant Deputy Chairperson and Member *(Appeal Division)*
Member *(Convention Refugee Determination Division)*
Coordinating Member
Member *(Appeal Division)*

Environment

Canadian Environmental Assessment Agency
President / Chief Executive Officer
Executive Vice-President

Finance

Canadian International Trade Tribunal
Chairperson
Vice-Chairperson
Permanent / Temporary Member

Office of the Superintendent of Financial Institutions
Superintendent

Fisheries and Oceans

Department of Fisheries and Oceans
Commissioner for Aquaculture Development

Foreign Affairs and International Trade

International Centre for Human Rights and Democratic Development
President

International Joint Commission
Chairman and Commissioner

Health

Canadian Centre on Substance Abuse
Chief Executive Officer

Hazardous Materials Information Review Commission
President

Canadian Institutes of Health Research
President

Human Resources Development

Canada Employment Insurance Commission
Commissioner (Workers / Employers)

Canada Pension Plan / Old Age Security: Review Tribunals
Commissioner
Deputy Commissioner

Indian Affairs and Northern Development

British Columbia Treaty Commission
Chief Commissioner

Canadian Polar Commission
Chairperson

Northwest Territories / Yukon / Nunavut
Commissioner

Office of the Treaty Commissioner in Saskatchewan
Commissioner

Industry

Bankruptcy
Superintendent

Canadian Space Agency
President
Executive Vice-President

Competition Tribunal
Lay Member

Copyright Board
Vice-Chairman
Member

National Research Council of Canada
President

Natural Sciences and Engineering Research Council
President

Office of the Commissioner of Competition
Commissioner

Patents and Trade Marks
Commissioner of Patents and Registrar of Trade Marks

Social Sciences and Humanities Research Council
President

International Trade

Canadian Secretariat – North American Free Trade Agreement
Secretary

Justice

Canadian Human Rights Commission
Chief Commissioner

Canadian Human Rights Tribunal
Chairperson
Vice-Chairperson
Member

Law Commission of Canada
President

Office of the Commissioner for Federal Judicial Affairs
Commissioner

Supreme Court of Canada
Registrar
Deputy Registrar

Labour

Canada Industrial Relations Board
Chairperson
Vice-Chairperson
Member (Employees / Employers)

Canadian Artists and Producers Professional Relations Tribunal
Chairperson
Vice-Chairperson

Canadian Centre for Occupational Health and Safety
President

Leader of the Government in the House of Commons

Office of the Chief Electoral Officer
Assistant Chief Electoral Officer

National Defence

Canadian Forces
Chief of Defence Staff

Canadian Forces Grievance Board
Chairperson
Vice-Chairperson

Judge Advocate General of the Canadian Forces
Judge Advocate General

Military Police Complaints Commission
Chairperson
Member

Office of the Ombudsperson for the Department of National Defence and the Canadian Forces
Ombudsperson

Natural Resources

Canadian Nuclear Safety Commission
President and Member

National Energy Board
Chairman and Member
Vice-Chairman and Member
Member

Parliament

House of Commons
Clerk of the House
Sergeant-at-Arms
Deputy Clerk
Law Clerk and Parliamentary Counsel
Clerk Assistant

Library of Parliament
Parliamentary Librarian
Associate Parliamentary Librarian

Senate
Clerk of the Senate and Clerk of the Parliaments
Usher of the Senate

President of the Queen's Privy Council for Canada

Canadian Transportation Accident Investigation and Safety Board
Chairperson and Member
Member

Public Service Staff Relations Board
Chairperson

Vice-Chairperson
Deputy Chairperson
Member (Full-Time)

Prime Minister

Canadian Intergovernmental Conference Secretariat
Secretary

Governor General's Office
Secretary

National Round Table on the Environment and the Economy
Executive Director

Solicitor General of Canada

Department of the Solicitor General
Inspector General

National Parole Board
Chairperson and Member
Executive Vice-Chairperson and Member
Vice-Chairperson and Member (Appeal Division)
Vice-Chairperson and Member (Regional Division)
Member (Regional Division)
Member (Appeal Division)

Office of the Correctional Investigator of Canada
Correctional Investigator

Royal Canadian Mounted Police
Commissioner

Royal Canadian Mounted Police External Review Committee
Chairman

Royal Canadian Mounted Police Public Complaints Commission
Chairman

Transport

Canadian Transportation Agency
Chairperson and Member
Vice-Chairperson and Member
Member

Civil Aviation Tribunal
Chairman
Vice-Chairman

Veterans Affairs

Veterans Review and Appeal Board
Chairperson/Member
Deputy Chairperson/Member
Permanent/Temporary Member

Appendix E

Executive Summary of KPMG Review of Job Evaluation

Plans for Executive Positions in the Federal Public Service

Treasury Board Secretariat (TBS) engaged KPMG to undertake a review of the performance of the current Hay-based EX Group Position Evaluation Plan (EGPEP), including suggestions for improvement. We were also to consider the Universal Classification Standard (UCS) and two other "major job evaluation plans" and make recommendations as to the optimal job evaluation (JE) plan for the federal Public Service.

In order to have a common basis for comparability, KPMG developed through consultation with senior public servants and academics, a list of characteristics and criteria of an ideal JE plan for the federal Public Service. The criteria were:

1. Gender neutral
2. Proven
3. Ease of comparability to executive positions in other public and private sector jurisdictions
4. Comprehensive
5. Credible
6. Reliable
7. Flexible
8. A balance between flexibility and reliability
9. Work and results oriented
10. Ease of use
11. Currency

We assessed the EGPEP against these criteria and conclude that the EGPEP meets all but two of the criteria of an ideal job evaluation plan for executive positions in the federal Public Service. The exceptions being that the current plan is likely to be found not gender neutral and the plan lacks the required flexibility because of out-dated benchmarks.

We assessed the Universal Classification Standard against these criteria and concluded that the UCS should not be considered at the present time as a job evaluation plan for executive positions in the federal Public Service.

We conducted a survey of provincial public sectors, Crown Corporations and a select number of private sector organizations in Canada and, through our international KPMG connections, the public services of the United Kingdom, Australia and the United States to identify the JE plans used to evaluate executive positions.

The results of our survey of 24 organizations show:

- 11 use the Hay plan
- 6 use customized plans
- 4 use other plans (Willis, Towers Perrin, KPMG COMP-ETE and Ernst & Young's Decision Band Method)
- 3 have no executive JE plans

We approached Towers Perrin to obtain information about their plan but they declined to participate in this review. In consultation with TBS we agreed to concentrate our efforts on obtaining information on the nature and extent of modifications to the Hay Plan made by the surveyed organizations.

We conclude that there is little to learn from the experiences of these organizations that would help in improving the EGPEP except with respect to the Working Conditions factor, should TBS choose to add this factor to the EGPEP.

Our review concludes with five recommendations:

Recommendation 1: We recommend that EGPEP be maintained as the job evaluation system for federal Public Service executive positions.

Recommendation 2: We recommend that Treasury Board Secretariat assess whether it is in the best interest of the Public Service to implement a Working Conditions factor into the EGPEP.

Recommendation 3: We recommend that Treasury Board Secretariat develop a plan to update within the next two years the benchmark positions in the EGPEP to better reflect the current work realities of Public Service executive jobs and that benchmark positions be regularly reviewed and up-dated on a three to five year cycle.

Recommendation 4: We recommend that Treasury Board Secretariat review the Criticality of Human Relations element to determine whether to leave it as is, make it more discriminating amongst executive positions or remove it as an element in the EGPEP.

Recommendation 5: We recommend that the Treasury Board Secretariat consider the collapse of the Executive Group to three classification levels.

Appendix F

Summary of Watson Wyatt Survey on Flexible Benefits

In February 2000, the Treasury Board Secretariat distributed an excellent information package to Executives and Deputy Ministers describing their benefits and requesting their response to a survey of their interest in flexible benefits. Watson Wyatt Canada collected and analyzed the responses. The survey results have provided a wealth of information.

Nine hundred and forty-six (946) Executives of all ages, gender, marital status, length of service and location responded to the survey to constitute a highly credible base for the purposes of statistical inferences. Responses were provided by 29% of the surveyed group, a participation rate that is average for a survey of this type. This response rate provides a confidence level of 95%, or 19 times out of 20, that the survey results would yield the same responses, within + or – 2.7%. Demographic data provided by the respondents indicate that they are highly representative of the current workforce.

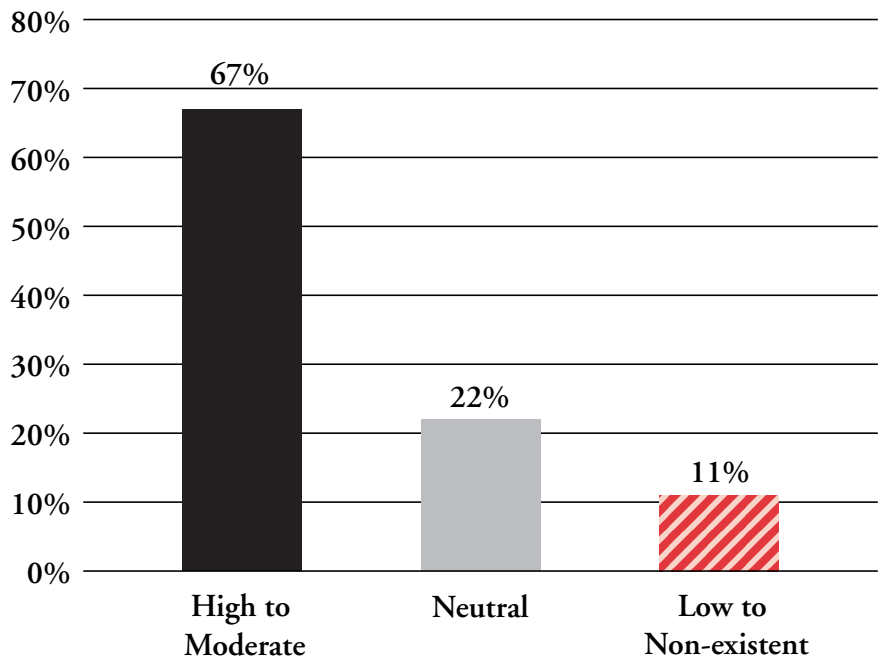
In their responses, 67% of Executives clearly indicated that the ability to tailor, customize, adapt, and change benefit levels as life and work circumstances evolve would meet their needs. It was clear that flexible benefits are viewed as an opportunity to redirect employer benefit dollars from benefits not needed to areas of greater need. Recorded comments showed that there was enthusiastic support for flexible benefits provided that:

- it made their package a distinctive feature of their compensation;
- It reduced perceived and ill-accepted internal inequities (e.g., vacation, severance, overtime, salary inversion);
- their base salary and performance-based incentives were competitive with private and other large public organizations.

Major Findings

While overall, 67% of respondents indicated high to moderate interest, interest was highest for those without dependents (89%) and those younger than age 45 (81%). Many were undecided (22%). Recorded comments showed that the undecided group prefers to evaluate the options, the extent of flexibility offered and the cost/value implications before deciding. Some respondents (11%) were not, or were barely, interested in flexible benefits. Current benefits, they argued, are adequate; others believed the annual selection of complicated benefit choices would be too time-consuming.

Level of Interest in Flexible Benefits



Desirable Plan Design and Plan Elements

Survey responses also provided some preliminary indications of a preferred plan design. A 'core plus options' approach wherein there are mandatory benefits plus an array of options was preferred by 71% of respondents, while 37% preferred an "à la carte" plan, or full cafeteria plan. Younger and single Executives expressed the highest level of interest in having the most flexibility.

The results made it clear that simply flexing traditional insurance-type benefits would not meet the needs of respondents. In fact, overall, there was only a small number who would reduce or opt-out of the traditional group insurance plans. Respondents preferred a broad, more inclusive definition of flexibility, one that extends beyond the spectrum of traditional group insurance plans to include total compensation issues, working conditions, perquisites, and work/life balance.

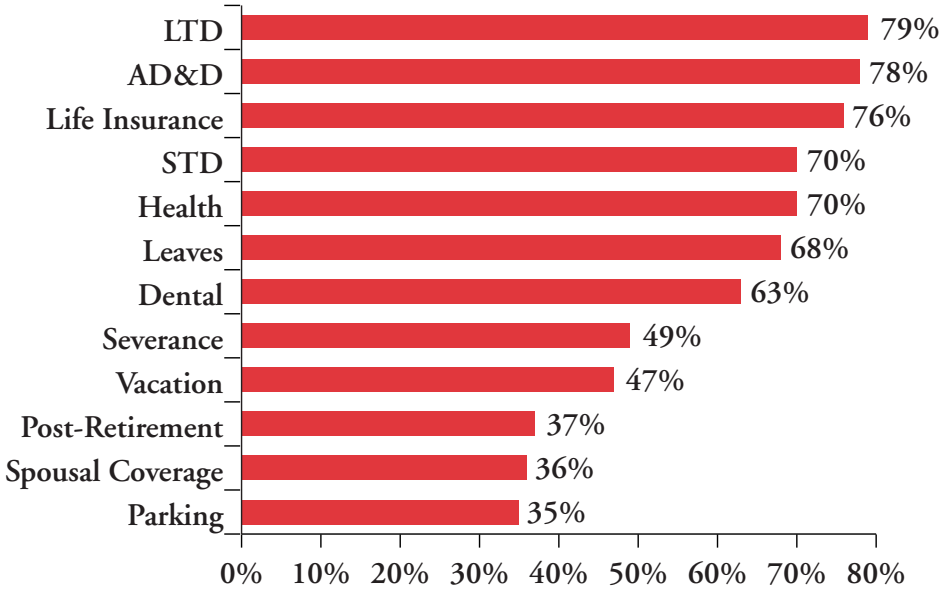
As one respondent said, "flexible benefits, especially if they include the new ones suggested (sabbaticals, HCSA, Health club memberships, etc.), might actually give me the perception I do have some benefits aside from retirement or dying." Based on the results of the survey and supported by the numerous open-ended comments, it appears that for many respondents, flexibility means:

1. the ability/opportunity to access and redirect funds that currently are not available to them, specifically the value of unused sick leave credits, funds earmarked for parking, and uncompensated overtime work; and
2. the ability/opportunity to tailor other benefits and working conditions to help manage the pressures of work and strike a proper balance between work/family/personal priorities.

Adequacy of Current Benefits

Respondents' view of the adequacy of current benefits varies significantly, and ranges from a low of 35% (parking subsidy) to a high of 79% (long-term disability). Generally, respondents indicated that the current traditional group insurance plans offer adequate protection, with the exception of spousal/dependent life insurance. Other benefits, however, such as vacation, severance, parking, and post-retirement benefits are clearly perceived as inadequate. Open-ended comments suggest that those benefits need to be improved.

Perceived Adequacy of Current Benefits



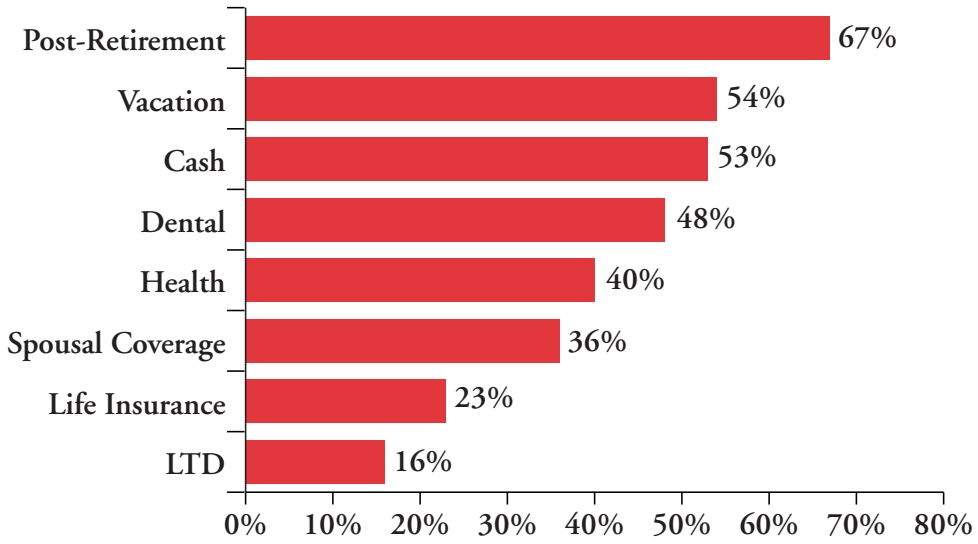
Respondents' Perception of Competitiveness of Current Benefits

Less than a quarter of respondents believed that their benefits were competitive with those offered by other major Canadian employers, particularly in the private sector. For example, there are no-stock accumulation opportunities, less generous pension accrual features, no flexible benefits, lower salaries and bonus arrangements, no air miles, no business class, no expense accounts. However, respondents appear to be as much, if not more, concerned by internal relativities, as their benefits are seen as poorer than those offered to unionized employees, for example, a less generous vacation schedule, lower severance accrual opportunity, no overtime pay, and salary inversion.

Benefits Perceived as Needing Improvement

Responses indicated that some of the current benefits need to be improved, especially post-retirement benefits (67%), vacation entitlements (54%), dental (48%) and health (40%). A significant number of respondents (53%) indicated they would consider receiving additional cash in lieu of benefit dollars allocated to unwanted benefits. The number dramatically increases to 66% for those younger than 45.

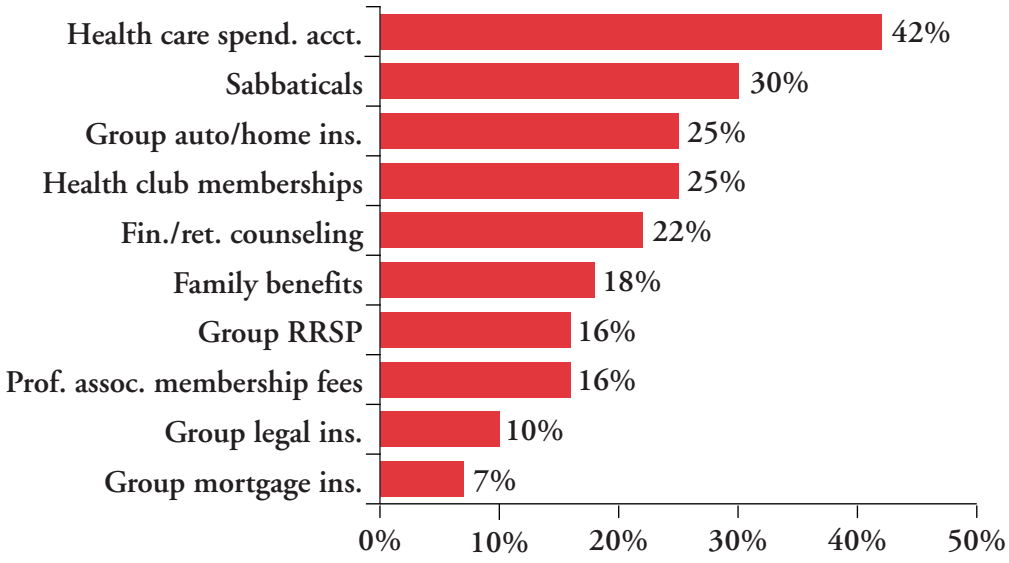
Benefits Perceived as Needing Improvement



Additional Options Desired

The survey asked respondents to choose which benefits, from an array of choices common to many flexible benefits plans, would be of most interest to them. 42% indicated a health care spending account would be an attractive feature. This option was equally attractive to all age groups and to both genders. Notable interest occurred for sabbaticals (30%), health club memberships (29%), group auto/homeowner insurance (25%), and financial/retirement counseling (22%). Younger respondents valued sabbaticals (40%), health club memberships (37%) and family benefits (30%).

Interest in Additional Benefits Options



Other Issues Raised

In response to the opportunity to provide a recorded comment, respondents provided additional information of interest. On pension plan benefits, some respondents indicated they were disappointed that pension benefits were not included in the discussion on flexible benefits. Pension enhancements and pension portability were identified as key issues, for example:

- increase pension accrual percentage from 2% to 2.5%/3% per year of service as an executive;
- increase the survivor pension, from 50% to 60%/75%;
- reduce the formula for full pension entitlement;
- count sick leave as credited service;
- permit opting-out of registered pension plan.

Travel benefits were clearly perceived as inadequate and not in line with private sector offerings; for example, there are no air miles, no business class, no luggage allowance, no airport lounge privileges, no travel with spouses, and restricted hotel accommodations. Respondents, especially those who traveled a lot, believed that they should be compensated for the significant investment in time spent away from home.

Appendix G

Performance Management Program for the Executive Group (PMP)

Preliminary Results for the Learning Year (1999-2000)

Background

The new Performance Management Program for the Executive Group (PMP) was launched April 1,1999. The "learning year" for the program has been completed. The Treasury Board Secretariat (TBS) is responsible for ensuring the consistent and equitable application of the PMP for the Executive Group across departments and agencies. To begin to achieve this objective, it is important that TBS assess the performance agreements developed to date.

Consulting and Audit Canada (CAC) reviewed the level of compliance to the 1999-2000 PMP guidelines related to the development of performance agreements based on a 10% sampling of performance agreements developed by Executives (EX) in departments. CAC made recommendations regarding lessons learned, good practices and tools that could help build a foundation for consistency across organisations in the application of the PMP policy. CAC reviewed 140 out of 285 performance agreements. This number represents a distribution of the EX population by department/agency size, EX level, geographic location and functional area of work.

The PMP guidelines indicate that *ongoing commitments* and *key commitments* should be identified within a performance agreement, with specific, results-oriented *performance measures* clearly linked to the commitments. Progression through the salary range is dependent on satisfactory achievement of *ongoing commitments*. *Ongoing Commitments* are recurring, and form part of core operational activities (e.g. financial management, HR management, and program delivery.)

The variable 'at-risk' portion of performance pay is dependent on the achievement of *key commitments*, which focus on corporate priorities for the annual performance cycle, and are challenging, i.e. they involve "stretch" beyond ongoing commitments.

Good Practices

The following good practices were noted in the sample of performance agreements:

- The average length of performance agreements, number of ongoing and key commitments and respective performance measures follow PMP guidelines;
- Over half of key commitments reviewed are results-oriented, as per the PMP guidelines;
- Almost half of the performance agreements mention Public Service leadership competencies, especially in the ongoing commitment area; and
- Core accountabilities identified in the PMP guidelines are well represented in the ongoing commitments.

Lessons Learned

Some lessons learned from the "learning year" review include:

- Drafting the performance agreement in a non-standard format such as listing goals or objectives or job description elements instead of commitments makes the information presented inconsistent with the policy guidelines, and difficult for managers and review committees to evaluate consistently at the end of the performance cycle;
- Providing more context around the commitments would allow for more informed assessment at the end of the performance cycle;
- Vague and unclear wording impacts on how well performance measures can be quantified, measured or linked to the commitments. Performance measures often do not clearly permit an assessment of level of attainment of the commitments; and

- Several of the agreements either made no mention of the timeframe during which the commitments and related measures would be completed, or went beyond the performance cycle.

Recommendations

1. To address the issue of departmental consistency and equity in the application of the PMP, it is suggested that a standard departmental template be developed. A standard template would reduce some of the inconsistencies noted.

2. To make performance agreements clearer and easier to understand, it is suggested that managers provide a context for their commitments and performance measures.

3. The PMP guidelines should emphasise that commitments be worded in a more results oriented manner, e.g. verbs are written in the past tense, "course outline developed" (more results-oriented) vs. "develop a course outline" (more process-oriented).

4. PMP guidelines should include a clear statement of what constitutes a performance measure i.e. "a performance measure will clearly indicate that a commitment has been achieved, within a certain timeframe and a defined level of quantity and quality". The performance measures should identify "what" is going to be measured, "when" and "how" with expected quantity and quality.

5. The PMP guidelines should indicate a clear requirement to explicitly include the timeframe for the commitments and the performance measures. Also, there is a need to draft commitments that are measurable within the performance cycle. When commitments extend beyond the review cycle, milestones that respect the performance cycle timeframe should be set.

6. More detail may be required on which Public Service leadership competencies to include. Developing a framework and including suggestions and examples of how Public Service leadership competencies can be integrated into the agreements would ensure that they are taken into account when developing a performance agreement.

7. To determine the degree of stretch of key commitments within departments it was recommended that an internal review of the cascade of commitments within a functional level be conducted with feedback obtained on the degree of stretch from departmental review committees.

8. These recommendations could be implemented partly through enhanced PMP guidelines in 2000-2001 **and** through coaching sessions for Executives.

Catalogue no. 85-002-X
ISSN 1209-6393

Juristat

Profile of family law cases in Canada, 2019/2020

by Lyndsay Ciavaglia Burns

Release date: June 28, 2021

Statistics Canada Statistique Canada

Canada

How to obtain more information

For information about this product or the wide range of services and data available from Statistics Canada, visit our website, www.statcan.gc.ca.

You can also contact us by

Email at STATCAN.infostats-infostats.STATCAN@canada.ca

Telephone, from Monday to Friday, 8:30 a.m. to 4:30 p.m., at the following numbers:

- Statistical Information Service 1-800-263-1136
- National telecommunications device for the hearing impaired 1-800-363-7629
- Fax line 1-514-283-9350

Depository Services Program

- Inquiries line 1-800-635-7943
- Fax line 1-800-565-7757

Standards of service to the public

Statistics Canada is committed to serving its clients in a prompt, reliable and courteous manner. To this end, Statistics Canada has developed standards of service that its employees observe. To obtain a copy of these service standards, please contact Statistics Canada toll-free at 1-800-263-1136. The service standards are also published on www.statcan.gc.ca under "Contact us" > "Standards of service to the public."

Note of appreciation

Canada owes the success of its statistical system to a long-standing partnership between Statistics Canada, the citizens of Canada, its businesses, governments and other institutions. Accurate and timely statistical information could not be produced without their continued co-operation and goodwill.

Profile of family law cases in Canada, 2019/2020: Highlights

- There were just over 275,000 family law cases active in the 10 provinces and territories reporting to the Civil Court Survey in fiscal year 2019/2020, down 6% from the previous year.
- Divorce applications (39%), cases with custody/access issues (16%), cases with support issues (7%), cases seeking protection (17%), other family cases such as adoptions and estate matters (17%), as well as cases where the family law issues were not identified (4%) made up the total active family caseload in 2019/2020.
- Family cases were more active in the courts in 2019/2020 compared to non-family cases. Family cases reported an average of 11 court events per case, while non-family cases reported 6.
- In 2019/2020, custody/access cases represented 31% of the total family events recorded by the courts and were more active than cases seeking a divorce and resolution of custody, access and/or support issues.
- Cases involving claims for support in 2019/2020 reported more child support issues (63%) than spousal support issues (19%) and 7% reported both issues of child and spousal support.
- The median number of days for family cases involving a civil protection application to reach a first disposition was one week, while newly initiated child protection cases reached a first disposition in nine days.
- Most family cases active in 2019/2020 proceeded through the court system uncontested, though, divorce cases that also involved other issues reported almost even proportions between contested (51%) and uncontested cases (49%).
- There were more female (67%) than male (33%) applicants in the active family cases in 2019/2020 across the provinces and territories reporting to the survey and most respondents were male (66%).
- More family law litigants represented themselves (58%) rather than retained representation (42%) in 2019/2020, continuing the upward trend of self-represented litigants in family law cases since 2014/2015.

Profile of family law cases in Canada, 2019/2020

by Lyndsay Ciavaglia Burns, Canadian Centre for Justice and Community Safety Statistics

When a family dynamic breaks down, several decisions need to be made concerning the children of the relationship, finances, housing and property, among other things. Some matters may be resolved privately between the parties, including by way of a separation agreement. However, in some cases, the parties may make use of a family dispute resolution process such as mediation or begin the court process.

Using data from the Civil Court Survey, this *Juristat* article will examine family law cases active in the Canadian civil courts in the 2019/2020 fiscal year. It will profile various case types where spouses or couples have experienced a family breakdown, which required the assistance of a court to dissolve (i.e. a marriage) or resolve (such as custody, access and/or support issues). Criminal court cases are out of scope for this survey.

Additional analysis is provided on the contentious nature of the case, the sex of the applicant and respondent, whether the parties were represented by legal counsel or self-represented, types of court activity that took place throughout the fiscal year and the average number of days it took a case to reach a first disposition.

It is expected that the COVID-19 pandemic will have had a significant impact on the Canadian civil justice system. The data provided in this article will establish a baseline to enable analysis of the impact of the pandemic on family law cases in the civil courts. This information will be provided in subsequent reports as those data become available.

Further, on March 1, 2021, the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) was amended to "promote the best interests of the child, address family violence, help reduce child poverty and make the justice system more accessible and efficient". Specifically, terminology around custody and access was removed in favour of parenting arrangements, language some provinces adopted prior to the introduction of the amendments. The data included in this report were collected prior to the implementation of the March 1, 2021 amendments and as a result do not reflect the parenting terminology introduced therein.

This *Juristat* was produced with the support of the Department of Justice Canada.

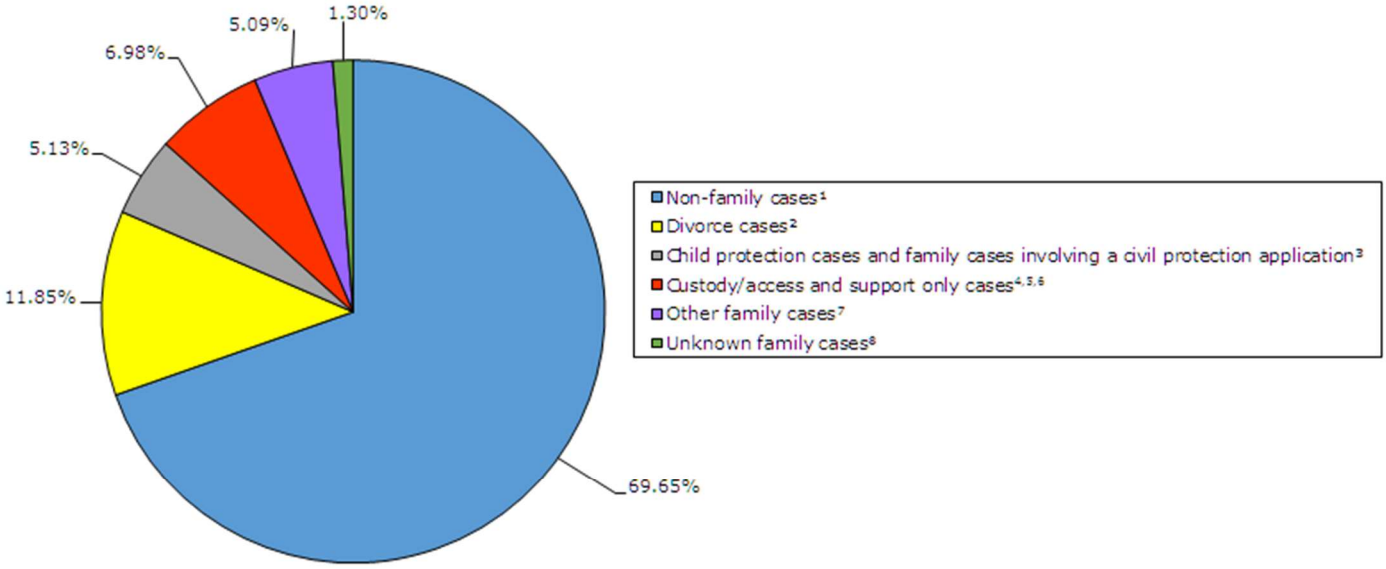
Family cases account for nearly one-third of all civil court cases in Canada

There were just over 907,000 civil court cases active in the courts in 2019/2020, and family law cases accounted for nearly one-third (30%).

Family law cases involve divorces, parenting arrangements, support payments, child protection cases, family cases involving a civil protection application and various other family matters. The larger portion of active cases were non-family cases, including civil disputes, lawsuits for damages, employment actions, probate proceedings, and other claims involving money (Chart 1, Table 1).

There were two active non-family cases for every one family law case each year since 2014/2015.[1] However, while the number of newly initiated non-family cases showed an upward trend, the number of new family cases steadily declined each year. The largest year-over-year decline in new family cases was recorded in 2019/2020 (-7%) (Chart 2).

Chart 1
Distribution of active civil court cases by type, selected provinces and territories, 2019/2020



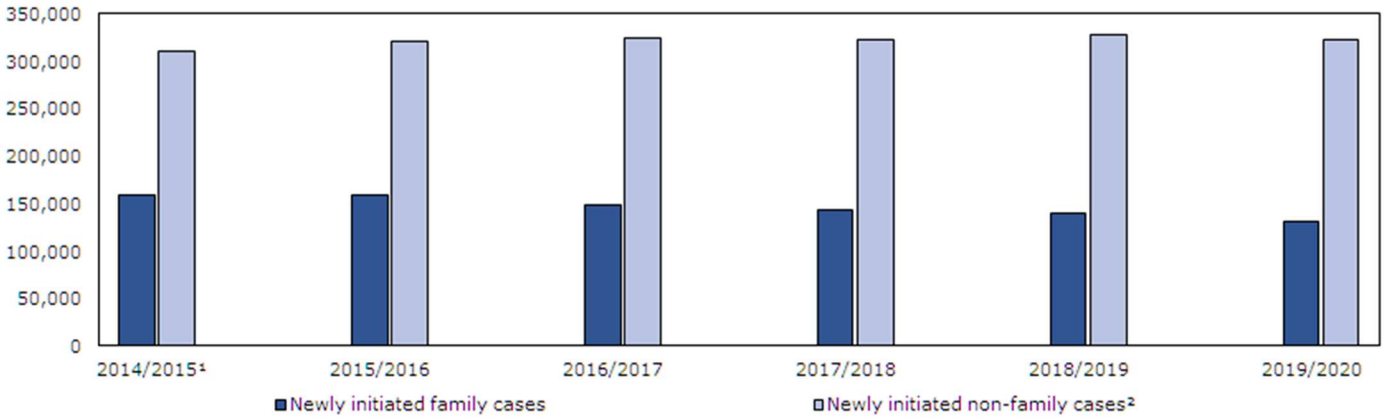
1. A non-family civil case is any civil action that is not a family-related action, such as contracts, torts, bankruptcy, probate matters and other claims involving money.
2. Divorce cases include applications to the court by one spouse or both spouses to dissolve their marriage.
3. Child protection cases and family cases involving a civil protection application include applications to family court for protection for a child or protection from an individual.
4. Custody/access cases include cases in which custody and/or access have been recorded as matters requiring resolution. Custody refers to the living arrangements of a child or children and which parent will have decision-making authority. Access allows the parent with whom the child does not primarily reside to apply for parenting time. These case types do not include applications for divorce but may involve other issues such as requests for support.
5. Support only cases include cases in which child or spousal support issues were identified. These case types may include support matters not specifically identified but it is important to note that applications for divorce are not included here.
6. Given that the data are derived from records originally kept for non-statistical purposes, complete survey information is not always available. For example, information related to issues, such as custody, access and support, may not always be available from the court information systems and, as such, may be under reported.
7. Other family cases include issues of parentage, non-parental guardianship matters, enforcement of court orders, estate matters, adoptions, other family-related disputes and cases where issues have not yet been recorded. A portion of the active cases classified as "Other family" may change over time as more issues are identified in the case.
8. Unknown family cases include unidentifiable family-related matters.

Note: Active cases include all cases with activity (at least one court event, which moves all or part of the case through the court process) during the year and thus include initiated cases. Additionally, Newfoundland and Labrador, Quebec and Manitoba are excluded as they do not report to the Civil Court Survey.

Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Civil Court Survey.

Chart 2
Newly initiated civil court cases, selected provinces and territories, 2014/2015 to 2019/2020

number of newly initiated civil court cases



1. 2014/2015 is the first year the Civil Court Survey collected and reported data from ten provinces and territories.
2. A non-family civil case is any civil action that is not a family-related action, such as contracts, torts, bankruptcy, probate matters and other claims involving money.

Note: Initiated cases include all cases that were newly started in the fiscal year. Additionally, Newfoundland and Labrador, Quebec and Manitoba are excluded as they do not report to the Civil Court Survey.

Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Civil Court Survey.

Text box 1
Classification of family law case types and methodology

This report examines family law cases active in 2019/2020. Multiple family-related issues may be identified throughout the life of a case and are, therefore, included in this analysis regardless of the year in which they were identified.

Family cases in this report have been grouped into several categories:

Divorce cases: Cases where one spouse or both spouses apply to the court to dissolve their marriage. Divorce cases will be differentiated throughout this report as either a divorce case without issues or a divorce case with issues.

- **Divorce cases without issues:** Cases involving an application to the court to dissolve a marriage where no issues of custody, access or support have been identified, though the couple may have dealt with these issues earlier in a separation agreement. These case types may include issues related to the division of matrimonial property. It is possible that divorce cases initiated late in the fiscal year may be reported as a divorce without issues if an answer is not filed until the next fiscal year.
- **Divorce cases with issues:** Cases involving an application to the court to dissolve a marriage and resolve custody, access and/or support issues. These case types may include issues related to the division of matrimonial property.

Custody/access cases: Cases in which custody and/or access have been recorded as matters requiring resolution. Custody refers to the living arrangements of a child or children and which parent will have decision-making authority. Access allows the parent with whom the child does not primarily reside to apply for parenting time. These case types do not include applications for divorce but may involve other issues such as requests for support.

Support only cases: Include cases in which child or spousal support issues were identified. These case types may include support matters not specifically identified but it is important to note that applications for divorce are not included here.

Other family cases: Include issues of parentage, non-parental guardianship matters, enforcement of court orders, estate matters, adoptions, other family-related disputes and cases where issues have not yet been recorded. A portion of the active cases classified as “Other family” may change over time as more issues are identified in the case.

Unknown family cases: Unknown family cases include unidentifiable family-related matters.

The family case categories above do not include cases that identified child protection issues or family cases seeking a civil protection order. However, cases seeking protection, as defined below, will be profiled in text boxes.

Child protection cases: Include applications to the court by the government for orders seeking the supervision of parents, guardians or caregivers, or the apprehension of children into government care because of issues of parental abuse, neglect, or incapacity.

Family cases involving a civil protection application: Include applications to the family court by individuals seeking orders to ensure their safety, such as protection orders and restraining orders.

Family law cases declined in 2019/2020

There were 275,296 family law cases active in the 10 provinces and territories[2] reporting to the Civil Court Survey in 2019/2020 (Table 1), 6% fewer than the previous year. When child protection cases and family cases involving a civil protection application are removed, the total active family caseload for 2019/2020 was 228,758 (Table 2), down 7% from the previous year. Unless otherwise specified, child protection cases and family cases involving a civil protection application are excluded in further sections of this report due to the nature and specific rules that govern these case types.

Close to half (48%) of the active family law cases in 2019/2020 were newly initiated during the year while the remaining 52% were ongoing from a previous year.

A case is considered to be “active” in any year that court activity is recorded. There are three main types of activity in civil court cases: **initiation activity**[3] which opens a new case in the civil courts, **process events**[4, 5] such as document filings,[6] pre-trial events[7, 8] and hearings, adjournments[9, 10] and trial hearings, which move the case forward through the civil process and **disposition events**,[11, 12] including judgments[13] and settlement agreements, which dispose of part, or all of a case.

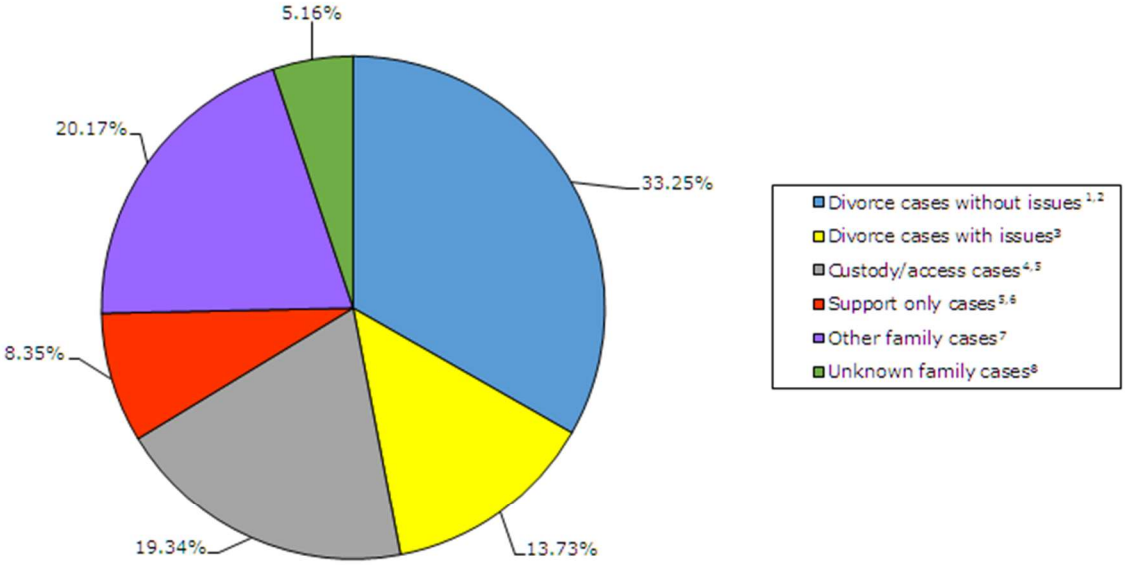
Filing a court document, attending a conference in person or remotely, settling a dispute or receiving a judgment from the court are all events that trigger the active status of a case in a fiscal year. It is important to note that family cases may return to court periodically to amend the terms of a court order.

The family cases examined here recorded court activity in 2019/2020. The cases were either newly initiated or ongoing from a previous year.

Divorce cases represent almost half of the active family caseload in 2019/2020

Overall, divorce cases made up 47% of the active cases in 2019/2020 (Table 3.1). Custody/access cases, support only cases, and other and unknown family cases, accounted for the other 53% (Chart 3).

Chart 3
Distribution of active family court cases by type, selected provinces and territories, 2019/2020



1. Divorce cases without issues involve applications to the court to dissolve a marriage where no issues of custody, access or support have been identified, though the couple may have dealt with these issues earlier in a separation agreement. These case types may include issues related to the division of matrimonial property.
2. Divorce cases initiated late in the fiscal year may be reported as a divorce without issues if an answer is not filed until the next fiscal year.
3. Divorce cases with issues involve applications made to the court to dissolve a marriage and resolve custody, access and/or support issues. These case types may include issues related to the division of matrimonial property.
4. Custody/access cases include cases in which custody and/or access have been recorded as matters requiring resolution. Custody refers to the living arrangements of a child or children and which parent will have decision-making authority. Access allows the parent with whom the child does not primarily reside to apply for parenting time. These case types do not include applications for divorce but may involve other issues such as requests for support.
5. Given that the data are derived from records originally kept for non-statistical purposes, complete survey information is not always available. For example, information related to issues, such as custody, access and support, may not always be available from the court information systems and, as such, may be under reported.
6. Support only cases include cases in which child or spousal support issues were identified. These case types may include support matters not specifically identified but it is important to note that applications for divorce are not included here.
7. Other family cases include issues of parentage, non-parental guardianship matters, enforcement of court orders, estate matters, adoptions, other family-related disputes and cases where issues have not yet been recorded. A portion of the active cases classified as "Other family" may change over time as more issues are identified in the case.
8. Unknown family cases include unidentifiable family-related matters.
Note: For the purposes of this chart, child protection cases and family cases involving a civil protection application are excluded from the total active family caseload in 2019/2020. Active cases include all cases with activity (at least one court event, which moves all or part of the case through the court process) during the year and thus include initiated cases. Additionally, Newfoundland and Labrador, Quebec and Manitoba are exduded as they do not report to the Civil Court Survey.
Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Civil Court Survey.

Divorce cases without issues were the most predominate active case type (33%) during the year (Table 3.2), followed by custody/access (19%) (Table 4) and divorce cases with issues[14, 15, 16] (14%) (Table 3.3). Support only cases represented 8% (Table 5) of the active cases, while other[17] and unknown family cases made up the remaining 25%.

Family cases are more active than non-family cases

Family cases are typically more active in the courts than non-family cases due to the number of issues that require resolution. More court activity is recorded in family cases involving multiple or complex issues which contribute to an increase in the courts caseload, resources and time. Family cases with multiple issues are also more likely to be reactivated when new issues require resolving or a previous order requires amending (Allen 2014).

Family cases active in 2019/2020 reported an average of 11 events per case in 2019/2020, five more events than in non-family cases (6). Process events made up the largest portion of events (9 events) with document filings, whether in person or remotely, representing over three quarters (78%) of those events (Table 2).

Pre-trial events are important steps in a family case that allow the parties to disclose relevant documents, to settle issues that may arise outside of the main application and to provide the parties with an opportunity to resolve some or all of the issues in the case prior to trial. Active family cases reported an average of one pre-trial event each during 2019/2020. It is important to note that the reporting of pre-trial events varies across jurisdictions and therefore, reporting limitations may exist as indicated previously.

Parties in a family case may ask for an appearance date to be re-scheduled or adjourned to a new date with permission from the court. There are also circumstances in which the court will be required to request an adjournment for the case in the event of a scheduling conflict with another case or a court closure. Family cases active in 2019/2020 reported an average of one adjournment per case.

Family cases reached a first disposition faster in 2019/2020 than the year before

When a family dispute is resolved either between the parties or by the court, a verbal or written judgment or order may be rendered by the court and placed on the court file. Depending on the number of issues requiring resolution, it is not uncommon for parties in a family case to receive multiple decisions from the court that either dispose of part, or all, of a case.

Overall, the median length of time for family cases to reach a first disposition was 79 days, two days quicker than in 2018/2019 (81 days). In 2019/2020, family cases reported receiving an average of two judgments per case (Table 2).

Divorce cases

Based on 20 million Canadians surveyed by the General Social Survey in 2017, 56% of adults aged 25 to 64 were married and 6% were separated or divorced at that time (Statistics Canada 2019a; Statistics Canada 2019b).

Finances, infidelity, incompatibility or abuse may be some of the reasons that contribute to a marital breakdown. However, in order to legally end a marriage, the spouses must establish the breakdown of their marriage by providing evidence to the court that they have lived separate and apart for at least one year, one spouse has committed adultery, or one spouse has treated the other spouse with physical or mental cruelty and made it impossible to continue living together, prior to obtaining a divorce order (*Divorce Act*).

Divorce cases remain the predominate active family case type

As noted above, divorce cases made up almost half (47%) of the total active family cases in 2019/2020 (Chart 3, Table 3.1). Just over two-thirds (71%) of the divorce cases were reported without custody, access or support issues (Table 3.2) while close to one-third (29%) were reported with issues related to custody, access and/or support (Table 3.3).

New divorce cases accounted for 46% of the newly initiated family cases in 2019/2020. Divorce cases without issues represented 40% of the new cases. Similarly, divorce cases ongoing from previous years with activity reported in 2019/2020 composed 48% of the total number of active family cases ongoing from a previous year. More divorce cases without issues continued into 2019/2020 from a previous fiscal year (56%) compared to divorce cases with issues (44%).

Divorce cases with issues reported slightly longer disposition times than divorce cases without issues

If reasonable child support arrangements have been made and other issues resulting from the marital breakdown are resolved privately between the spouses, a divorce may proceed through the court simply on the application and written evidence with no need for the parties to appear before a judge in person or remotely. For these reasons, divorce cases without issues (8 events) (Table 3.2) reported seven fewer events than divorce cases with issues (15 events) (Table 3.3).

There was an average of one pre-trial event and one adjournment event per divorce case with issues, compared to divorce cases without issues which reported an average of less than one pre-trial and adjournment events in the year.

Due to the number of issues that require resolution throughout the case, divorce cases with issues had an average of two more judgments (3) than divorce cases without issues (1) and one more judgment than the average family case (2).

Around half (47%) of divorce cases without issues that reached a first disposition did so within the first three months, a further 40% in over three months to one year and the remaining 13% in over one year. In comparison, divorce cases with issues took a little longer to resolve, with a little over one-third (38%) reaching the first disposition within the first three months, 44% in over three months to one year and 17% in over one year.

Text box 2
Family cases involving a civil protection application

There were almost 9,000 new family court cases involving an application for a civil protection order in 2019/2020 (Table 6).

Family cases involving a civil protection application are distinctly different from child protection applications which involve the government applying to the court for protection of a child. In a family civil protection application, a family member who experiences or is at risk of experiencing family violence, applies for the protection order from the court. In 2% of the active family cases involving a civil protection application examined here, issues relating to the safety of a child were also present.

According to police-reported family violence statistics, 107,810 people experienced intimate partner violence in 2019, 79% of whom were women (Conroy 2021). Criminal offences are out of scope for the Civil Court Survey, yet, it is important to note that there may be situations of family violence that involve a criminal court case as well as a civil case.

In 2019/2020, there were 20,682 family cases active in the civil courts which reported at least one application for a family civil protection order over the lifetime of the case. Just under one-third (30%) of the active cases reported the sex[18] of the applicant. Of those, 73% were female and 27% were male. However, the data excludes Ontario, Alberta and Yukon due to limitations in reporting the sex of the applicant and therefore should be interpreted with caution due to the small number of cases for which this information is available.

Most of the active family cases involving a civil protection application proceeded uncontested (70%) while 30% reported respondent activity at least once during the case.

Due to the safety concerns raised in an application for protection, the process of obtaining a protection order from the court is expedited. In 2019/2020, over three-quarters (79%) of family cases involving a civil protection application reached a first disposition within the first three months, the median amount of days being one week.

Cases involving custody and/or access issues

Determination of custody and access arrangements often both need adjudication. According to the *Divorce Act,*[19] when determining custody and access issues, a judge shall consider the best interests of the child or children who formed part of the relationship.

Custody issues can be divided into living arrangements, where a child will primarily reside and with which parent, and decision-making, whether one parent will have primary decision-making authority for the child on issues such as health, education and religion or whether this decision-making authority will be shared. A judge may order that custody of a child be granted to one or both parents.

Additionally, access orders can be granted to allow the parent with whom the child does not primarily reside with parenting time. The court order will stipulate who may spend time with the child, how often and for how long. Some access types may include liberal/reasonable, supervised, no access, scheduled/specified or mixed arrangements. Grandparents and non-family members may also apply for access to children.

Cases involving custody/access issues represented 19% of active family cases in 2019/2020 (Table 4). It is important to note that the custody/access case types examined here may include married or common-law couples who are separated but do not include applications for divorce. Requests for support may also be involved in these cases.

Close to one-third (31%) of the active custody/access cases were new in 2019/2020 and 28% were continuing on from 2018/2019, while the remainder (41%) were initiated in 2017/2018 or earlier.

Custody/access cases are the most active type of family case

Custody/access cases tend to involve more court activity and remain in court longer than the other family case types due to the number of issues requiring resolution (Allen 2014). The case length can have a significant impact not only on the courts time and resources but also the families involved.

In 2019/2020, custody/access cases represented just under one-third (31%) of the total family events recorded by the courts.

There was an average of 18 events per case identifying custody and/or access issues, three more events than divorce cases with issues (15) and seven more events than the average in family cases (11) (Table 4).

There was an average of two pre-trial events, one adjournment, and four disposition events per custody/access case.

Of the 39,888 custody/access cases that reported a disposition event such as a judgment, 68% reached the first disposition on one or more of the issues in the case within the first three months, 25% in over three months to one year and 6% took over one year.

Cases involving support issues only

Support is a type of relief that can be requested by a party to a family case following a divorce or separation. Child support obligations must be paid by the parent with whom the child does not primarily reside to ensure that children are supported financially by both parents (Department of Justice Canada 2016). The Child Support Guidelines can help calculate the amount of support that must be paid. However, the amount may be adjusted over time should the financial circumstances of the payor or recipient change.

Spousal support payments can be requested by one spouse for financial support after the breakdown of a marriage or common-law relationship. The Spousal Support Advisory Guidelines can help a judge consider the amount, if any, a spouse is entitled to receive.

It is important to note that the support only case types examined here may include married or common-law couples who are separated but do not include applications for divorce.

There were just over 19,000 support only cases active in the family courts in 2019/2020, representing 8% of the total active family caseload. Similar to custody/access cases, there were more support only cases ongoing (64%) from previous years than newly initiated cases (36%) (Table 5).

Child support issues were reported in 63% of the support only cases active in the year, while 19% of cases reported issues of spousal support. Both child and spousal issues were reported in 7% of the active support only cases. More than one type of support may be requested in a case, and therefore, the proportions will not equal 100%.

Text box 3
Just over one-third of support cases enrolled in a maintenance enforcement program were in full compliance in 2019/2020

Child and spousal support payments stipulated in a court order or registered agreement are enforceable. Provincial and Territorial maintenance enforcement programs (MEP's) exist to help secure child and spousal support payments before requesting assistance from the courts. MEP's are available across Canada, however, the participation requirements vary between jurisdictions. MEP's have administrative powers to enforce child and spousal support payment by garnishing the payors wages, suspending their drivers license, seizing their assets, among other administrative actions.

According to results from the most recent Survey of Maintenance Enforcement Programs, 95,200 child and spousal court-ordered financial support cases were registered with a MEP in 2019/2020, in the five provinces and two territories responding to the survey. Of those, 35% were in full compliance, meaning payments were received in all months of the fiscal year, compared to 16% of cases which were never compliant throughout the year. The remainder were compliant at some times during the year (Statistics Canada 2021).

It is important to note that there is no direct link from the support cases reported by the Civil Court Survey to the cases reported by the Survey of Maintenance Enforcement Programs.

Many support issues can be resolved within the first three months

More than two-thirds of events (75%) in support only cases were process events (9), made up primarily by document filings (6). Similar to other family case types, there was an average of one pre-trial event and one adjournment event per support only case and three disposition events (Table 5).

Of the 15,724 support only cases that had a disposition event, over half (55%) reached the first disposition event within the first three months, 31% in over three months to one year and 14% in over one year.

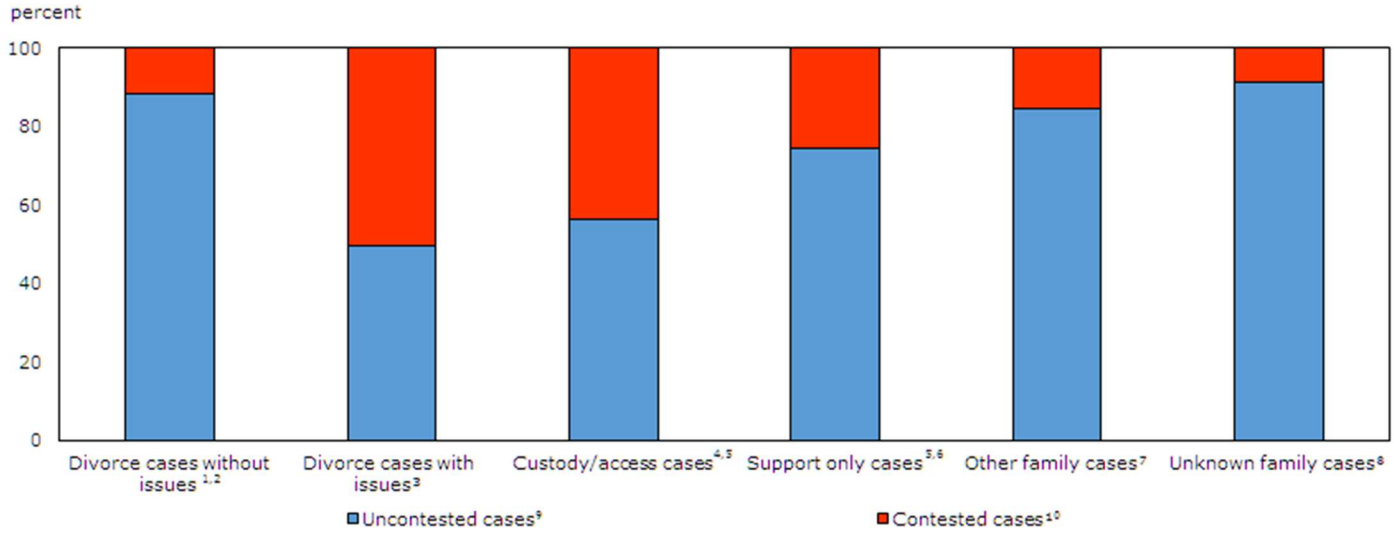
Uncontested versus contested family cases

For the purpose of this analysis, a case was considered contested by the opposing party if a responding document, such as an answer opposing the relief sought in the case, was recorded on this file. Uncontested cases did not report a responding document while contested cases did.

Most family cases are uncontested

Three quarters (75%) of active family cases in 2019/2020 were uncontested,[20] 48% of which were divorce cases[21] (Chart 4).

Chart 4
Proportion of uncontested and contested active family court cases by type, selected provinces and territories, 2019/2020



1. Divorce cases without issues involve applications to the court to dissolve a marriage where no issues of custody, access or support have been identified, though the couple may have dealt with these issues earlier in a separation agreement. These case types may include issues related to the division of matrimonial property.
2. Divorce cases initiated late in the fiscal year may be reported as a divorce without issues if an answer is not filed until the next fiscal year.
3. Divorce cases with issues involve applications made to the court to dissolve a marriage and resolve custody, access and/or support issues. These case types may include issues related to the division of matrimonial property.
4. Custody/access cases include cases in which custody and/or access have been recorded as matters requiring resolution. Custody refers to the living arrangements of a child or children and which parent will have decision-making authority. Access allows the parent with whom the child does not primarily reside to apply for parenting time. These case types do not include applications for divorce but may involve other issues such as requests for support.
5. Given that the data are derived from records originally kept for non-statistical purposes, complete survey information is not always available. For example, information related to issues, such as custody, access and support, may not always be available from the court information systems and, as such, may be under reported.
6. Support only cases include cases in which child or spousal support issues were identified. These case types may include support matters not specifically identified but it is important to note that applications for divorce are not included here.
7. Other family cases include issues of parentage, non-parental guardianship matters, enforcement of court orders, estate matters, adoptions, other family-related disputes and cases where issues have not yet been recorded. A portion of the active cases classified as "Other family" may change over time as more issues are identified in the case.
8. Unknown family cases include unidentifiable family-related matters.
9. Uncontested cases did not report the filing of a responding document, such as an answer, to the original application. Cases initiated close to the end of a fiscal year may be classified as uncontested and reclassified as contested the following fiscal year when more information, such as the filing of an answer, becomes available. Therefore, it is possible that the number of new uncontested cases is over-reported.
10. Contested cases reported the filing of a responding document, such as an answer, to the original application.

Note: For the purposes of this chart, child protection cases and family cases involving a civil protection application are excluded from the total active family caseload in 2019/2020. Active cases include all cases with activity (at least one court event, which moves all or part of the case through the court process) during the year and thus include initiated cases. Additionally, Newfoundland and Labrador, Quebec and Manitoba are exduded as they do not report to the Civil Court Survey.
Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Civil Court Survey.

Divorce cases without issues were mostly uncontested (88%), while divorce cases with issues revealed almost even proportions between contested (51%) and uncontested cases (49%).

Custody/access cases were 56% uncontested and 44% contested compared to support only cases which were mostly uncontested (74%).

Applicant and respondent profiles

The applicant in a family case is generally the party who brought the matter to court. The opposing party to the application is known as the respondent.[22]

While the Civil Court Survey attempts to collect the sex[23] of the parties in civil court cases, in 2019/2020, only 15% of active family cases reported the sex of the applicant and only 16% reported the sex of the respondent. In the remaining cases, the information was unavailable, unknown, or, in a small number of cases, related to a government or an organization.

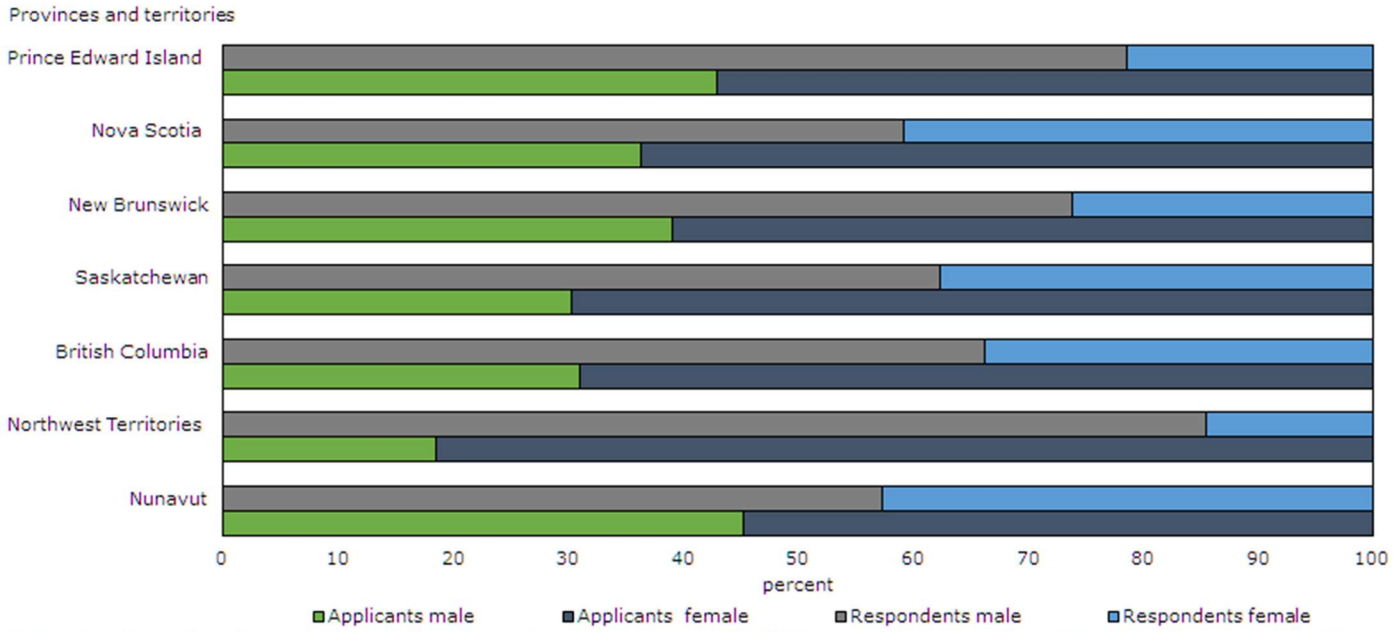
The following analysis is based on reported male and female applicant and respondents only and exclude Ontario, Alberta and Yukon due to reporting limitations. Caution should be exercised when interpreting these data due to the small number of cases for which this information is available. Child protection cases and family cases involving a civil protection application are included here. However, it is important to note that the applicant in a child protection case is most often a government entity.

More applicants are female and more respondents are male

Of the reported male and female applicant and respondent types only in 2019/2020, 67% of applicants in family law cases were female and 66% of respondents were male.

Female applicants were more prominent in family cases than male applicants across the provinces and territories included in this analysis. In contrast, the respondents in family cases were mostly male (Chart 5).

Chart 5
Proportion of male and female litigants in active family court cases by selected provinces and territories, 2019/2020



Note: This chart is based on active cases where the applicant sex was reported (15.39%) and active cases where this information was reported for respondents (16.03%) in 2019/2020. Caution should be exercised when interpreting this data due to the small number of cases for which this information is available. Alberta and Yukon are excluded in the context of all family case types due to limitations in the reporting of this data. Ontario is included in the context of child protection cases but excluded from other family case types. For the purposes of this chart, child protection cases and family cases involving a civil protection application are included in the total active family caseload for 2019/2020. However, it is important to note that the applicant in a child protection case is most often a government entity. Alberta, Yukon and Northwest Territories are excluded in the context of child protection cases due to limitations in the reporting of this data. Data collection for the sex of the parties in a civil court case reflects the data entry practices in each reporting province and territory. Therefore, the Civil Court Survey is unable to distinguish between sex and gender. Active cases include all cases with activity (at least one court event, which moves all or part of the case through the court process) during the year and thus include initiated cases. Additionally, Newfoundland and Labrador, Quebec and Manitoba are exduded as they do not report to the Civil Court Survey. Percentages may not total 100% due to rounding.
Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Civil Court Survey.

Most applicants in child protection cases are a government entity

The following analysis is based on reported applicants and respondents in the context of child protection cases only and exclude applicants and respondents in Alberta and Yukon, as well as respondents in Northwest Territories due to limitations in the reporting of these data.

The applicant in a child protection case is most often a government entity who is made aware of a situation in which a child requires protection and applies to the court for supervision or protection of that child.

Of the known applicants (74%) in child protection cases, nearly all were the government or an organization (99.5%) while slightly more respondents were male (35%) or female (28%).

Legal representation in family cases

The following analysis is based only on cases which reported a known type of representation and should be interpreted with caution due to the small number of cases for which this information in available. Nunavut is excluded due to limitations in the reporting of this data.

While the Civil Court Survey attempts to collect the legal representation status of applicants and respondents in civil court cases, in 2019/2020, only 27% of active family cases reported a representation status other than unknown or not applicable for the applicant and only 12% reported it for the respondent, as at the end of the fiscal year.

Applicants and respondents in family cases can choose whether or not to hire a lawyer for their case. Though it is generally advisable to obtain representation when going to court (Ontario Court of Justice 2018), some litigants may not be able to afford legal representation for part or all of the proceeding and represent themselves.

In the following section, family cases active in 2019/2020 were examined to determine whether the applicant and respondent were represented or self-represented[24] in the fiscal year. However, it is possible for the parties to obtain legal representation later on in the case. Cases involving child protection cases and family cases involving a civil protection application are included in this section.

The majority of applicants and respondents in family cases are self-represented

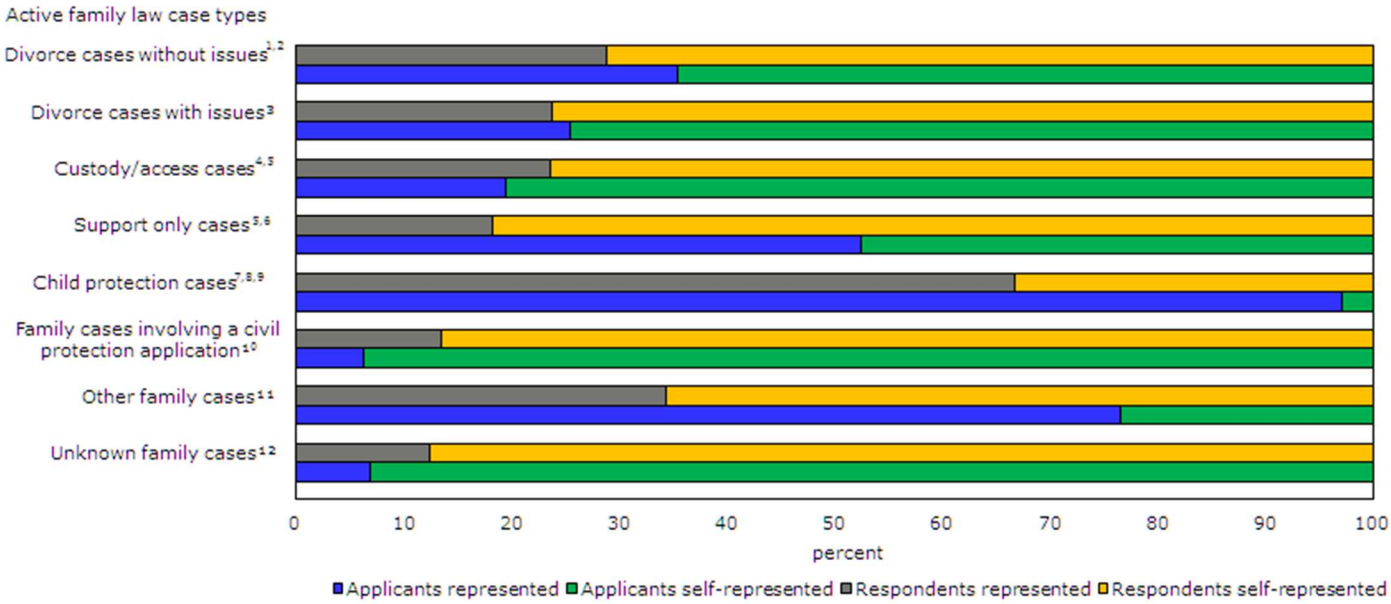
Overall, more family case litigants in active cases were self-represented (58%) than not (42%) in 2019/2020.

When analyzing applicants only, almost half (47%) were represented by a legal-aid lawyer (3%), a non-legal aid lawyer (44%) or duty counsel (0.3%). Another 1% had non-legal representation, such as a family member, which will not be analyzed further in this section. The remaining 53% of applicants were self-represented.

The number of self-represented applicants exceeds the number of represented applicants across the active family case types examined in this report, with the exception of support only, child protection and other family cases.

Similarly, about two-thirds (70%) of respondents in family cases were self-represented and almost one-third (30%) were represented at least one time in the fiscal year (Chart 6).

Chart 6
Proportion of represented and self-represented litigants in active family court cases by case type, selected provinces and territories, 2019/2020



1. Divorce cases without issues involve applications to the court to dissolve a marriage where no issues of custody, access or support have been identified, though the couple may have dealt with these issues earlier in a separation agreement. These case types may include issues related to the division of matrimonial property.
2. Divorce cases initiated late in the fiscal year may be reported as a divorce without issues if an answer is not filed until the next fiscal year.
3. Divorce cases with issues involve applications made to the court to dissolve a marriage and resolve custody, access and/or support issues. These case types may include issues related to the division of matrimonial property.
4. Custody/access cases include cases in which custody and/or access have been recorded as matters requiring resolution. Custody refers to the living arrangements of a child or children and which parent will have decision-making authority. Access allows the parent with whom the child does not primarily reside to apply for parenting time. These case types do not include applications for divorce but may involve other issues such as requests for support.
5. Given that the data are derived from records originally kept for non-statistical purposes, complete survey information is not always available. For example, information related to issues, such as custody, access and support, may not always be available from the court information systems and, as such, may be under reported.
6. Support only cases include cases in which child or spousal support issues were identified. These case types may include support matters not specifically identified but it is important to note that applications for divorce are not included here.
7. Child protection cases include applications to the court by the government for orders seeking the supervision of parents, guardians or caregivers, or the apprehension of children into government care because of issues of parental abuse, neglect, or incapacity.
8. The child protection cases examined in this chart include cases where child protection was identified as an issue and do not include applications for divorce.
9. This chart excludes litigants in the context of child protection cases in Yukon, Northwest Territories and Nunavut due to limitations in the reporting of this data.
10. Family cases involving a civil protection application include applications to the family court by individuals seeking orders to ensure their safety, such as protection orders and restraining orders.
11. Other family cases include issues of parentage, non-parental guardianship matters, enforcement of court orders, estate matters, adoptions, other family-related disputes and cases where issues have not yet been recorded. A portion of the active cases classified as "Other family" may change over time as more issues are identified in the case.
12. Unknown family cases include unidentifiable family-related matters.
Note: For the purposes of this chart, child protection cases and family cases involving a civil protection application are included in the total active family caseload for 2019/2020. This chart is based on the representation status of applicants in 27.47% of active family cases and respondents in 11.62% of active family cases as at the end of the 2019/2020 fiscal year. Caution should be exercised when interpreting this data due to the small number of cases for which this information is available. Nunavut is excluded due to limitations in the reporting of this data. For the purposes of this chart, "self-represented" includes both self-represented and unrepresented litigants as classified in the Civil Court Survey National Data Requirements. However, the Civil Court Survey is unable to differentiate between self-represented and unrepresented litigants. Active cases include all cases with activity (at least one court event, which moves all or part of the case through the court process) during the year and thus include initiated cases. Additionally, Newfoundland and Labrador, Quebec and Manitoba are excluded as they do not report to the Civil Court Survey.
Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Civil Court Survey.

Most applicants and respondents are represented by legal counsel in child protection cases

The applicant, such as the Children's Aid Society in Ontario, and the respondent parent in a child protection application are generally both represented by legal counsel. It is also possible that the child of the application will be represented by counsel from the Office of the Children's Lawyer, or a similar entity in the other provinces and territories, if the court deems it necessary for the child to be represented (Department of Justice 2012). The parent in a child protection application has a right to respond but may choose not to do so.

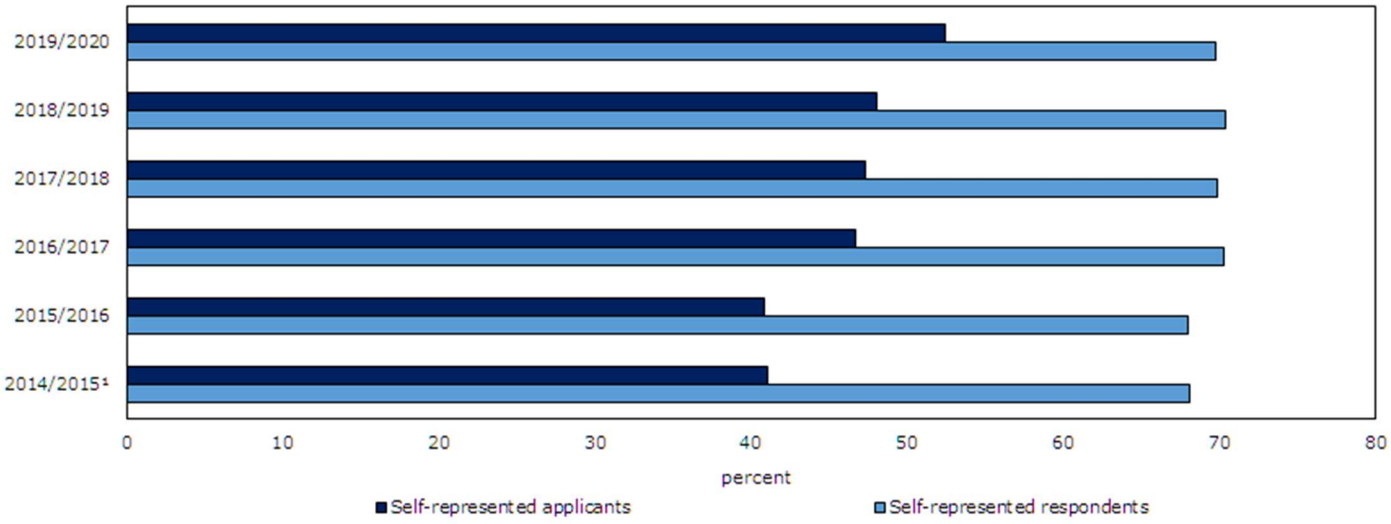
In addition to support only and other family cases, child protection cases also reported more represented parties (91%) than not (9%) in 2019/2020. Based on 72% of active child protection cases that reported a type of legal representation, almost all (97%) of the applicants and close to two-thirds (67%) of respondents were represented during the year. The high proportion of represented parties, compared to other family cases, may reflect the involvement of the government as the applicant. These data exclude litigants in the context of child protection cases in Yukon, Northwest Territories and Nunavut due to limitations in the reporting of this data.

Self-represented litigants in family cases are increasing

In 2020, 57 Ontario judges were surveyed on their perceptions of the number of represented and unrepresented litigants appearing before the courts over the past decade. The survey revealed the judges' perception that more litigants in family law cases appeared before the courts representing themselves rather than with representation (Birnbaum and Bala 2020).

Data from the Civil Court Survey supports the judges' survey. The number of self-represented applicants active in the family courts rose by 11 percentage points between 2014/2015 (41%) and 2019/2020 (52%) while self-represented respondents increased from 68% to 70% in that time (Chart 7).

Chart 7
Proportion of self-represented litigants in active family court cases, selected provinces and territories, 2014/2015 to 2019/2020



1. 2014/2015 is the first year the Civil Court Survey collected and reported data from ten provinces and territories.
Note: For the purposes of this chart, child protection cases and family cases involving a civil protection application are included in the total active family caseload for 2019/2020. This chart is based on the representation status of applicants in 27.47% of active family cases and respondents in 11.62% of active family cases as at the end of the 2019/2020 fiscal year. Caution should be exercised when interpreting this data due to the small number of cases for which this information is available. Nunavut is excluded due to limitations in the reporting of this data. For the purposes of this chart, "self-represented" includes both self-represented and unrepresented litigants as classified in the Civil Court Survey National Data Requirements. However, the survey is unable to differentiate between self-represented and unrepresented litigants. Active cases include all cases with activity (at least one court event, which moves all or part of the case through the court process) during the year and thus include initiated cases. Additionally, Newfoundland and Labrador, Quebec and Manitoba are excluded as they do not report to the Civil Court Survey.
Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Civil Court Survey.

Text box 4
Child protection cases

When the government is made aware that a child is being abused physically, sexually, psychologically or emotionally, an application can be made to the court for an order to have the time that the child spends with their parents or custodians supervised or to have the child removed from the situation all together.

The cases examined here include cases where child protection was identified as an issue and do not include applications for divorce.

In 2019/2020, there were almost 12,000 new applications for child protection orders initiated in the civil courts (Table 7), an 8% decrease from the previous year. Due to the urgency of these case types to ensure the safety of the child, the courts prioritize protection matters (Ontario Superior Court of Justice 2012). As such, the median number of days to reach a first disposition in new child protection cases was 9 days. Northwest Territories and Saskatchewan are excluded from the median number of days to reach a first disposition in 2019/2020.

In 2019, according to police-reported data from the Incident-based Uniform Crime Reporting Survey, 22,299 children were victimized by a family member with almost 60% of the perpetrators being a parent (Conroy 2021). Though criminal cases are out of scope for the Civil Court Survey, there may be family violence situations that involve both criminal court cases and child protection applications. A child protection application may be started after an act of family violence has been reported or before if there is a concern for a child's safety.

As with any other civil case, the respondent has a legal right to respond to the application. However, over two-thirds (77%) of the new child protection applications in 2019/2020 proceeded without respondent activity.

Summary

This report profiles divorce cases, custody/access cases, support only cases, child protection cases and family cases involving a civil protection application active in the civil courts in 2019/2020. The profiles establish a baseline of family law court data which will enable future analysis of the impact of the COVID-19 pandemic, as well as amendments introduced in the March 1, 2021 *Divorce Act*, on family law cases in the Canadian civil courts.

The 2019/2020 family law caseload was mostly made up of divorce cases with and without issues, followed by child protection cases, family cases involving a civil protection application and cases involving custody, access and support issues.

Family law cases were more active in the courts and reached a first disposition faster than general civil cases in 2019/2020. Overall, most family cases, including protection cases, reached a first disposition within the first three months.

Survey description

In 2019/2020, the Civil Court Survey (CCS) included data for Prince Edward Island, Nova Scotia, New Brunswick, Ontario, Saskatchewan, Alberta, British Columbia, Yukon, Northwest Territories and Nunavut. Newfoundland and Labrador, Quebec and Manitoba are not yet reporting to the survey. Collection for the year began in June 2020 and covered the April 1, 2019 to March 31, 2020 (2019/2020) fiscal year.

The data examined includes only the provinces and territories that are capable of reporting the information and only the cases that recorded a meaningful value for the variable. Unknown and not applicable values were excluded from some portions of the analysis, as noted.

Data for the CCS are based on the administrative records stored in civil court automated information systems in the ten provinces and territories listed above. Given that the data are derived from records originally kept for non-statistical purposes, complete survey information is not always available for all provinces and territories. In particular, some provinces and territories may not be able to provide full information on secondary issues for a case. For example, information related to issues such as custody, access, support and property may not always be available from the court information systems and, as such, may be under-reported. The degree of under-reporting is unknown. Information is provided by province and territory to support analysis of individual provinces or territories. However, comparisons of data by province and territory are not recommended as reporting is not consistent for all case types.

References

Allen, Mary. 2014. "Family law cases in the civil courts, 2012/2013." *Juristat.* Statistics Canada Catalogue no. 85-002-X.

Birnbaum, Rachel and Nicholas Bala. 2020. "Judicial perspectives on self-represented litigants in family courts." *The Lawyer's Daily*. (accessed January 25, 2021).

Conroy, Shana. 2021. "Family violence in Canada: A statistical profile, 2019." *Juristat*. Statistics Canada Catalogue no. 85-002-X.

Department of Justice Canada. 2012. "Best practices where there is family violence." *Criminal Law Perspective.* (accessed March 1, 2021).

Department of Justice Canada. 2016. *Child Support Fact Sheet.* (accessed January 8, 2021).

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). Parliament of Canada.

Ontario Court of Justice. 2018. *Representing Yourself at Your Family Law Trial. A Guide.* (accessed February 23, 2021).

Ontario Superior Court of Justice. 2012. *Statement of Objectives. Prioritizing Children Initiative*. (accessed February 10, 2021).

Statistics Canada. 2019a. "Being married or common-law in Canada." *Infographic*. Statistics Canada Catalogue no. 11-627-M.

Statistics Canada. 2019b. "Separation or divorced in Canada." *Infographic*. Statistics Canada Catalogue no. 11-627-M.

Statistics Canada. 2021. "Survey of Maintenance Enforcement Programs: Child and spousal support, 2019/2020." *The Daily*. Statistics Canada Catalogue no. 11-001-X.

Notes

1. 2014/2015 is the first year the Civil Court Survey collected and reported data from ten provinces and territories.

2. Excludes Newfoundland and Labrador, Quebec and Manitoba, not yet reporting to the survey.

3. Initiation events initiate a case in the civil courts by adding a new case to the court's active case inventory.

4. Process events are events that move the case forward through the civil process, but are not the initiating event.

5. In New Brunswick, a breakdown of the "Process events" and "Disposition events" for family matters is not available for 2019/2020.

6. Document filed events include any document filed or registered with the courts by the parties or documents issued by the courts. Examples include, among others, separation agreements, financial statements, affidavits and expert witness reports.

7. Pre-trial events include case management conferences, discovery proceedings, pre-trial conference/hearings, motions and default hearings, status hearings and reference hearings.

8. Pre-trial hearing events in Nunavut are under-represented due to limited data entry in the Nunavut civil information system. Other pre-trial events including case management conferences and reference hearings are also not reported.

9. Adjournment events involve the postponement of a court hearing or trial to another date or time or the continuation of a court hearing or trial on another date or time but excludes adjourned sine die.

10. Adjournment data is not available for Northwest Territories.

11. See note 5.

12. A disposition is a court event that disposes part of or all of the civil case (for example, settlement, consent judgment and judgment). Disposition events may also include cases that are transferred permanently to another court location, court level or type of court. Therefore, it is important to note that the case may not necessarily be disposed of but rather continuing in another court.

13. A judgment is a decision made by a judge (or a master), including interim orders, orders, decisions on costs or other decisions that dispose of part of or all of the case, including summary judgments.

14. In Prince Edward Island, the issues of custody, access and support may be under-reported since these issues are typically not captured when cases are first initiated but rather are identified from activity (such as judgments) over the length of the case.

15. In Nova Scotia, divorce cases with issue(s) identified and the subcategories of access, custody and support are under-reported due to limitations in the system capacity to report secondary issues of custody, access and support.

16. In Ontario, the issues of custody, access and support may be under-reported since these issues are typically not captured when cases are first initiated but rather are identified from activity (such as judgments) over the length of the case.

17. A portion of the active cases classified as “Other family” may change over time as more issues are identified in the case. This is particularly true for cases in Ontario where information on issues is not recorded directly, but is determined by the outcome of a case as recorded in the judgment.

18. Data collection for the sex of the parties in a civil court case reflects the data entry practices in each reporting province and territory. Therefore, the Civil Court Survey is unable to distinguish between sex and gender.

19. *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) (2019), ss. 16(8).

20. Cases initiated close to the end of a fiscal year may be classified as uncontested and reclassified as contested the following fiscal year when more information, such as the filing of an answer, becomes available. Therefore, it is possible that the number of new uncontested cases is over-reported.

21. Ontario represented 43% of the uncontested divorce cases. It is important to note that issues will be added over time as determined from the outcome of the case, as recorded in judgments, therefore, it is possible that there is over-reporting of uncontested divorce cases in Ontario.

22. The Civil Court Survey National Data Requirements labels the left-hand and right-hand parties “plaintiffs” and “defendants”. For the purpose of family cases profiled in this report, “applicant” and “respondent” are used.

23. See note 18.

24. For the purposes of this analysis, “self-represented” includes both self-represented and unrepresented litigants as classified in the Civil Court Survey National Data Requirements. However, the Civil Court Survey is unable to differentiate between self-represented and unrepresented litigants.

Detailed data tables

Table 1
Number of active civil court cases, by type and reporting jurisdiction, 2019/2020

	P.E.I.[1]	N.S.[2]	N.B.[3]	Ont.[4]	Sask.	Alta.	B.C.	Y.T.	N.W.T.	Nvt.	Total
Cases						number					
Family cases[5]	**1,366**	**12,724**	**7,553**	**124,447**	**9,466**	**61,892**	**56,001**	**429**	**757**	**661**	**275,296**
Divorce cases without issues[6, 7]	561	4,159	765	38,481	2,528	15,409	13,922	160	62	21	76,068
Divorce cases with issues[8]	40	107	1,518	6,018	2,658	12,704	8,265	60	34	9	31,413
Custody/access cases[9, 10]	2	912	1,869	20,459	2,079	9,807	8,876	63	127	48	44,242
Support only cases[10, 11]	153	315	1,233	8,760	571	2,841	5,154	32	23	15	19,097
Child protection cases[12, 13]	37	1,636	523	14,012	1,152	4,427	3,899	17	40	113	25,856
Family cases involving a civil protection application[14]	75	186	511	1,729	22	8,232	9,781	14	85	47	20,682
Other and unknown family cases[15, 16]	498	5,409	1,134	34,988	456	8,472	6,104	83	386	408	57,938
Non-family civil cases[17]	**2,678**	**22,722**	**10,351**	**295,303**	**16,310**	**135,694**	**146,477**	**748**	**1,161**	**318**	**631,762**
Lawsuits for injury or damage[18]	508	4,183	.	91,797	.	31,479	69,381	162	77	10	197,597
Contract disuptes[19]	779	8,325	6	62,718	1,282	49,264	5,905	226	807	152	129,464
Bankruptcy[20]	220	1,912	886	9,884	1,011	6,950	3,661	17	47	9	24,597
Probate[21]	538	4,807	1,307	5,437	3,604	11,383	14,782	167	62	31	42,118
Other and unknown non-family cases[22]	633	3,495	8,152	125,467	10,413	36,617	52,748	176	168	116	237,985
Total caseload	**4,044**	**35,446**	**17,904**	**419,750**	**25,776**	**197,586**	**202,478**	**1,177**	**1,918**	**979**	**907,058**
						percent					
Family cases as percentage of total caseload	33.78	35.90	42.19	29.65	36.72	31.32	27.66	36.45	39.47	67.52	30.35

. not available for any reference period

1. In Prince Edward Island, the issues of custody, access and support may be under-reported since these issues are typically not captured when cases are first initiated but rather are identified from activity (such as judgments) over the length of the case.
2. In Nova Scotia, divorce cases with issues identified and the subcategories of access, custody and support are under-reported due to limitations in the system capacity to report secondary issues of custody, access and support.
3. In New Brunswick, "Contract disputes" represent landlord/tenant disputes only.
4. In Ontario, the issues of custody, access and support may be under-reported since these issues are typically not captured when cases are first initiated but rather are identified from activity (such as judgments) over the length of the case.
5. Family cases are cases involving family law-related issues, including divorces, separation, custody and access arrangements, support payments and protection applications.
6. Divorce cases without issues involve applications to the court to dissolve a marriage where no issues of custody, access or support have been identified, though the couple may have dealt with these issues earlier in a separation agreement. These case types may include issues related to the division of matrimonial property.
7. Divorce cases initiated late in the fiscal year may be reported as a divorce without issues if an answer is not filed until the next fiscal year.
8. Divorce cases with issues involve applications made to the court to dissolve a marriage and resolve custody, access and/or support issues. These case types may include issues related to the division of matrimonial property.
9. Custody/access cases include cases in which custody and/or access have been recorded as matters requiring resolution. Custody refers to the living arrangements of a child or children and which parent will have decision-making authority. Access allows the parent with whom the child does not primarily reside to apply for parenting time. These case types do not include applications for divorce but may involve other issues such as requests for support.
10. Given that the data are derived from records originally kept for non-statistical purposes, complete survey information is not always available. For example, information related to issues, such as custody, access and support, may not always be available from the court information systems and, as such, may be under reported.
11. Support only cases include cases in which child or spousal support issues were identified. These case types may include support matters not specifically identified but it is important to note that applications for divorce are not included here.
12. Child protection cases include applications to the court by the government for orders seeking the supervision of parents, guardians or caregivers, or the apprehension of children into government care because of issues of parental abuse, neglect, or incapacity.
13. The child protection cases examined in this table include cases where child protection was identified as an issue and do not include applications for divorce.

Table 1
Number of active civil court cases, by type and reporting jurisdiction, 2019/2020

14. Family cases involving a civil protection application include applications to the family court by individuals seeking orders to ensure their safety, such as protection orders and restraining orders.
15. Other family cases include issues of parentage, non-parental guardianship matters, enforcement of court orders, estate matters, adoptions, other family-related disputes and cases where issues have not yet been recorded. A portion of the active cases classified as “Other family” may change over time as more issues are identified in the case.
16. Unknown family cases include unidentifiable family-related matters.
17. A non-family civil case is any civil action that is not a family-related action, such as contracts, torts, bankruptcy, probate matters and other claims involving money.
18. Lawsuits for injury or damage include: motor vehicle actions, malpractice, defamation, negligence, other tort and unknown tort.
19. Contract disputes include landlord/tenant, employment, mortgage foreclosure, lien, other contract (contract cases not specifically listed) and unknown contract (contract cases where the details are unknown) cases.
20. Bankruptcy refers to proceedings initiated either by an insolvent individual or business (voluntary bankruptcy) or by creditors (involuntary bankruptcy) seeking to either have the debtor's remaining assets distributed among the creditors or to restructure debt.
21. Probate refers to cases involving the administration and distribution of the estates of deceased persons (whether they left a will or died intestate).
22. Other non family case types include: administrative law, enforcement, adult protection/committeeship, civil protection, constitutional/charter, and other, which includes all non-family action types in a jurisdiction that do not fit into the categories specifically collected by the survey. Unknown cases include all other non-family not specifically identified.
Note: Active cases include all cases with activity (at least one court event, which moves all or part of the case through the court process) during the 2019/2020 fiscal year and thus include initiated cases. Based on information provided by Prince Edward Island, Nova Scotia, New Brunswick, Ontario, Saskatchewan, Alberta, British Columbia, Yukon, Northwest Territories and Nunavut. Information excludes data from Newfoundland and Labrador, Quebec and Manitoba, not yet reporting to the survey.
Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Civil Court Survey.

Table 2
Profile of active family cases, by reporting jurisdiction, 2019/2020

	P.E.I.	N.S.	N.B.[1]	Ont.	Sask.	Alta.	B.C.	Y.T.	N.W.T.	Nvt.[2]	Total
Cases						number					
Number of active family cases[3, 4]	**1,254**	**10,902**	**6,519**	**108,706**	**8,292**	**49,233**	**42,321**	**398**	**632**	**501**	**228,758**
Number of new family cases[5]	**420**	**3,502**	**2,598**	**62,037**	**3,447**	**20,193**	**17,250**	**157**	**244**	**304**	**110,152**
						percent					
New family cases as a percentage of active family cases	33.49	32.12	39.85	57.07	41.57	41.02	40.76	39.45	38.61	60.68	48.15
						number					
Number of family cases ongoing from a previous year[6]	**834**	**7,400**	**3,921**	**46,669**	**4,845**	**29,040**	**25,071**	**241**	**388**	**197**	**118,606**
						percent					
Ongoing family cases as a percentage of active family cases	66.51	67.88	60.15	42.93	58.43	58.98	59.24	60.55	61.39	39.32	51.85
						number					
Average number of events per active family case[7, 8]	**9.83**	**12.51**	**6.24**	**12.33**	**9.88**	**10.53**	**10.68**	**9.75**	**7.20**	**8.58**	**11.34**
Average number of process events per active family case[9, 10]	**8.67**	**11.04**	**..**	**9.30**	**8.43**	**8.11**	**7.41**	**8.17**	**6.75**	**7.13**	**8.71**
Average number of document filed events per active family case[11]	8.00	9.80	..	6.70	7.19	6.53	6.26	7.52	5.40	6.50	6.75
Average number of pre-trial events per active family case[12]	0.50	0.20	..	0.99	0.33	0.35	0.45	0.17	1.26	0.00	0.68
Average number of adjournments per active family case[13]	0.07	0.47	..	0.71	0.40	0.49	0.38	0.47	..	0.33	0.57
Average number of dispositions per active family case[14, 15]	**0.83**	**1.06**	**..**	**2.35**	**0.92**	**1.74**	**1.79**	**1.18**	**0.04**	**0.85**	**1.97**
Average number of judgments per active family case[16]	0.71	0.97	..	2.22	0.88	1.60	1.22	1.17	0.04	0.67	1.76
						percent					
Process events as a percentage of events	88.17	88.29	..	75.45	85.36	77.00	69.38	83.78	93.87	83.07	76.81
Disposition events as a percentage of events	8.49	8.44	..	19.07	9.36	16.57	16.79	12.14	0.59	9.86	17.40
						number					
Median days to first disposition in active family case	122.5	138.0	72.0	66.0	112.0	71.0	126.0	66.0	107.0	42.0	79.0

.. not available for a specific reference period
1. In New Brunswick, a breakdown of the "Process events" and "Disposition events" for family matters is not available for 2019/2020.
2. Pre-trial hearing events in Nunavut are under-represented due to limited data entry in the Nunavut civil information system. Other pre-trial events including case management conferences and reference hearings are also not reported.
3. Active cases include all cases with activity (at least one court event, which moves all or part of the case through the court process) during the 2019/2020 fiscal year and thus include initiated cases.
4. For the purposes of this table, child protection cases and family cases involving a civil protection application are excluded from the total active family caseload in 2019/2020. Therefore, the total active family caseload in this table will not align with Table 1, Table 6 or Table 7.
5. Refers to cases newly started during the 2019/2020 fiscal year.
6. Refers to cases initiated in a previous fiscal year with activity recorded during the 2019/2020 fiscal year.
7. Events include initiation, process and disposition events. Initiation events initiate a case in the civil courts by adding a new case to the court's active case inventory. Process events move the case forward through the civil process, but are not the initiating event. Disposition events include all court events that dispose of a part of, or all of the case.

Table 2
Profile of active family cases, by reporting jurisdiction, 2019/2020

8. Initiation events are not displayed in the table and therefore, it is important to note that the average number of process and disposition events will not equal the average number of events.
9. Process events are events that move the case forward through the civil process, but are not the initiating event.
10. Other process events not displayed in the breakdown may include trial hearings, enforcement hearings, appeal hearings, other and unknown hearing/conference.
11. Document filed events include any document filed or registered with the courts by the parties or documents issued by the courts. Examples include, among others, separation agreements, financial statements, affidavits and expert witness reports.
12. Pre-trial events include case management conferences, discovery proceedings, pre-trial conference/hearings, motions and default hearings, status hearings and reference hearings. It is important to note that the reporting of pre-trial events varies across jurisdictions and therefore, reporting limitations may exist.
13. Adjournment events involve the postponement of a court hearing or trial to another date or time or the continuation of a court hearing or trial on another date or time but excludes adjourned *sine die*.
14. A disposition is a court event that disposes part of or all of the civil case (for example, settlement, consent judgment and judgment). Disposition events may also include cases that are transferred permanently to another court location, court level or type of court. Therefore, it is important to note that the case may not necessarily be disposed of but rather continuing in another court.
15. Other disposition events not displayed in the breakdown may include enforcement judgment, time limit expired, transferred permanently to another court, other and unknown disposition events.
16. A judgment is a decision made by a judge (or a master), including interim orders, orders, decisions on costs or other decisions that dispose of part of or all of the case, including summary judgments.
Note: Based on information provided by Prince Edward Island, Nova Scotia, New Brunswick, Ontario, Saskatchewan, Alberta, British Columbia, Yukon, Northwest Territories and Nunavut. Information excludes data from Newfoundland and Labrador, Quebec and Manitoba, not yet reporting to the survey.
Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Civil Court Survey.

Table 3.1
Profile of active divorce cases, by reporting jurisdiction, 2019/2020

	P.E.I.	N.S.	N.B.[1]	Ont.	Sask.	Alta.	B.C.	Y.T.	N.W.T.	Nvt.[2]	Total
Cases						number					
Number of active family cases[3]	**1,254**	**10,902**	**6,519**	**108,706**	**8,292**	**49,233**	**42,321**	**398**	**632**	**501**	**228,758**
Number of active divorce cases[4, 5]	**601**	**4,266**	**2,283**	**44,499**	**5,186**	**28,113**	**22,187**	**220**	**96**	**30**	**107,481**
						percent					
Active divorce cases as a percentage of active family cases	47.93	39.13	35.02	40.94	62.54	57.10	52.43	55.28	15.19	5.99	46.98
						number					
Number of new divorce cases[6, 7]	**262**	**1,610**	**1,150**	**26,194**	**2,073**	**9,519**	**9,586**	**82**	**49**	**8**	**50,533**
						percent					
New divorce cases as a percentage of active family cases	20.89	14.77	17.64	24.10	25.00	19.33	22.65	20.60	7.75	1.60	22.09
New divorce cases as a percentage of active divorce cases	43.59	37.74	50.37	58.86	39.97	33.86	43.21	37.27	51.04	26.67	47.02
						number					
Number of divorce cases ongoing from a previous year[8]	**339**	**2,656**	**1,133**	**18,305**	**3,113**	**18,594**	**12,601**	**138**	**47**	**22**	**56,948**
						percent					
Ongoing divorce cases as a percentage of active family cases	27.03	24.36	17.38	16.84	37.54	37.77	29.77	34.67	7.44	4.39	24.89
Ongoing divorce cases as a percentage of active divorce cases	56.41	62.26	49.63	41.14	60.03	66.14	56.79	62.73	48.96	73.33	52.98
						number					
Average number of events per active divorce case[9, 10]	**11.01**	**12.04**	**6.50**	**9.73**	**9.36**	**10.14**	**10.02**	**9.88**	**7.93**	**7.43**	**9.91**
Average number of process events per active divorce case[11, 12]	**9.82**	**10.42**	**..**	**7.22**	**8.02**	**7.94**	**7.97**	**8.31**	**7.18**	**6.20**	**7.76**
Average number of document filed events per active divorce case[13]	9.28	9.73	..	5.74	7.02	6.79	7.50	7.82	6.09	5.60	6.64
Average number of pre-trial events per active divorce case[14]	0.44	0.15	..	0.49	0.29	0.19	0.26	0.18	1.05	0.00	0.34
Average number of adjournments per active divorce case[15]	0.04	0.18	..	0.26	0.32	0.51	0.12	0.30	..	0.50	0.29
Average number of dispositions per active divorce case[16, 17]	**0.76**	**1.18**	**..**	**1.88**	**0.87**	**1.64**	**1.27**	**1.19**	**0.24**	**0.97**	**1.60**
Average number of judgments per active divorce case[18]	0.67	1.13	..	1.83	0.84	1.50	1.00	1.17	0.24	0.73	1.48
						percent					
Process events as a percentage of events	89.19	86.53	..	74.22	85.77	78.25	79.62	84.17	90.54	83.41	78.30
Disposition events as a percentage of events	6.89	9.78	..	19.29	9.27	16.13	12.64	12.01	3.02	13.00	16.11
						number					
Median days to first disposition in active divorce case	113.0	154.0	55.0	86.0	137.0	114.0	122.0	100.5	107.0	212.5	104.0

.. not available for a specific reference period

1. In New Brunswick, a breakdown of the "Process events" and "Disposition events" for family matters is not available for 2019/2020.
2. Pre-trial hearing events in Nunavut are under-represented due to limited data entry in the Nunavut civil information system. Other pre-trial events including case management conferences and reference hearings are also not reported.

Table 3.1
Profile of active divorce cases, by reporting jurisdiction, 2019/2020

3. For the purposes of this table, child protection cases and family cases involving a civil protection application are excluded from the total active family caseload in 2019/2020. Therefore, the total active family caseload in this table will not align with Table 1, Table 6 or Table 7.
4. Active cases include all cases with activity (at least one court event, which moves all or part of the case through the court process) during the 2019/2020 fiscal year and thus include initiated cases.
5. Divorce cases include applications to the court by one spouse or both spouses to dissolve their marriage.
6. Refers to cases newly started during the 2019/2020 fiscal year.
7. Divorce cases initiated late in the fiscal year may be reported as a divorce without issues if an answer is not filed until the next fiscal year.
8. Refers to cases initiated in a previous fiscal year with activity recorded during the 2019/2020 fiscal year.
9. Events include initiation, process and disposition events. Initiation events initiate a case in the civil courts by adding a new case to the court's active case inventory. Process events move the case forward through the civil process, but are not the initiating event. Disposition events include all court events that dispose of a part of, or all of the case.
10. Initiation events are not displayed in the table and therefore, it is important to note that the average number of process and disposition events will not equal the average number of events.
11. Process events are events that move the case forward through the civil process, but are not the initiating event.
12. Other process events not displayed in the breakdown may include trial hearings, enforcement hearings, appeal hearings, other and unknown hearing/conference.
13. Document filed events include any document filed or registered with the courts by the parties or documents issued by the courts. Examples include, among others, separation agreements, financial statements, affidavits and expert witness reports.
14. Pre-trial events include case management conferences, discovery proceedings, pre-trial conference/hearings, motions and default hearings, status hearings and reference hearings. It is important to note that the reporting of pre-trial events varies across jurisdictions and therefore, reporting limitations may exist.
15. Adjournment events involve the postponement of a court hearing or trial to another date or the continuation of a court hearing or trial on another date or time but excludes adjourned *sine die*.
16. A disposition is a court event that disposes part of or all of the civil case (for example, settlement, consent judgment and judgment). Disposition events may also include cases that are transferred permanently to another court location, court level or type of court. Therefore, it is important to note that the case may not necessarily be disposed of but rather continuing in another court.
17. Other disposition events not displayed in the breakdown may include enforcement judgment, time limit expired, transferred permanently to another court, other and unknown disposition events.
18. A judgment is a decision made by a judge (or a master), including interim orders, orders, decisions on costs or other decisions that dispose of part of or all of the case, including summary judgments.
Note: Based on information provided by Prince Edward Island, Nova Scotia, New Brunswick, Ontario, Saskatchewan, Alberta, British Columbia, Yukon, Northwest Territories and Nunavut. Information excludes data from Newfoundland and Labrador, Quebec and Manitoba, not yet reporting to the survey.
Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Civil Court Survey.

Table 3.2
Profile of active divorce cases without issues, by reporting jurisdiction, 2019/2020

	P.E.I.	N.S.	N.B.[1]	Ont.	Sask.	Alta.	B.C.	Y.T.	N.W.T.	Nvt.[2]	Total
Cases						number					
Number of active family cases[3]	**1,254**	**10,902**	**6,519**	**108,706**	**8,292**	**49,233**	**42,321**	**398**	**632**	**501**	**228,758**
Number of active divorce cases[4]	**601**	**4,266**	**2,283**	**44,499**	**5,186**	**28,113**	**22,187**	**220**	**96**	**30**	**107,481**
Number of active divorce cases without issues[5, 6]	**561**	**4,159**	**765**	**38,481**	**2,528**	**15,409**	**13,922**	**160**	**62**	**21**	**76,068**
						percent					
Active divorce cases without issues as a percentage of active family cases	44.74	38.15	11.73	35.40	30.49	31.30	32.90	40.20	9.81	4.19	33.25
Active divorce cases without issues as a percentage of active divorce cases	93.34	97.49	33.51	86.48	48.75	54.81	62.75	72.73	64.58	70.00	70.77
						number					
Number of new divorce cases without issues[7, 8]	**261**	**1,603**	**650**	**25,170**	**1,219**	**7,782**	**7,384**	**78**	**39**	**7**	**44,193**
						percent					
New divorce cases without issues as a percentage of active family cases	20.81	14.70	9.97	23.15	14.70	15.81	17.45	19.60	6.17	1.40	19.32
New divorce cases without issues as a percentage of active divorce cases	43.43	37.58	28.47	56.56	23.51	27.68	33.28	35.45	40.63	23.33	41.12
New divorce cases without issues as a percentage of active divorce cases without issues	46.52	38.54	84.97	65.41	48.22	50.50	53.04	48.75	62.90	33.33	58.10
						number					
Number of divorce cases without issues ongoing from a previous year[9]	**300**	**2,556**	**115**	**13,311**	**1,309**	**7,627**	**6,538**	**82**	**23**	**14**	**31,875**
						percent					
Ongoing divorce cases without issues as a percentage of active family cases	23.92	23.45	1.76	12.24	15.79	15.49	15.45	20.60	3.64	2.79	13.93
Ongoing divorce cases without issues as a percentage of active divorce cases	49.92	59.92	5.04	29.91	25.24	27.13	29.47	37.27	23.96	46.67	29.66
Ongoing divorce cases without issues as a percentage of active divorce cases without issues	53.48	61.46	15.03	34.59	51.78	49.50	46.96	51.25	37.10	66.67	41.90
						number					
Average number of events per active divorce case without issues[10, 11]	**11.43**	**11.81**	**4.87**	**7.90**	**6.75**	**7.34**	**7.71**	**8.16**	**7.23**	**4.71**	**7.92**
Average number of process events per active divorce case without issues[12, 13]	**10.23**	**10.19**	**..**	**5.83**	**5.61**	**5.96**	**6.64**	**6.83**	**6.31**	**3.95**	**6.28**
Average number of document filed events per active divorce case without issues[14]	9.67	9.54	..	4.78	5.30	5.32	6.63	6.53	5.76	3.90	5.55
Average number of pre-trial events per active divorce case without issues[15]	0.47	0.14	..	0.26	0.10	0.06	0.01	0.17	0.55	0.00	0.16
Average number of adjournments per active divorce case without issues[16]	0.04	0.17	..	0.14	0.10	0.37	0[s]	0.12	..	0.00	0.16
Average number of dispositions per active divorce case without issues[17, 18]	**0.74**	**1.17**	**..**	**1.40**	**0.66**	**0.75**	**0.53**	**0.84**	**0.29**	**0.43**	**1.06**
Average number of judgments per active divorce case without issues[19]	0.65	1.12	..	1.37	0.64	0.68	0.51	0.83	0.29	0.38	1.02
						percent					
Process events as a percentage of events	89.50	86.31	..	73.83	83.13	81.26	86.21	83.61	87.28	83.84	79.25
Disposition events as a percentage of events	6.47	9.90	..	17.76	9.75	10.27	6.84	10.34	4.02	9.09	13.42
						number					
Median days to first disposition in active divorce case without issues	94.0	153.0	11.0	85.0	106.0	98.0	113.0	117.0	92.0	211.0	95.0

Table 3.2
Profile of active divorce cases without issues, by reporting jurisdiction, 2019/2020

.. not available for a specific reference period
0[s] value rounded to 0 (zero) where there is a meaningful distinction between true zero and the value that was rounded
1. In New Brunswick, a breakdown of the “Process events” and “Disposition events” for family matters is not available for 2019/2020.
2. Pre-trial hearing events in Nunavut are under-represented due to limited data entry in the Nunavut civil information system. Other pre-trial events including case management conferences and reference hearings are also not reported.
3. For the purposes of this table, child protection cases and family cases involving a civil protection application are excluded from the total active family caseload in 2019/2020. Therefore, the total active family caseload in this table will not align with Table 1, Table 6 or Table 7.
4. Divorce cases include applications to the court by one spouse or both spouses to dissolve their marriage.
5. Divorce cases without issues involve applications to the court to dissolve a marriage where no issues of custody, access or support have been identified, though the couple may have dealt with these issues earlier in a separation agreement. These case types may include issues related to the division of matrimonial property.
6. Active cases include all cases with activity (at least one court event, which moves all or part of the case through the court process) during the 2019/2020 fiscal year and thus include initiated cases.
7. Refers to cases newly started during the 2019/2020 fiscal year.
8. Divorce cases initiated late in the fiscal year may be reported as a divorce without issues if an answer is not filed until the next fiscal year.
9. Refers to cases initiated in a previous fiscal year with activity recorded during the 2019/2020 fiscal year.
10. Events include initiation, process and disposition events. Initiation events initiate a case in the civil courts by adding a new case to the court's active case inventory. Process events move the case forward through the civil process, but are not the initiating event. Disposition events include all court events that dispose of a part of, or all of the case.
11. Initiation events are not displayed in the table and therefore, it is important to note that the average number of process and disposition events will not equal the average number of events.
12. Process events are events that move the case forward through the civil process, but are not the initiating event.
13. Other process events not displayed in the breakdown may include trial hearings, enforcement hearings, appeal hearings, other and unknown hearing/conference.
14. Document filed events include any document filed or registered with the courts by the parties or documents issued by the courts. Examples include, among others, separation agreements, financial statements, affidavits and expert witness reports.
15. Pre-trial events include case management conferences, discovery proceedings, pre-trial conference/hearings, motions and default hearings, status hearings and reference hearings. It is important to note that the reporting of pre-trial events varies across jurisdictions and therefore, reporting limitations may exist.
16. Adjournment events involve the postponement of a court hearing or trial to another date or the continuation of a court hearing or trial on another date or time but excludes adjourned *sine die*.
17. A disposition is a court event that disposes part of or all of the civil case (for example, settlement, consent judgment and judgment). Disposition events may also include cases that are transferred permanently to another court location, court level or type of court. Therefore, it is important to note that the case may not necessarily be disposed of but rather continuing in another court.
18. Other disposition events not displayed in the breakdown may include enforcement judgment, time limit expired, transferred permanently to another court, other and unknown disposition events.
19. A judgment is a decision made by a judge (or a master), including interim orders, orders, decisions on costs or other decisions that dispose of part of or all of the case, including summary judgments.
Note: Based on information provided by Prince Edward Island, Nova Scotia, New Brunswick, Ontario, Saskatchewan, Alberta, British Columbia, Yukon, Northwest Territories and Nunavut. Information excludes data from Newfoundland and Labrador, Quebec and Manitoba, not yet reporting to the survey.
Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Civil Court Survey.

Table 3.3
Profile of active divorce cases with issues, by reporting jurisdiction, 2019/2020

	P.E.I.[1]	N.S.[2]	N.B.[3]	Ont.[4]	Sask.	Alta.	B.C.	Y.T.	N.W.T.	Nvt.[5]	Total
Cases						number					
Number of active family cases[6]	**1,254**	**10,902**	**6,519**	**108,706**	**8,292**	**49,233**	**42,321**	**398**	**632**	**501**	**228,758**
Number of active divorce cases[7]	**601**	**4,266**	**2,283**	**44,499**	**5,186**	**28,113**	**22,187**	**220**	**96**	**30**	**107,481**
Number of active divorce cases with issues[8, 9]	**40**	**107**	**1,518**	**6,018**	**2,658**	**12,704**	**8,265**	**60**	**34**	**9**	**31,413**
						percent					
Active divorce cases with issues as a percentage of active family cases	3.19	0.98	23.29	5.54	32.05	25.80	19.53	15.08	5.38	1.80	13.73
Active divorce cases with issues as a percentage of active divorce cases	6.66	2.51	66.49	13.52	51.25	45.19	37.25	27.27	35.42	30.00	29.23
						number					
Number of new divorce cases with issues[10]	**1**	**7**	**500**	**1,024**	**854**	**1,737**	**2,202**	**4**	**10**	**1**	**6,340**
						percent					
New divorce cases with issues as a percentage of active family cases	0.08	0.06	7.67	0.94	10.30	3.53	5.20	1.01	1.58	0.20	2.77
New divorce cases with issues as a percentage of active divorce cases	0.17	0.16	21.90	2.30	16.47	6.18	9.92	1.82	10.42	3.33	5.90
New divorce cases with issues as a percentage of active divorce cases with issues	2.50	6.54	32.94	17.02	32.13	13.67	26.64	6.67	29.41	11.11	20.18
						number					
Number of divorce cases with issues ongoing from a previous year[11]	**39**	**100**	**1,018**	**4,994**	**1,804**	**10,967**	**6,063**	**56**	**24**	**8**	**25,073**
						percent					
Ongoing divorce cases with issues as a percentage of active family cases	3.11	0.92	15.62	4.59	21.76	22.28	14.33	14.07	3.80	1.60	10.96
Ongoing divorce cases with issues as a percentage of active divorce cases	6.49	2.34	44.59	11.22	34.79	39.01	27.33	25.45	25.00	26.67	23.33
Ongoing divorce cases with issues as a percentage of active divorce cases with issues	97.50	93.46	67.06	82.98	67.87	86.33	73.36	93.33	70.59	88.89	79.82
						number					
Average number of events per active divorce case with issues[12, 13]	**5.13**	**21.06**	**7.32**	**21.40**	**11.84**	**13.54**	**13.91**	**14.45**	**9.21**	**13.78**	**14.71**
Average number of process events per active divorce case with issues[14, 15]	**4.08**	**19.27**	**..**	**16.08**	**10.32**	**10.33**	**10.22**	**12.28**	**8.76**	**11.44**	**11.48**
Average number of document filed events per active divorce case with issues[16]	3.88	17.13	..	11.93	8.66	8.57	8.96	11.25	6.71	9.56	9.39
Average number of pre-trial events per active divorce case with issues[17]	0.10	0.50	..	2.02	0.46	0.34	0.69	0.22	1.97	0.00	0.79
Average number of adjournments per active divorce case with issues[18]	0.00	0.56	..	1.00	0.52	0.67	0.31	0.77	..	1.67	0.62
Average number of dispositions per active divorce case with issues[19, 20]	**1.03**	**1.53**	**..**	**4.90**	**1.07**	**2.70**	**2.51**	**2.10**	**0.15**	**2.22**	**2.94**
Average number of judgments per active divorce case with issues[21]	0.95	1.42	..	4.75	1.02	2.51	1.83	2.10	0.15	1.56	2.63

Table 3.3
Profile of active divorce cases with issues, by reporting jurisdiction, 2019/2020

Cases	P.E.I.[1]	N.S.[2]	N.B.[3]	Ont.[4]	Sask.	Alta.	B.C.	Y.T.	N.W.T.	Nvt.[5]	Total
						percent					
Process events as a percentage of events	79.51	91.52	..	75.15	87.20	76.26	73.46	85.01	95.21	83.06	78.05
Disposition events as a percentage of events	20.00	7.28	..	22.89	9.01	19.98	18.04	14.53	1.60	16.13	19.96
						number					
Median days to first disposition in active divorce case with issues	1280.0	172.0	113.5	99.0	173.0	127.5	140.0	70.5	185.0	299.0	124.0

.. not available for a specific reference period
1. In Prince Edward Island, the issues of custody, access and support may be under-reported since these issues are typically not captured when cases are first initiated but rather are identified from activity (such as judgments) over the length of the case.
2. In Nova Scotia, divorce cases with issues identified and the subcategories of access, custody and support are under-reported due to limitations in the system capacity to report secondary issues of custody, access and support.
3. In New Brunswick, a breakdown of the “Process events” and “Disposition events” for family matters is not available for 2019/2020.
4. In Ontario, the issues of custody, access and support may be under-reported since these issues are typically not captured when cases are first initiated but rather are identified from activity (such as judgments) over the length of the case.
5. Pre-trial hearing events in Nunavut are under-represented due to limited data entry in the Nunavut civil information system. Other pre-trial events including case management conferences and reference hearings are also not reported.
6. For the purposes of this table, child protection cases and family cases involving a civil protection application are excluded from the total active family caseload in 2019/2020. Therefore, the total active family caseload in this table will not align with Table 1, Table 6 or Table 7.
7. Divorce cases include applications to the court by one spouse or both spouses to dissolve their marriage.
8. Divorce cases with issues involve applications made to the court to dissolve a marriage and resolve custody, access and/or support issues. These case types may include issues related to the division of matrimonial property.
9. Active cases include all cases with activity (at least one court event, which moves all or part of the case through the court process) during the 2019/2020 fiscal year and thus include initiated cases.
10. Refers to cases newly started during the 2019/2020 fiscal year.
11. Refers to cases initiated in a previous fiscal year with activity recorded during the 2019/2020 fiscal year.
12. Events include initiation, process and disposition events. Initiation events initiate a case in the civil courts by adding a new case to the court's active case inventory. Process events move the case forward through the civil process, but are not the initiating event. Disposition events include all court events that dispose of a part of, or all of the case.
13. Initiation events are not displayed in the table and therefore, it is important to note that the average number of process and disposition events will not equal the average number of events.
14. Process events are events that move the case forward through the civil process, but are not the initiating event.
15. Other process events not displayed in the breakdown may include trial hearings, enforcement hearings, appeal hearings, other and unknown hearing/conference.
16. Document filed events include any document filed or registered with the courts by the parties or documents issued by the courts. Examples include, among others, separation agreements, financial statements, affidavits and expert witness reports.
17. Pre-trial events include case management conferences, discovery proceedings, pre-trial conference/hearings, motions and default hearings, status hearings and reference hearings. It is important to note that the reporting of pre-trial events varies across jurisdictions and therefore, reporting limitations may exist.
18. Adjournment events involve the postponement of a court hearing or trial to another date or the continuation of a court hearing or trial on another date or time but excludes adjourned *sine die*.
19. A disposition is a court event that disposes part of or all of the civil case (for example, settlement, consent judgment and judgment). Disposition events may also include cases that are transferred permanently to another court location, court level or type of court. Therefore, it is important to note that the case may not necessarily be disposed of but rather continuing in another court.
20. Other disposition events not displayed in the breakdown may include enforcement judgment, time limit expired, transferred permanently to another court, other and unknown disposition events.
21. A judgment is a decision made by a judge (or a master), including interim orders, orders, decisions on costs or other decisions that dispose of part of or all of the case, including summary judgments.
Note: Based on information provided by Prince Edward Island, Nova Scotia, New Brunswick, Ontario, Saskatchewan, Alberta, British Columbia, Yukon, Northwest Territories and Nunavut. Information excludes data from Newfoundland and Labrador, Quebec and Manitoba, not yet reporting to the survey.
Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Civil Court Survey.

Table 4
Profile of active custody/access cases, by reporting jurisdiction, 2019/2020

	P.E.I.[1]	N.S.[2]	N.B.[3]	Ont.[4]	Sask.	Alta.	B.C.	Y.T.	N.W.T.	Nvt.[5]	Total
Cases						number					
Number of active family cases[6]	**1,254**	**10,902**	**6,519**	**108,706**	**8,292**	**49,233**	**42,321**	**398**	**632**	**501**	**228,758**
Number of active custody/access cases[7, 8, 9]	**2**	**912**	**1,869**	**20,459**	**2,079**	**9,807**	**8,876**	**63**	**127**	**48**	**44,242**
						percent					
Active custody/access cases as a percentage of active family cases	0.16	8.37	28.67	18.82	25.07	19.92	20.97	15.83	20.09	9.58	19.34
						number					
Number of new custody/access cases[10]	**2**	**0**	**664**	**6,229**	**852**	**3,434**	**2,609**	**10**	**60**	**14**	**13,874**
						percent					
New custody/access cases as a percentage of active family cases	0.16	0.00	10.19	5.73	10.27	6.97	6.16	2.51	9.49	2.79	6.06
New custody/access cases as a percentage of active custody/access cases	100.00	0.00	35.53	30.45	40.98	35.02	29.39	15.87	47.24	29.17	31.36
						number					
Number of custody/access cases ongoing from a previous year[11]	**0**	**912**	**1,205**	**14,230**	**1,227**	**6,373**	**6,267**	**53**	**67**	**34**	**30,368**
						percent					
Ongoing custody/access cases as a percentage of active family cases	0.00	8.37	18.48	13.09	14.80	12.94	14.81	13.32	10.60	6.79	13.28
Ongoing custody/access cases as a percentage of active custody/access cases	0.00	100.00	64.47	69.55	59.02	64.98	70.61	84.13	52.76	70.83	68.64
						number					
Average number of events per active custody/access case[12, 13]	**11.50**	**12.65**	**8.16**	**21.92**	**12.99**	**14.46**	**16.68**	**11.56**	**12.27**	**10.60**	**17.97**
Average number of process events per active custody/access case[14, 15]	**9.00**	**11.52**	**..**	**16.11**	**11.19**	**10.84**	**9.10**	**9.75**	**11.70**	**8.21**	**13.05**
Average number of document filed events per active custody/access case[16]	7.00	9.69	..	10.73	9.06	7.85	6.07	8.68	8.21	6.54	8.97
Average number of pre-trial events per active custody/access case[17]	1.50	0.20	..	2.29	0.54	0.69	1.03	0.11	3.16	0.00	1.52
Average number of adjournments per active custody/access case[18]	0.50	0.93	..	1.56	0.70	0.57	1.08	0.95	..	1.19	1.17
Average number of dispositions per active custody/access case[19, 20]	**1.50**	**1.07**	**..**	**5.21**	**1.14**	**2.79**	**3.79**	**1.63**	**0.02**	**2.10**	**4.04**
Average number of judgments per active custody/access case[21]	1.00	0.93	..	5.00	1.08	2.64	2.37	1.62	0.02	0.81	3.60
						percent					
Process events as a percentage of events	78.26	91.08	..	73.49	86.11	74.95	54.59	84.34	95.38	77.41	72.63
Disposition events as a percentage of events	13.04	8.45	..	23.76	8.78	19.32	22.73	14.15	0.13	19.84	22.48
						number					
Median days to first disposition in active custody/access case	79.0	114.0	100.0	55.0	86.0	41.0	106.0	42.0	95.0	44.0	57.0

.. not available for a specific reference period
0 true zero or a value rounded to zero
1. In Prince Edward Island, the issues of custody, access and support may be under-reported since these issues are typically not captured when cases are first initiated but rather are identified from activity (such as judgments) over the length of the case.
2. In Nova Scotia, divorce cases with issues identified and the subcategories of access, custody and support are under-reported due to limitations in the system capacity to report secondary issues of custody, access and support.

Table 4
Profile of active custody/access cases, by reporting jurisdiction, 2019/2020

3. In New Brunswick, a breakdown of the “Process events” and “Disposition events” for family matters is not available for 2019/2020.
4. In Ontario, the issues of custody, access and support may be under-reported since these issues are typically not captured when cases are first initiated but rather are identified from activity (such as judgments) over the length of the case.
5. Pre-trial hearing events in Nunavut are under-represented due to limited data entry in the Nunavut civil information system. Other pre-trial events including case management conferences and reference hearings are also not reported.
6. For the purposes of this table, child protection cases and family cases involving a civil protection application are excluded from the total active family caseload in 2019/2020. Therefore, the total active family caseload in this table will not align with Table 1, Table 6 or Table 7.
7. Custody/access cases include cases in which custody and/or access have been recorded as matters requiring resolution. Custody refers to the living arrangements of a child or children and which parent will have decision-making authority. Access allows the parent with whom the child does not primarily reside to apply for parenting time. These case types do not include applications for divorce but may involve other issues such as requests for support.
8. Active cases include all cases with activity (at least one court event, which moves all or part of the case through the court process) during the 2019/2020 fiscal year and thus include initiated cases.
9. Given that the data are derived from records originally kept for non-statistical purposes, complete survey information is not always available. For example, information related to issues, such as custody, access and support, may not always be available from the court information systems and, as such, may be under reported.
10. Refers to cases newly started during the 2019/2020 fiscal year.
11. Refers to cases initiated in a previous fiscal year with activity recorded during the 2019/2020 fiscal year.
12. Events include initiation, process and disposition events. Initiation events initiate a case in the civil courts by adding a new case to the court's active case inventory. Process events move the case forward through the civil process, but are not the initiating event. Disposition events include all court events that dispose of a part of, or all of the case.
13. Initiation events are not displayed in the table and therefore, it is important to note that the average number of process and disposition events will not equal the average number of events.
14. Process events are events that move the case forward through the civil process, but are not the initiating event.
15. Other process events not displayed in the breakdown may include trial hearings, enforcement hearings, appeal hearings, other and unknown hearing/conference.
16. Document filed events include any document filed or registered with the courts by the parties or documents issued by the courts. Examples include, among others, separation agreements, financial statements, affidavits and expert witness reports.
17. Pre-trial events include case management conferences, discovery proceedings, pre-trial conference/hearings, motions and default hearings, status hearings and reference hearings. It is important to note that the reporting of pre-trial events varies across jurisdictions and therefore, reporting limitations may exist.
18. Adjournment events involve the postponement of a court hearing or trial to another date or the continuation of a court hearing or trial on another date or time but excludes adjourned *sine die*.
19. A disposition is a court event that disposes part of or all of the civil case (for example, settlement, consent judgment and judgment). Disposition events may also include cases that are transferred permanently to another court location, court level or type of court. Therefore, it is important to note that the case may not necessarily be disposed of but rather continuing in another court.
20. Other disposition events not displayed in the breakdown may include enforcement judgment, time limit expired, transferred permanently to another court, other and unknown disposition events.
21. A judgment is a decision made by a judge (or a master), including interim orders, orders, decisions on costs or other decisions that dispose of part of or all of the case, including summary judgments.
Note: Based on information provided by Prince Edward Island, Nova Scotia, New Brunswick, Ontario, Saskatchewan, Alberta, British Columbia, Yukon, Northwest Territories and Nunavut. Information excludes data from Newfoundland and Labrador, Quebec and Manitoba, not yet reporting to the survey.
Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Civil Court Survey.

Table 5
Profile of active support only cases, by reporting jurisdiction, 2019/2020

	P.E.I.[1]	N.S.[2]	N.B.[3]	Ont.[4]	Sask.	Alta.	B.C.	Y.T.	N.W.T.	Nvt.[5]	Total
Cases						number					
Number of active family cases[6]	**1,254**	**10,902**	**6,519**	**108,706**	**8,292**	**49,233**	**42,321**	**398**	**632**	**501**	**228,758**
Number of active support only cases[7, 8, 9]	**153**	**315**	**1,233**	**8,760**	**571**	**2,841**	**5,154**	**32**	**23**	**15**	**19,097**
						percent					
Active support only cases as a percentage of active family cases	12.20	2.89	18.91	8.06	6.89	5.77	12.18	8.04	3.64	2.99	8.35
						number					
Number of new support only cases[10]	**18**	**41**	**455**	**3,351**	**279**	**1,016**	**1,698**	**17**	**18**	**0**	**6,893**
						percent					
New support only cases as a percentage of active family cases	1.44	0.38	6.98	3.08	3.36	2.06	4.01	4.27	2.85	0.00	3.01
New support only cases as a percentage of active support only cases	11.76	13.02	36.90	38.25	48.86	35.76	32.95	53.13	78.26	0.00	36.09
						number					
Number of support only cases ongoing from a previous year[11]	**135**	**274**	**778**	**5,409**	**292**	**1,825**	**3,456**	**15**	**5**	**15**	**12,204**
						percent					
Ongoing support only cases as a percentage of active family cases	10.77	2.51	11.93	4.98	3.52	3.71	8.17	3.77	0.79	2.99	5.33
Ongoing support only cases as a percentage of active support only cases	88.24	86.98	63.10	61.75	51.14	64.24	67.05	46.88	21.74	100.00	63.91
						number					
Average number of events per active support only case[12, 13]	**6.12**	**11.95**	**4.75**	**14.93**	**5.74**	**10.21**	**11.40**	**7.78**	**12.91**	**9.53**	**12.20**
Average number of process events per active support only case[14, 15]	**5.13**	**11.13**	**..**	**10.86**	**4.46**	**7.68**	**7.62**	**6.31**	**12.04**	**8.20**	**9.16**
Average number of document filed events per active support only case[16]	4.63	10.16	..	7.17	3.72	5.97	5.67	5.56	8.74	7.33	6.46
Average number of pre-trial events per active support only case[17]	0.32	0.14	..	1.45	0.15	0.45	0.70	0.13	3.26	0.00	1.00
Average number of adjournments per active support only case[18]	0.07	0.34	..	1.08	0.27	0.38	0.67	0.63	..	0.47	0.80
Average number of dispositions per active support only case[19, 20]	**0.86**	**0.60**	**..**	**3.55**	**0.77**	**1.92**	**2.29**	**0.97**	**0.04**	**1.33**	**2.76**
Average number of judgments per active support only case[21]	0.77	0.52	..	3.42	0.73	1.81	1.42	0.97	0.04	0.53	2.42
						percent					
Process events as a percentage of events	83.87	93.12	..	72.76	77.68	75.28	66.88	81.12	93.27	86.01	75.10
Disposition events as a percentage of events	14.10	5.05	..	23.81	13.47	18.83	20.12	12.45	0.34	13.99	22.58
						number					
Median days to first disposition in active support only case	102.0	219.0	126.5	64.0	54.0	70.0	147.0	42.0	167.0	72.0	78.0

.. not available for a specific reference period
0 true zero or a value rounded to zero
1. In Prince Edward Island, the issues of custody, access and support may be under-reported since these issues are typically not captured when cases are first initiated but rather are identified from activity (such as judgments) over the length of the case.
2. In Nova Scotia, divorce cases with issues identified and the subcategories of access, custody and support are under-reported due to limitations in the system capacity to report secondary issues of custody, access and support.

Table 5
Profile of active support only cases, by reporting jurisdiction, 2019/2020

3. In New Brunswick, a breakdown of the “Process events” and “Disposition events” for family matters is not available for 2019/2020.
4. In Ontario, the issues of custody, access and support may be under-reported since these issues are typically not captured when cases are first initiated but rather are identified from activity (such as judgments) over the length of the case.
5. Pre-trial hearing events in Nunavut are under-represented due to limited data entry in the Nunavut civil information system. Other pre-trial events including case management conferences and reference hearings are also not reported.
6. For the purposes of this table, child protection cases and family cases involving a civil protection application are excluded from the total active family caseload in 2019/2020. Therefore, the total active family caseload in this table will not align with Table 1, Table 6 or Table 7.
7. Support only cases include cases in which child or spousal support issues were identified. These case types may include support matters not specifically identified but it is important to note that applications for divorce are not included here.
8. Active cases include all cases with activity (at least one court event, which moves all or part of the case through the court process) during the 2019/2020 fiscal year and thus include initiated cases.
9. Given that the data are derived from records originally kept for non-statistical purposes, complete survey information is not always available. For example, information related to issues, such as custody, access and support, may not always be available from the court information systems and, as such, may be under reported.
10. Refers to cases newly started during the 2019/2020 fiscal year.
11. Refers to cases initiated in a previous fiscal year with activity recorded during the 2019/2020 fiscal year.
12. Events include initiation, process and disposition events. Initiation events initiate a case in the civil courts by adding a new case to the court's active case inventory. Process events move the case forward through the civil process, but are not the initiating event. Disposition events include all court events that dispose of a part of, or all of the case.
13. Initiation events are not displayed in the table and therefore, it is important to note that the average number of process and disposition events will not equal the average number of events.
14. Process events are events that move the case forward through the civil process, but are not the initiating event.
15. Other process events not displayed in the breakdown may include trial hearings, enforcement hearings, appeal hearings, other and unknown hearing/conference.
16. Document filed events include any document filed or registered with the courts by the parties or documents issued by the courts. Examples include, among others, separation agreements, financial statements, affidavits and expert witness reports.
17. Pre-trial events include case management conferences, discovery proceedings, pre-trial conference/hearings, motions and default hearings, status hearings and reference hearings. It is important to note that the reporting of pre-trial events varies across jurisdictions and therefore, reporting limitations may exist.
18. Adjournment events involve the postponement of a court hearing or trial to another date or the continuation of a court hearing or trial on another date or time but excludes adjourned *sine die*.
19. A disposition is a court event that disposes part of or all of the civil case (for example, settlement, consent judgment and judgment). Disposition events may also include cases that are transferred permanently to another court location, court level or type of court. Therefore, it is important to note that the case may not necessarily be disposed of but rather continuing in another court.
20. Other disposition events not displayed in the breakdown may include enforcement judgment, time limit expired, transferred permanently to another court, other and unknown disposition events.
21. A judgment is a decision made by a judge (or a master), including interim orders, orders, decisions on costs or other decisions that dispose of part of or all of the case, including summary judgments.
Note: Based on information provided by Prince Edward Island, Nova Scotia, New Brunswick, Ontario, Saskatchewan, Alberta, British Columbia, Yukon, Northwest Territories and Nunavut. Information excludes data from Newfoundland and Labrador, Quebec and Manitoba, not yet reporting to the survey.
Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Civil Court Survey.

Table 6
Profile of active family cases involving applications for civil protection orders, by reporting jurisdiction, 2019/2020

	P.E.I.	N.S.	N.B.[1]	Ont.	Sask.	Alta.	B.C.	Y.T.	N.W.T.	Nvt.[2]	Total
Cases						number					
Number of active family cases[3]	**1,366**	**12,724**	**7,553**	**124,447**	**9,466**	**61,892**	**56,001**	**429**	**757**	**661**	**275,296**
Number of active family cases involving a civil protection application[4, 5]	**75**	**186**	**511**	**1,729**	**22**	**8,232**	**9,781**	**14**	**85**	**47**	**20,682**
						percent					
Active family cases involving a civil protection application as a percentage of active family cases	5.49	1.46	6.77	1.39	0.23	13.30	17.47	3.26	11.23	7.11	7.51
						number					
Number of new family cases involving a civil protection application[6]	**68**	**112**	**315**	**512**	**19**	**5,760**	**1,959**	**13**	**62**	**44**	**8,864**
						percent					
New family cases involving a civil protection application as a percentage of active family cases	4.98	0.88	4.17	0.41	0.20	9.31	3.50	3.03	8.19	6.66	3.22
New family cases involving a civil protection application as a percentage of active family cases involving a civil protection application	90.67	60.22	61.64	29.61	86.36	69.97	20.03	92.86	72.94	93.62	42.86
						number					
Number of family cases involving a civil protection application ongoing from a previous year[7]	**7**	**74**	**196**	**1,217**	**3**	**2,472**	**7,822**	**1**	**23**	**3**	**11,818**
						percent					
Ongoing family cases involving a civil protection application as a percentage of active family cases	0.51	0.58	2.59	0.98	0.03	3.99	13.97	0.23	3.04	0.45	4.29
Ongoing family cases involving a civil protection application as a percentage of active family cases involving a civil protection application	9.33	39.78	38.36	70.39	13.64	30.03	79.97	7.14	27.06	6.38	57.14
						number					
Average number of events per active family case involving a civil protection application[8, 9]	**10.39**	**12.34**	**8.37**	**23.00**	**6.55**	**10.68**	**24.73**	**8.14**	**5.93**	**8.74**	**18.28**
Average number of process events per active family case involving a civil protection application[10, 11]	**7.89**	**9.84**	**..**	**16.87**	**4.00**	**7.52**	**13.20**	**5.07**	**4.24**	**6.45**	**11.08**
Average number of document filed events per active family case involving a civil protection application[12]	7.55	8.28	..	11.42	3.64	6.07	9.12	5.07	4.01	6.28	8.02
Average number of pre-trial events per active family case involving a civil protection application[13]	0.33	0.49	..	2.46	0.09	0.36	1.51	0.00	0.22	0.00	1.10
Average number of adjournments per active family case involving a civil protection application[14]	0.01	0.61	..	1.52	0.09	0.23	1.47	0.00	..	0.11	0.94
Average number of dispositions per active family case involving a civil protection application[15, 16]	**1.21**	**1.89**	**..**	**5.50**	**1.64**	**2.52**	**5.94**	**2.14**	**0.95**	**1.36**	**4.41**
Average number of judgments per active family case involving a civil protection application[17]	1.19	1.88	..	5.25	1.59	2.41	3.76	2.14	0.74	1.28	3.29
						percent					
Process events as a percentage of events	75.99	79.78	..	73.34	61.11	70.47	53.35	62.28	71.43	73.72	60.59
Disposition events as a percentage of events	11.68	15.34	..	23.91	25.00	23.63	24.02	26.32	16.07	15.57	24.15

Table 6
Profile of active family cases involving applications for civil protection orders, by reporting jurisdiction, 2019/2020

	P.E.I.	N.S.	N.B.[1]	Ont.	Sask.	Alta.	B.C.	Y.T.	N.W.T.	Nvt.[2]	Total
Cases						number					
Median days to first disposition in active family case involving a civil protection application	2.0	8.0	77.0	4.0	1.0	2.0	50.0	1.0	6.0	1.0	7.0

.. not available for a specific reference period
1. In New Brunswick, a breakdown of the “Process events” and “Disposition events” for family matters is not available for 2019/2020.
2. Pre-trial hearing events in Nunavut are under-represented due to limited data entry in the Nunavut civil information system. Other pre-trial events including case management conferences and reference hearings are also not reported.
3. For the purposes of this table, child protection cases and family cases involving a civil protection application are included in the total active family caseload in 2019/2020. Therefore, the total active family caseload in this table will not align with Table 2, Table 3.1, Table 3.2, Table 3.3, Table 4 or Table 5.
4. Family cases involving a civil protection application include applications to the family court by individuals seeking orders to ensure their safety, such as protection orders and restraining orders.
5. Active cases include all cases with activity (at least one court event, which moves all or part of the case through the court process) during the 2019/2020 fiscal year and thus include initiated cases.
6. Refers to cases newly started during the 2019/2020 fiscal year.
7. Refers to cases initiated in a previous fiscal year with activity recorded during the 2019/2020 fiscal year.
8. Events include initiation, process and disposition events. Initiation events initiate a case in the civil courts by adding a new case to the court's active case inventory. Process events move the case forward through the civil process, but are not the initiating event. Disposition events include all court events that dispose of a part of, or all of the case.
9. Initiation events are not displayed in the table and therefore, it is important to note that the average number of process and disposition events will not equal the average number of events.
10. Process events are events that move the case forward through the civil process, but are not the initiating event.
11. Other process events not displayed in the breakdown may include trial hearings, enforcement hearings, appeal hearings, other and unknown hearing/conference.
12. Document filed events include any document filed or registered with the courts by the parties or documents issued by the courts. Examples include, among others, separation agreements, financial statements, affidavits and expert witness reports.
13. Pre-trial events include case management conferences, discovery proceedings, pre-trial conference/hearings, motions and default hearings, status hearings and reference hearings. It is important to note that the reporting of pre-trial events varies across jurisdictions and therefore, reporting limitations may exist.
14. Adjournment events involve the postponement of a court hearing or trial to another date or the continuation of a court hearing or trial on another date or time but excludes adjourned *sine die*.
15. A disposition is a court event that disposes part of or all of the civil case (for example, settlement, consent judgment and judgment). Disposition events may also include cases that are transferred permanently to another court location, court level or type of court. Therefore, it is important to note that the case may not necessarily be disposed of but rather continuing in another court.
16. Other disposition events not displayed in the breakdown may include enforcement judgment, time limit expired, transferred permanently to another court, other and unknown disposition events.
17. A judgment is a decision made by a judge (or a master), including interim orders, orders, decisions on costs or other decisions that dispose of part of or all of the case, including summary judgments.
Note: Based on information provided by Prince Edward Island, Nova Scotia, New Brunswick, Ontario, Saskatchewan, Alberta, British Columbia, Yukon, Northwest Territories and Nunavut. Information excludes data from Newfoundland and Labrador, Quebec and Manitoba, not yet reporting to the survey.
Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Civil Court Survey.

Table 7
Profile of active child protection cases, by reporting jurisdiction, 2019/2020

	P.E.I.	N.S.	N.B.[1]	Ont.	Sask.	Alta.	B.C.	Y.T.	N.W.T.	Nvt.[2]	Total
Cases						number					
Number of active family cases[3]	**1,366**	**12,724**	**7,553**	**124,447**	**9,466**	**61,892**	**56,001**	**429**	**757**	**661**	**275,296**
Number of active child protection cases[4 5 6]	**37**	**1,636**	**523**	**14,012**	**1,152**	**4,427**	**3,899**	**17**	**40**	**113**	**25,856**
						percent					
Active child protection cases as a percentage of active family cases	2.71	12.86	6.92	11.26	12.17	7.15	6.96	3.96	5.28	17.10	9.39
						number					
Number of new child protection cases[7]	**16**	**836**	**316**	**6,900**	**439**	**2,368**	**1,058**	**3**	**6**	**43**	**11,985**
						percent					
New child protection cases as a percentage of active family cases	1.17	6.57	4.18	5.54	4.64	3.83	1.89	0.70	0.79	6.51	4.35
New child protection cases as a percentage of active child protection cases	43.24	51.10	60.42	49.24	38.11	53.49	27.14	17.65	15.00	38.05	46.35
						number					
Number of child protection cases ongoing from a previous year[8]	**21**	**800**	**207**	**7,112**	**713**	**2,059**	**2,841**	**14**	**34**	**70**	**13,871**
						percent					
Ongoing child protection cases as a percentage of active family cases	1.54	6.29	2.74	5.71	7.53	3.33	5.07	3.26	4.49	10.59	5.04
Ongoing child protection cases as a percentage of active child protection cases	56.76	48.90	39.58	50.76	61.89	46.51	72.86	82.35	85.00	61.95	53.65
						number					
Average number of events per active child protection case[9 10]	**29.95**	**20.84**	**18.75**	**22.05**	**10.51**	**15.95**	**29.91**	**16.59**	**12.58**	**21.13**	**21.53**
Average number of process events per active child protection case[11 12]	**26.32**	**16.96**	**..**	**16.39**	**8.97**	**11.10**	**20.39**	**14.06**	**12.43**	**19.01**	**15.80**
Average number of document filed events per active child protection case[13]	21.57	13.74	..	10.25	5.22	6.51	13.42	11.59	7.68	14.41	10.11
Average number of pre-trial events per active child protection case[14]	2.62	1.58	..	2.05	1.01	1.35	2.53	0.18	4.35	0.00	1.92
Average number of adjournments per active child protection case[15]	1.65	1.20	..	2.04	1.33	0.52	2.79	2.29	..	3.07	1.80
Average number of dispositions per active child protection case[16 17]	**3.11**	**3.37**	**..**	**4.65**	**1.14**	**3.10**	**6.38**	**2.35**	**..**	**1.74**	**4.38**
Average number of judgments per active child protection case[18]	2.86	3.33	..	4.40	0.99	2.83	4.08	2.24	..	1.64	3.83
						percent					
Process events as a percentage of events	87.91	81.37	..	74.33	85.31	69.55	68.18	84.75	98.81	89.95	73.40
Disposition events as a percentage of events	10.38	16.16	..	21.07	10.81	19.40	21.33	14.18	..	8.25	20.33
						number					
Median days to first disposition in active child protection case	24.0	24.0	7.0	10.0	..	3.0	18.0	25.0	..	32.5	10.0

.. not available for a specific reference period

1. In New Brunswick, a breakdown of the "Process events" and "Disposition events" for family matters is not available for 2019/2020.
2. Pre-trial hearing events in Nunavut are under-represented due to limited data entry in the Nunavut civil information system. Other pre-trial events including case management conferences and reference hearings are also not reported.
3. For the purposes of this table, child protection cases and family cases involving a civil protection application are included in the total active family caseload in 2019/2020. Therefore, the total active family caseload in this table will not align with Table 2, Table 3.1, Table 3.2, Table 3.3, Table 4 or Table 5.

Table 7
Profile of active child protection cases, by reporting jurisdiction, 2019/2020

4. Child protection cases include applications to the court by the government for orders seeking the supervision of parents, guardians or caregivers, or the apprehension of children into government care because of issues of parental abuse, neglect, or incapacity.
5. The child protection cases examined in this table include cases where child protection was identified as an issue and do not include applications for divorce.
6. Active cases include all cases with activity (at least one court event, which moves all or part of the case through the court process) during the 2019/2020 fiscal year and thus include initiated cases.
7. Refers to cases newly started during the 2019/2020 fiscal year.
8. Refers to cases initiated in a previous fiscal year with activity recorded during the 2019/2020 fiscal year.
9. Events include initiation, process and disposition events. Initiation events initiate a case in the civil courts by adding a new case to the court's active case inventory. Process events move the case forward through the civil process, but are not the initiating event. Disposition events include all court events that dispose of a part of, or all of the case.
10. Initiation events are not displayed in the table and therefore, it is important to note that the average number of process and disposition events will not equal the average number of events.
11. Process events are events that move the case forward through the civil process, but are not the initiating event.
12. Other process events not displayed in the breakdown may include trial hearings, enforcement hearings, appeal hearings, other and unknown hearing/conference.
13. Document filed events include any document filed or registered with the courts by the parties or documents issued by the courts. Examples include, among others, separation agreements, financial statements, affidavits and expert witness reports.
14. Pre-trial events include case management conferences, discovery proceedings, pre-trial conference/hearings, motions and default hearings, status hearings and reference hearings. It is important to note that the reporting of pre-trial events varies across jurisdictions and therefore, reporting limitations may exist.
15. Adjournment events involve the postponement of a court hearing or trial to another date or the continuation of a court hearing or trial on another date or time but excludes adjourned *sine die*.
16. A disposition is a court event that disposes part of or all of the civil case (for example, settlement, consent judgment and judgment). Disposition events may also include cases that are transferred permanently to another court location, court level or type of court. Therefore, it is important to note that the case may not necessarily be disposed of but rather continuing in another court.
17. Other disposition events not displayed in the breakdown may include enforcement judgment, time limit expired, transferred permanently to another court, other and unknown disposition events.
18. A judgment is a decision made by a judge (or a master), including interim orders, orders, decisions on costs or other decisions that dispose of part of or all of the case, including summary judgments.
Note: Based on information provided by Prince Edward Island, Nova Scotia, New Brunswick, Ontario, Saskatchewan, Alberta, British Columbia, Yukon, Northwest Territories and Nunavut. Information excludes data from Newfoundland and Labrador, Quebec and Manitoba, not yet reporting to the survey.
Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Civil Court Survey.

2023 ANNUAL REPORT

Law Society of Saskatchewan

Regulating the Practice of Law in the Public Interest

Contents

About the Law Society of Saskatchewan

CORE PURPOSE:

The Law Society of Saskatchewan regulates the practice of law in the public interest.

MISSION:

The Law Society serves the public interest and advances the administration of justice by regulating competence and integrity in the practice of law, safeguarding the independence of the legal profession, and promoting access to legal services and justice.

VALUES:

ETHICAL
the Law Society acts honestly and with integrity.

ACCOUNTABLE
the Law Society is transparent, provides timely communication and processes and makes informed decisions.

FAIR
the Law Society treats all people respectfully and is consistent in the application of policies, procedures and practices.

INCLUSIVE
the Law Society embraces and promotes equity, diversity and inclusion.

COLLABORATIVE
the Law Society works cooperatively to achieve efficiencies and increase impact.

RESPONSIVE
the Law Society remains educated and aware and considers changes in the environment to achieve continuous improvement, innovation and effective regulatory outcomes.

Land Acknowledgement

The Law Society regulates the practice of law in the public interest in the province of Saskatchewan, which includes the shared lands of Treaties 2, 4, 5, 6, 7, 8, and 10, and the Homeland of the Métis Nation. The Law Society pays respect to past, present and future generations of all Indigenous Peoples and pledges to continue a path of Truth and Reconciliation for as long as "the sun shines, the rivers flow, and the grass grows."

The Law Society has received permission from the National Centre for Truth and Reconciliation to use its logo in connection with Truth and Reconciliation initiatives. As explained by the National Centre, the logo symbolizes the seven fires representing the Seven Sacred Teachings of respect, honesty, courage, love, humility, wisdom and truth. The fire represents a collective responsibility to care for and ensure that the fires of reconciliation stay bright.

As one looks into this fire, the image of two birds appears. These birds represent spirits being set free when the truth is told. The two birds also represent the relationships necessary for the process of healing and reconciliation: the relationships between Survivors and intergenerational Survivors, between Indigenous and non-Indigenous people, and between parents and children.

Andrea Argue, K.C.
President

Law Society of Saskatchewan

President's Message

The work of the Law Society of Saskatchewan for the year 2023, at its broadest retrospective characterization, may be described as considerable forward "thinking," in the midst of much "doing."

We are pleased to report that the Law Society progressed many of its initiatives, including matters pertinent to Truth and Reconciliation and attending to other core work integral to public protection through trust safety, insurance and firm regulation matters; addressing specific lawyer ethics, discipline and competency matters; and the like.

As to the forward thinking that preoccupied much of the organization's energy: unprecedented technological advances in the area of artificial intelligence (AI) have potentially astonishing impacts on the delivery of legal services. Will AI result in enhanced access to legal services? How may regulators continue to ensure that the public interest of safe and effective legal services is protected in a delivery landscape unlike any we have known before?

Thematically related in access to legal services, but in the context of different delivery model(s) than AI, the Law Society continued to build on the work of the Future of Legal Services Initiative. We were pleased to robustly engage with external stakeholders to foster the development and success of this initiative. We appreciate the good working relationship with the Ministry of Justice and Attorney General in this province in all things, but the collaborative advancement of this initiative is a particular example of note.

Engagement with external stakeholders was not limited to the sphere of Future of Legal Services. At various points this past year we were pleased to meet with and learn from our Law Society counterparts in Alberta, British Columbia and Manitoba as to matters, respectively, of continuing professional development and competency, shifting legal regulatory regimes, and the interplay of wellness and discipline.

Additionally, our engagement with the Federation of Law Societies presented opportunities to enhance our capacity to protect the public in relation to lawyer wellness (building on the learnings from the National Study) and, once again, AI.

The year ended with celebratory engagement with the Law Foundation, as we joined them in marking that organization's 50th anniversary. We are thankful for the Law Foundation, as through its important continued financial support, we are able to advance our efforts to protect the public.

In closing, I wish to extend my personal gratitude to the external stakeholders with whom I have had the pleasure to interact during my time in the office of President. These experiences enriched and informed much of my work at the Board table. Last, but not least, I wish to specifically address those around the "Board table": my sincere thanks go to the Benchers, Executive Committee, Law Society staff and Executive Director, Tim Brown, K.C., each for their diligent and capable work in service to the public of Saskatchewan.

Tim Brown, K.C.
Executive Director

Law Society of Saskatchewan

Executive Director's Message

In 2023, the Law Society introduced its new *Strategic Plan (2023-2026)*. This renewed plan builds on many of the same themes expressed in our *Strategic Plan (2019-2022)*. It establishes a forward-looking suite of accountabilities for the organization and is based on the ongoing work of our Board to understand the trends and developments which will influence the future of the profession in the rapidly evolving context in which these services are (and will be) delivered.

2023 served as a stark reminder of the speed of change with the rise of technologies such as large language models and generative artificial intelligence (AI) capturing the attention and imagination of professionals across various sectors, including law. These technologies have the potential for significant benefits like improving workflows, simplifying routine tasks and increasing the public's access to legal information. They also come with several early limitations and challenges, things like potential biases, inaccuracies, and so-called "AI hallucinations" – a phrase none of us were familiar with until last year. Like the internet, it is easy to predict that over time these technologies will become a seamless part of our everyday lives.

In 2023, the Law Society closely monitored these advancements to assess their safe application within legal practice. By the end of the year, this led to the formulation of *Guidelines for the Use of Artificial Intelligence in the Practice of Law*, published in early 2024, outlining good practices for incorporating AI technologies responsibly in legal work.

We remain vigilant and committed to continuously evaluating the impact and regulatory implications of these technological advancements on the legal profession, as we do in all aspects of our mission to regulate the practice of law in the public interest. As you will see in the report that follows, work towards the strategic objectives that support this aim is well underway. We also hope that our commitment to presenting supporting data in transparent ways will be helpful to today's readers, and on a comparative basis, to readers over time.

None of the work presented in this report, or otherwise, would be possible without the very significant effort of our committed staff, our Board, our volunteers from the profession and our collaborative partners at the Ministry of Justice, the College of Law, the Law Foundation of Saskatchewan and other law societies in Canada, including the Federation of Law Societies of Canada, who help us to make big ideas happen within the confines of a relatively modest budget.

Special thanks go to my staff colleagues on the Executive Leadership Team and to my colleagues on the Executive Committee: Past President James Korpan, K.C., Vice-President Suzanne Lalonde K.C. and, of course, to my devoted governance partner and learned friend, President Andrea Argue, K.C. Collectively, their wisdom and commitment to the mission of the organization cannot be overstated.

Strategic Plan (2023-2026)

GOAL 1: STRENGTHEN REGULATION

The Law Society demonstrates transparent, timely, fair and informed decision-making to build stakeholder understanding, trust and confidence in the regulation of the practice of law.

OBJECTIVES:

1. Increase stakeholder awareness of the role of the Law Society.
2. Improve Law Society communications regarding regulatory matters, including the public interest basis for decisions.
3. Increase dialogue with stakeholders and the use of data to regulate proactively and better inform decisions.
4. Increase timeliness and quality of regulatory processes and decisions.
5. Enhance effectiveness of Law Society governance.

GOAL 2: ENHANCE COMPETENCY

The Law Society supports members[1] in acquiring and maintaining the competencies necessary to provide quality legal services to meet the evolving needs of the public.

OBJECTIVES:

1. Increase awareness and understanding of the current and evolving range of competencies required to deliver quality legal services.
2. Enhance supports and resources available for members to acquire and maintain these competencies.
3. Increase the effectiveness of professional development regulation and programming.

GOAL 3: INCREASE EQUITY, DIVERSITY AND INCLUSION

The Law Society promotes equity, diversity and inclusion within the legal profession to strengthen access to legal services and the legitimacy and responsiveness of the administration of justice.

OBJECTIVES:

1. Increase diversity within the Law Society to better reflect the diversity of the public in Saskatchewan.
2. Increase the competency of the Law Society Board, staff and members in relation to human rights, equity, diversity and inclusion.
3. Strengthen the Law Society's commitment to human rights, equity, diversity and inclusion in its regulatory structure, policies and initiatives.
4. Reduce barriers to entry, advancement and retention in the legal profession faced by equity-seeking/equity-deserving groups.[2]

GOAL 4: ADVANCE TRUTH AND RECONCILIATION

The Law Society demonstrates commitment to Truth and Reconciliation and acts to support the unique needs of Indigenous peoples and Indigenous-led solutions to strengthen: (i) access to legal services; and (ii) the legitimacy and responsiveness of the administration of justice.

OBJECTIVES:

1. Increase diversity within the Law Society Board, staff and members to reflect Indigenous perspectives.
2. Increase the cultural competency of the Law Society Board, staff and members in line with the Calls to Action and Calls to Justice.
3. Reduce barriers to entry, advancement and retention in the legal profession faced by Indigenous peoples.
4. Advance the areas of priority and focus as recommended by the Law Society's Truth and Reconciliation Advisory Group.
5. Advance the *Truth, Reconciliation and Treaty Implementation Action Plan* prepared in partnership with the Office of the Treaty Commissioner.

GOAL 5: INCREASE ACCESS TO LEGAL SERVICES AND JUSTICE

The Law Society demonstrates commitment to access to justice and supports accessible legal services to improve legal outcomes for the public.

OBJECTIVES:

1. Reduce barriers to access caused by the Law Society's regulatory framework.
2. Increase the competency of the Law Society Board, staff and members in relation to access to justice issues.
3. Increase support to members to diversify the methods used to deliver legal services, particularly to underserved segments of the public.
4. Increase support for initiatives that address unmet legal needs and advance access to justice.

GOAL 6: INCREASE WELLNESS

The Law Society promotes a culture of wellness in the legal profession to facilitate the delivery of quality legal services to the public.

OBJECTIVES:

1. Increase awareness and understanding of mental illnesses, addictions and other health concerns to support members in identifying and addressing issues to mitigate risk to the public.
2. Reduce the stigma associated with mental illnesses, addictions and other health concerns to encourage members to seek appropriate supports.
3. Provide regulatory options to address mental illnesses, addictions and other health concerns experienced by members.

[1] Members of the Law Society include licensees entitled to practice law in Saskatchewan and firms as referenced in *The Legal Profession Act, 1990.*

[2] See the Government of Canada Guide on Equity, Diversity and Inclusion Terminology.

Strategic Plan Progress in 2023

Goal One: Strengthen Regulation

Decision-making that is transparent, informed, fair and timely supports stakeholder confidence in the regulation of the practice of law.

Progress Towards This Goal

Objective 3: Increase dialogue with stakeholders and the use of data to regulate proactively and better inform decisions.

- Stakeholder Services Working Group

In 2023, the Law Society initiated a cross-functional Stakeholder Services Working Group to approach stakeholder inquiries effectively and provide consistent and streamlined service to all stakeholders who contact the Law Society. Work during 2023 included reviewing data for quality assurance and lessons, making improvements to frequently used content, and developing approaches for complex inquiries.

Objective 4: Increase timeliness and quality of regulatory processes and decisions.

- Investigations and Adjudication

In 2023, amendments to Part 11 of the *Law Society of Saskatchewan Rules* were approved to address inefficiencies caused by complaints that are repetitious. Additionally, the Law Society developed data analytics capabilities to better inform caseload and resourcing decisions and improve efficiencies in the management of professional responsibility matters.

To enhance the quality of Law Society adjudications, the Law Society added two additional modules to the training provided to members of the Hearing Committee Adjudicator Roster: Trauma-Informed Adjudication and The *Gladue* Principles: From Criminal Law to the Regulation of Professions.

- Firm Regulation – Registration, Appointment of a Designated Representative and Annual Reporting

The Law Society continued to strengthen implementation of Part 9 of the *Law Society of Saskatchewan Rules* which supports risk identification and management for law firms and organizations.

Beginning in January 2020, all law firms in Saskatchewan completed a firm registration form and appointed a Designated Representative. All new firms and approved pro bono organizations complete this same process. In 2023, a new annual report was developed and moved online to streamline reporting. All firms continue to complete the online annual report, allowing for proactive identification and early resolution of issues.

- Trust Safety – Unified Year-End

To improve the efficiency and effectiveness of the Trust Safety program, amendments were approved to Parts 16 and 23 of the *Law Society of Saskatchewan Rules* to streamline the approach to trust safety. This included the creation of a uniform trust reporting period. The shift to a uniform year-end allows for increased timeliness of the audit processes, enabling the Law Society and members to be more proactive in identifying issues and risks. This change also facilitates the identification of potential trends in trust safety compliance.

Objective 5: Enhance effectiveness of Law Society governance.

- Policy Enhancements

The Law Society approved amendments to Part 4 of the *Law Society of Saskatchewan Rules* to provide clarity around member resolutions presented at a meeting of the members. The amendments assure that members voting on a resolution have sufficient

information to reasonably inform their decision, that resolutions presented are within the mandate of the Law Society, and that only those resolutions that are consistent with the duties of the Law Society are implemented.

Additionally, amendments to the governance policy on committees were approved to advance effective and efficient decision-making. The amendments provide guidelines for the creation of new committees and the review and discontinuation of existing committees, where appropriate. Based on implementation of these guidelines, the Firm Regulation Committee has assumed the ongoing responsibilities of the Trust Safety Committee.

Goal Two: Enhance Competency

Regulating professional competence is central to the Law Society's mandate of serving the public interest, necessitating continuous commitment to enhancing and creating opportunities for legal professionals to strengthen their skills and knowledge to effectively meet the evolving needs of the public.

Progress Towards This Goal

Objective 1: *Increase awareness and understanding of the current and evolving range of competencies required to deliver quality legal services.*

- Western Canada Competency Profile

In 2023, the Law Society partnered with the western law societies of British Columbia, Alberta and Manitoba to develop a set of common competencies to be demonstrated at entry to practice. Known as the Western Canada Competency Profile, this will inform lawyer training and education, including bar admission program development and articling standards, following validation by lawyers in all four provinces.

Importantly, substantive legal knowledge is only one aspect of competence, which encompasses a broader set of skills including interpersonal skills, technological capabilities, cross-cultural understanding, and personal well-being. The Competency Profile fosters a holistic understanding of the range of competencies required to deliver quality legal services. It was developed through a rigorous, industry-standard process, led by expert consultants and a representative task force from the four participating provinces.

Objective 2: *Enhance supports and resources available for members to acquire and maintain these competencies.*

- Cloud Computing Guide

During 2023, a working group completed a review and update of checklists and good practices to assist with evaluating and implementing cloud services within legal practice.

- Practice Management Assessment Tool

The Assessment Tool assists firms and legal organizations in assessing the strength of their organizational policies and processes to proactively identify and manage risks. This includes detailed lists of practice examples that highlight regulatory requirements and provide guidance. The second year of a three-year roll-out concluded in 2023 with 204 firms having successfully completed the self-assessment process.

Competency Supports and Tools

- *Continuing Professional Development:* Educational programming covering a wide range of topics
- *Informal Ethics Opinions:* Guidance on ethical issues
- *Legal Resources:* Access to bulk-purchased resources and research services
- *Practice Advisor Program:* Complaint reviews and recommendations to members in addition to
  - *Expanded Practice Advisor Program:* Access to advisors for issues related to practice management
  - *New Solo and Small Firm Practice Reviews:* Assistance for new solo or small law firms
- *Practice Resources:* A range of publications and tools for effective practice
- *Successor Listing:* Supports for developing a succession plan

Feedback on the Practice Management Assessment Tool

Designated Representatives offered the following reflections on use of the Assessment Tool during 2023:

- *"The questions prompted discussions in our firm."*
- *"It was a great opportunity to review our firm's policies and to expand on them where necessary."*
- *"For me, it was good to do a review of our existing practices, and to see some areas for improvement."*
- *"Going through the exercise as a reminder of important issues/topics that are not always top of mind due to busyness of practice."*
- *"I am now getting cybersecurity training for all staff. I also think I should join some pro bono boards. I help pro bono clients, but I believe I could contribute to a committee/board."*
- *"It was a good tool to reflect on current operations and contemplate how improvements may be made."*

• Principal Training Course

In 2022, the Law Society piloted a course to provide every principal with baseline training before undertaking the responsibility of supervising and teaching an articling student. The course consists of six self-directed lessons covering topics such as principal and student obligations and responsibilities, effective mentorship, setting and managing expectations, providing feedback and communicating in a culturally sensitive manner. Following a positive pilot, the course became mandatory for all principals beginning in 2023 with 100 percent compliance.

• Successor Listing

During 2023, the Law Society supplemented resources and supports to assist members to develop succession plans for their practices. This included an online listing to assist members to volunteer and indicate need for a successor. A functional successor arrangement allows for more secure planning for significant professional and life events. Agreeing to be a successor also creates opportunities for members to build their practice and their professional network.

Objective 3: Increase the effectiveness of professional development regulation and programming.

• Continuing Professional Development Renewal

In 2023, the Law Society began exploring options for improvement and renewal of continuing professional development regulation and programming to better reflect and support the needs of legal service providers and their clients. An initial change that came into effect on January 1, 2024, was the discontinuance of the pre-accreditation requirement for reported professional development hours. Members may select and report learning activities that suit their circumstances, subject to otherwise complying with the Continuing Professional Development Policy. This includes attaining and reporting 12 hours (including two ethics hours) during a year.

Goal Three: Increase Equity, Diversity and Inclusion

Equity, diversity and inclusion within the legal profession are important to strengthen access to legal services and the legitimacy and responsiveness of the administration of justice.

Progress Towards This Goal

Objective 2: Increase the competency of the Law Society Board, staff and members in relation to human rights, equity, diversity and inclusion.

• Learning Opportunities

The Law Society offered three continuing professional development sessions during 2023 focused on equity, diversity and inclusion themes, bringing the total sessions offered since 2011 to 16. Themes in 2023 focused on women in the law and the first Black woman lawyer in Canada, as well as estate planning for the 2SLGBTQQIA+ community.

• Practice Management Assessment Tool – Equity, Diversity and Inclusion

In 2023, additions focused on equity, diversity and inclusion were introduced into the Assessment Tool for use by firms and legal organizations. Areas for consideration relate to equity-seeking/equity-deserving groups, human resource obligations, accessibility measures, discrimination and harassment, Truth and Reconciliation, and human rights education. In 2023, 31 sole practitioner firms and 66 multi-lawyer firms completed self-assessment. Many of the participating firms provided thoughtful feedback and reflection related to equity, diversity and inclusion, with several indicating the establishment of an internal working group or committee to continue to evaluate progress.

Objective 3: Strengthen the Law Society's commitment to human rights, equity, diversity and inclusion in its regulatory structure, policies and initiatives.

• Addressing Discrimination and Harassment

In 2023, the Law Society amended section 6.3 of the *Law Society of Saskatchewan Code of Professional Conduct* relating to issues of discrimination and harassment. Through amendments to the *Code*, the Law Society has provided guidance and education in response to data identifying discrimination and harassment as significant concerns. The legal profession is an important public institution that must uphold human rights to advance the administration of justice.

Objective 4: Reduce barriers to entry, advancement and retention in the legal profession faced by equity-seeking/equity-deserving groups.

• Mentorship Program

To advance a mentorship program for members, the Law Society undertook a review of existing literature and key findings on mentorship in 2023, specifically in the equity, diversity and inclusion context. This included the importance and benefits of mentorship, barriers to effective mentorship opportunities and equitable mentorship good practices.

The literature review substantiated the benefits of mentorship and identified pitfalls to avoid. The Law Society also undertook a trial mentorship program during 2023. Trial participants indicated a positive experience and all participants responding to a survey indicated support for a formal mentorship program to advance.

Equity, Diversity and Inclusion Supports and Tools

- *Continuing Professional Development:* Programming to support an inclusive legal profession
- *Equity Office:* Support for legal service providers should equity issues arise
- *Practice Management Assessment Tool:* Guidance for effective legal practice including equity, diversity and inclusion

Truth and Reconciliation Supports and Tools

- *Continuing Professional Development:* Programming to support advancement of the Calls to Action, Calls to Justice and Treaty implementation
- *Gladue Rights Database:* Resources to strengthen understanding of the *Gladue* principles in partnership with Legal Aid Saskatchewan and the University of Saskatchewan
- *Legal Resources:* Indigenous titles and resources about residential schools and Indigenous perspectives

Goal Four: Advance Truth and Reconciliation

Advancing Truth and Reconciliation is important to recognize the unique needs of Indigenous people and to strengthen access to legal services and the legitimacy and responsiveness of the administration of justice.

Progress Towards This Goal

Objective 1: Increase diversity within the Law Society Board, staff and members to reflect Indigenous perspectives.

• Participation

The Law Society benefits from a Truth and Reconciliation Advisory Group of nine members, which includes Elder Sidney Fiddler from Waterhen Lake First Nation. During 2023, Elder and Knowledge Keeper Doug Pee-Ace from Yellow Quill First Nation also supported the Law Society through work with the Office of the Treaty Commissioner on Truth and Reconciliation through Treaty Implementation.

In 2023, four members (8.51%) of the Board and staff of the Law Society self-identified as Indigenous (Métis).

Objective 2: Increase the cultural competency of the Law Society Board, staff and members in line with the Calls to Action and Calls to Justice.

• Learning Opportunities

During 2023, the Law Society Board and staff participated in the second of a three-part series on anti-racism training. The Law Society also offered three continuing professional development sessions focused on Truth and Reconciliation themes, bringing the total sessions offered since 2011 to 41. Themes in 2023 focused on the *United Nations Declaration on the Rights of Indigenous Peoples* in the context of resource development, *Gladue* submissions and the experiences of Indigenous colleagues in the legal profession.

Objective 3: Reduce barriers to entry, advancement and retention in the legal profession faced by Indigenous peoples.

• Becoming a Lawyer

In 2022, the Law Society initiated a project with Pro Bono Students Canada and the Public Legal Education Association of Saskatchewan to raise awareness regarding law as a career path. The project helps dispel myths about becoming a lawyer and gives high school students an opportunity to engage with the Law Society and current law students. In 2023, a virtual component to the project was developed and 129 youth participated in school workshops.

• Support for Indigenous Law Students

The Law Society financially supported attendance of Indigenous law students at the Indigenous Bar Association Conference and sponsored the 2023 conference. The Law Society also provided a donation for *kwayeskāstasowin* (setting things right) at the University of Saskatchewan College of Law. This donation contributes to mutual learning, personal and professional supports and reconciliation, and research.

Objectives 4 and 5: Advance the areas of priority and focus as recommended by the Law Society's Truth and Reconciliation Advisory Group; Advance the Truth, Reconciliation and Treaty Implementation Action Plan prepared in partnership with the Office of the Treaty Commissioner.

- Truth and Reconciliation through Treaty Implementation

To advance a framework for action as a first area of priority, the Law Society completed the second phase of a Truth and Reconciliation through Treaty Implementation exercise with the Office of the Treaty Commissioner in 2023. This resulted in an Action Plan that evolved the 38 recommendations identified during the first phase into key goals and actions that fall into five areas of focus:

- Policy Review and Reform
- Capacity Building
- Service and Accessibility
- Collaboration and Engagement
- Communication

The Law Society also co-presented with the Office of the Treaty Commissioner at a national workshop titled Unlearn and Learn: Truth and Reconciliation with the Canadian Network of Agencies of Regulation in support of the National Day for Truth and Reconciliation.

Goal Five: Increase Access to Legal Services and Justice

Commitment to access to justice supports accessible legal services to improve legal outcomes for the public.

Progress Towards This Goal

Objective 1: Reduce barriers to access caused by the Law Society's regulatory framework.

- Exemptions from Unauthorized Practice

In 2023, several amendments to Part 10 of the *Law Society of Saskatchewan Rules* were approved. These included an update to the exemption for university law students which introduced terms and conditions and clarified direct supervision requirements. A clarifying amendment to the exemption for lobbyists was also approved following consultation with the Office of the Registrar of Lobbyists Saskatchewan.

Analysis of Truth and Reconciliation through Treaty Implementation Training

The content of the 41 sessions offered by the Law Society in support of Truth and Reconciliation as at the end of 2023 were considered in the context of the Office of the Treaty Commissioner's recommendations to the Law Society related to training. At the end of 2023, the Law Society has provided at least one continuing professional development session in all recommended areas of focus.

Office of the Treaty Commissioner Training Recommendations for Truth and Reconciliation through Treaty Implementation

Training Recommendation	Total sessions offered
16 – Treaty relationship, Treaty promises, and the consequences of broken Treaty promises	10
17 – *United Nations Declaration on the Rights of Indigenous Peoples*	4
20 – Trauma, intergenerational narratives of the history and policies of Residential Schools and how the consequences are being seen today at all levels	8
21 – Anti-racism theory and practice, and the foundations of microaggressions, stereotypes, discrimination and biases	5
23 – Cultural competency, Indigenous spirituality, protocols, and/or intent for ceremony	6
24 – Intersectionality in Truth, Reconciliation and Treaty Implementation	1
31 – Foundations of power, privilege, and white supremacy and how it relates to the oppression of Indigenous peoples in Canada	7
32 – Differences between heritage, culture, and worldview and how these terms relate to reconciliation	1
37 – Content of the Calls for Justice for Murdered and Missing Indigenous Women, Girls and 2SLGBTQQIA+ People	1
38 – Indigenous views of sustainability, stewardship of the land, relationships with the land, and environmental protection	1

Access to Legal Services and Justice Supports and Tools

- *Continuing Professional Development:* Programming to support an accessible legal system for all
- *Find Legal Assistance Directory:* A database to connect the public with legal service providers
- *Pro Bono Organizations:* Registration and support for approved organizations to facilitate delivery of pro bono legal services to the public and host members in the Active Pro Bono registration category
- *Practice Management Assessment Tool:* Guidance for effective legal practice including strengthening access to legal services

• Legal Information Guidelines

The Law Society continued to provide presentations on the deregulation of legal information and accompanying Legal Information Guidelines and through three presentations connected with 41 legal information service providers in 2023.

• Limited Licensing Pilot

Through the Future of Legal Services Initiative, the Law Society continued implementation of the 13 recommendations in the Legal Services Task Team Final Report, a joint project with the Ministry of Justice of Saskatchewan. During 2023, progress focused on the Limited Licensing Pilot, which was initiated in early 2022 and allows individuals not otherwise authorized to deliver legal services to assist with unmet legal needs. Lessons from 2023 highlight that the Pilot continues to:

- receive significant interest from consumers of legal services;
- have a positive impact on affordability of legal services based on average legal fees for Western Canada;
- reach locations outside of Regina and Saskatoon; and
- increase consumer choice.

Objective 2: Increase the competency of the Law Society Board, staff and members in relation to access to justice issues.

• Learning Opportunities

During 2023, the Law Society hosted two workshops on access to justice themes, bringing the total sessions offered since 2013 to 11. The first focused on limited scope legal services as a follow-up to an earlier bootcamp providing tips and guidance on how to deliver this type of representation effectively. At the end of the bootcamp, participants were asked if they would make changes in their practice based on what they learned. From 47 responses, 66% said they would make changes in their practice including updating retainer letters, better communication with clients, and letting clients know about limited scope options.

The second workshop focused on the Saskatchewan Legal Needs Assessment, a research project with the College of Law and Centre for Forensic Behavioural Science and Justice Studies at the University of Saskatchewan supported by the Law Foundation of Saskatchewan and Law Society to better understand perspectives on legal needs in Saskatchewan. The surveys of 67 community organizations and 272 lawyers revealed key insights. Community organizations reported that the legal system is difficult to navigate for those looking for legal support for their justice-related problem and communities in which they operated did not offer adequate legal supports and services. Lawyer respondents reported that the eligibility criteria for free, subsidized, or low-cost legal services are too restrictive and there are not an adequate number of services available to support the legal needs of their communities.

• Practice Management Assessment Tool – Access to Legal Services

In 2023, additions focused on access to legal services were introduced into the Assessment Tool for use by firms and legal organizations. Areas for consideration include facilitating access to legal services, providing volunteer services, encouraging innovation and offering a variety of unbundled or limited scope services.

Objective 3: Increase support to members to diversify the methods used to deliver legal services, particularly to underserved segments of the public.

- Approved Pro Bono Organizations

The Law Society implemented a process to approve pro bono organizations for the effective delivery of pro bono legal services to the public in 2023. This also supports an Active Pro Bono registration category to facilitate the delivery of legal services by members who would otherwise be retired or inactive. At the end of 2023, there were five approved pro bono organizations providing services in the province.

Objective 4: Increase support for initiatives that address unmet legal needs and advance access to justice.

- Assistance for Incarcerated Persons

The Law Society worked with partners throughout 2023 to better connect the incarcerated population with legal information and options for legal assistance. Presentations were provided to over 50 correctional centre managers and staff and meetings with the Ministry of Corrections identified ways to meet the legal information and assistance needs of incarcerated persons. In 2023, the Law Society connected 330 incarcerated persons with legal information and assistance options.

- Portal for the Public

In 2023, the Law Society developed an online portal through its website to centralize legal information and assistance sources. This portal makes it easier for members of the public to learn about the law, research the law, find options for legal assistance and obtain legal information assistance.

- Saskatchewan Access to Justice Week

From October 23-27, 2023, the Law Society and CREATE Justice co-hosted an annual Access to Justice Week, which engages communities across the province in a conversation about improving access to justice. In 2023, the focus was on inclusivity and data-informed change and the public, law students and members of the justice community participated in eight events with 362 attendees.

Goal Six: Increase Wellness

Supporting the well-being of legal service providers by promoting a culture of wellness in the profession through appropriate education, member resources and regulation is key to ensuring that high quality legal services are available to the public.

Progress Towards This Goal

Objective 1: Increase awareness and understanding of mental illnesses, addictions and other health concerns to support members in identifying and addressing issues to mitigate risk to the public.

Limited Licensing Pilot insights at the end of 2023

PILOT PARTICIPANTS

33
Applicants

26
Approved participants

3
Not approved participants

1
Removed participant

3
Applications pending review

CLIENTS

12,459
Client inquiries regarding Pilot services*

3,750
Clients served via Pilot

87
Positive consumer reviews

7
Negative consumer reviews

* In some Pilot service contexts there is a high volume of inquiry regarding legal services, but not all clients will elect or be candidates for services.

Wellness Supports and Tools

- *Continuing Professional Development:* Educational programming focused on wellness
- *Health and Wellness Resources:* A range of publications and tools for developing wellness practices
- *Lawyers Concerned for Lawyers:* A program offered with Saskatchewan Lawyers' Insurance Association Inc. available to any Saskatchewan lawyer, articling student, law student or eligible family member for confidential assistance 24 hours a day and 7 days a week

• Learning Opportunities

In 2023, the Law Society offered four continuing professional development sessions focused on wellness, bringing the total sessions offered since 2011 to 18. One session, co-hosted with the Canadian Bar Association – Saskatchewan Branch, discussed the recommendations and findings of the *National Study on the Psychological Health Determinants of Legal Professionals in Canada*. A panel of lawyers, judges and legal educators shared personal experiences and spoke about reducing stigma in the profession, power dynamics for new and Indigenous lawyers, and implementing the study's recommendations.

A series of two sessions centered on building better boundaries. The first session focused on types of boundaries and creating and communicating healthy boundaries. In the second session, participants explored emotional aspects and roadblocks to boundary setting and received practical tips and exercises for having difficult conversations and regulating emotions. The final wellness session covered concrete strategies for supporting well-being and creating healthy resiliency, including exercising self-compassion.

Objective 2: Reduce the stigma associated with mental illnesses, addictions and other health concerns to encourage members to seek appropriate supports.

• Practice Management Assessment Tool – Wellness

As a component of a proactive approach, the Assessment Tool recognizes that the ability to deliver competent legal services can be affected by a person's well-being. Addictions, mental and physical health issues, and stress are often ignored in the legal profession. When left unaddressed, the impacts can be profound in one's personal and professional life. The Assessment Tool encourages reflection on the well-being of all staff and lawyers by considering a series of questions related to structured time away, available resources and programs, workplace health and safety, and response to addictions and illnesses and associated policies. Identified gaps are addressed with suggested resources and continuing professional development options.

Objective 3: Provide regulatory options to address mental illnesses, addictions and other health concerns experienced by members.

• Wellness and Health Crisis Working Group

In 2023, the Law Society established a Wellness and Health Crisis Working Group to provide a focused forum to advance recommendations from the *2022 National Study on the Psychological Health Determinants of Legal Professionals in Canada*. In 2023, initial efforts focused on discussing existing scenarios and review of an environmental scan on initiatives advanced by law societies.

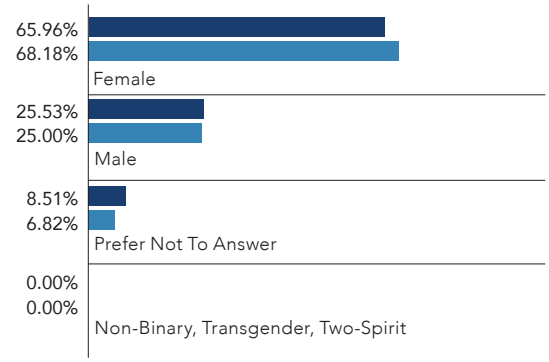
Demographics in 2023

Board and Staff Demographics

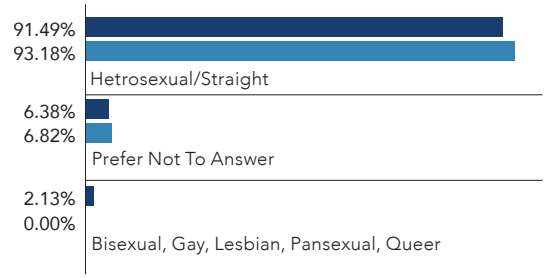
On December 31, 2023, there were 53 Board (21) and staff (32) members at the Law Society. Demographic data is reported for 47, as 6 did not complete the data collection.

For 2023, demographic trends demonstrate increased diversity as compared to 2022 in the percentage of Law Society Board and staff members self-identifying as belonging in the following equity-seeking/equity-deserving groups: bisexual, gay, lesbian, pansexual or queer (2.13%), one or more racialized or ethnic groups (7.49%) and Métis (1.69%). Trends also demonstrate an increase in the percentage of Board and staff identifying as speaking a first language other than or in addition to English or French (1.69%).

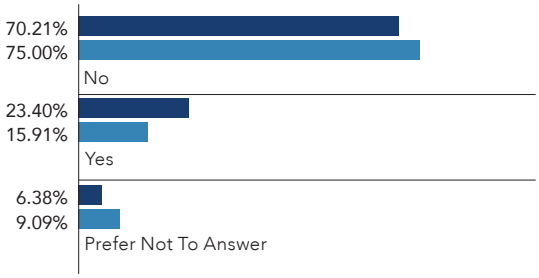
Gender Identity



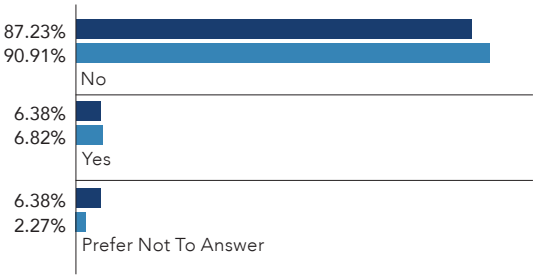
Sexual Identity



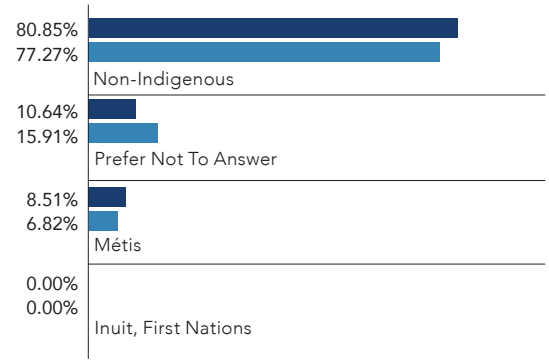
Race/Ethnicity



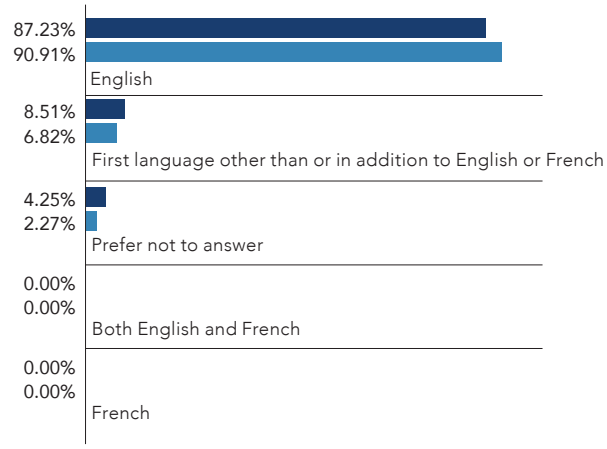
Disability



Indigeneity



First Language



Demographics in 2023

Membership Demographics

The Law Society has several membership categories and data is reported on two primary categories:

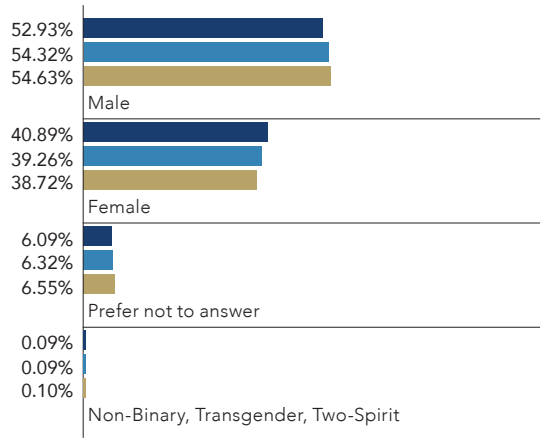
- ***Active:*** a member with a valid practising certificate entitled to practise law.
- ***Inactive:*** a member qualified to practise but electing not to maintain an Active membership and not currently permitted to practise law.

Active Member Demographics

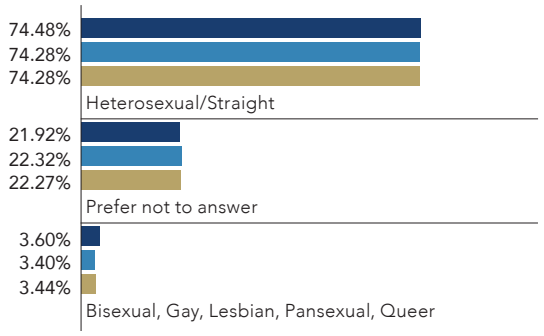
On December 31, 2023, there were 2,174 Active members residing within (1,917) and outside of (257) Saskatchewan. Demographic data is reported for 2,167 Active members, as 7 did not provide demographic information due to change in status/reinstatement.

During 2023, demographic trends demonstrate an increase since 2021 in the percentage of Active members self-identifying as belonging to the following equity-seeking/equity-deserving groups: female (1.63%), bisexual, gay, lesbian, pansexual, or queer (0.16%), one or more racialized or ethnic groups (2.14%), persons with a disability (0.10%), Inuit and/or First Nations (0.42%) and Métis (0.5%). Trends also demonstrate an increase in the percentage of Active members identifying as speaking a first language other than or in addition to English or French (0.64%).

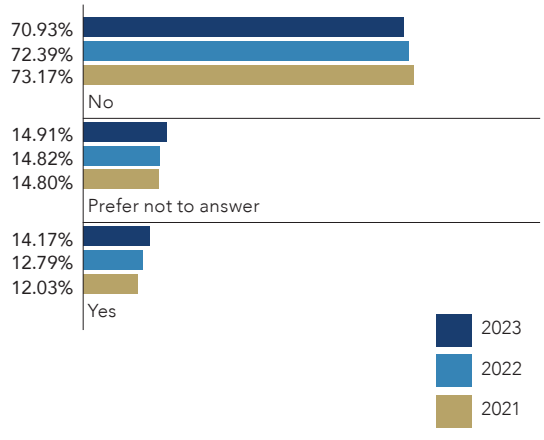
Gender Identity



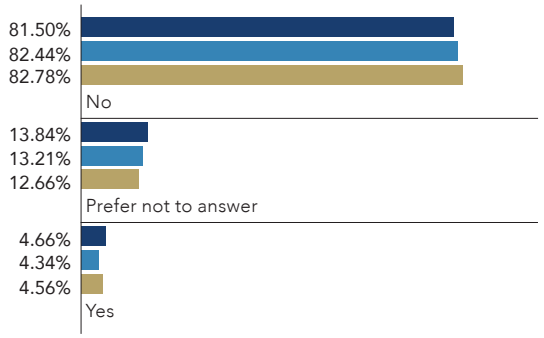
Sexual Identity



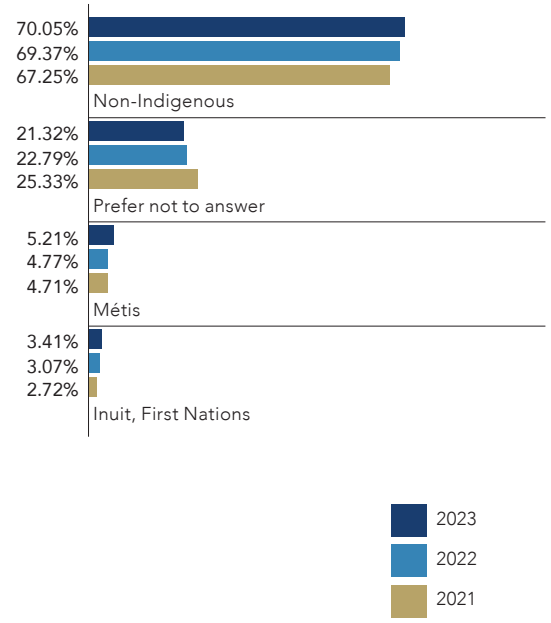
Race/Ethnicity



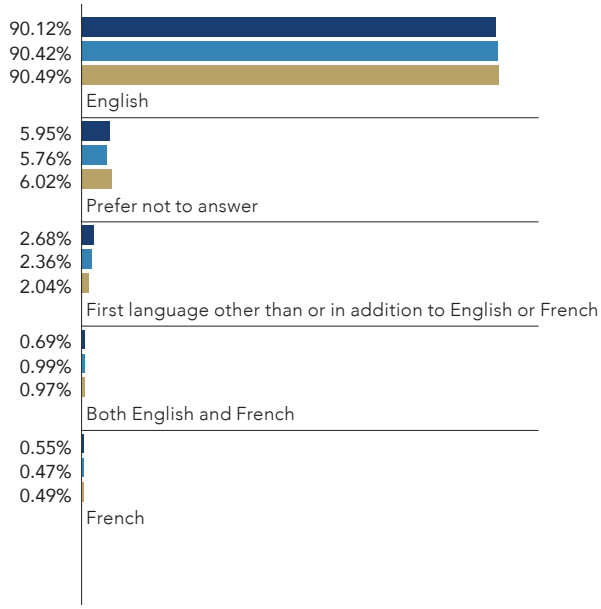
Disability



Indigeneity



First Language

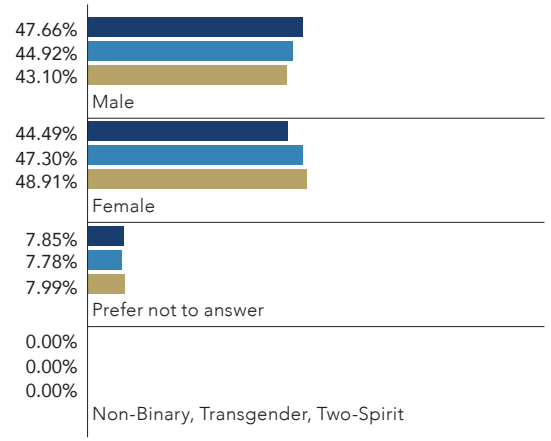


Inactive Member Demographics

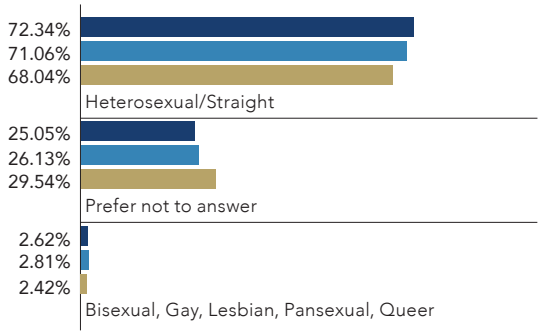
On December 31, 2023, there were 537 Inactive members residing within (272) and outside of (265) Saskatchewan. Demographic data is reported for 535 members, as 2 did not provide demographic information due to change in status/reinstatements.

The percentage of Inactive members self-identifying as belonging to equity-seeking/equity-deserving groups increased in 2023 as compared to 2021, with the exception of persons identifying as female and Inuit and/or First Nations. The percentage of Inactive members identifying as female decreased by 4.42% with an increase to the percentage of Inactive members self-identifying as male of 4.56%. The percentage of Inactive members identifying as Inuit and/or First Nations decreased by 0.77%.

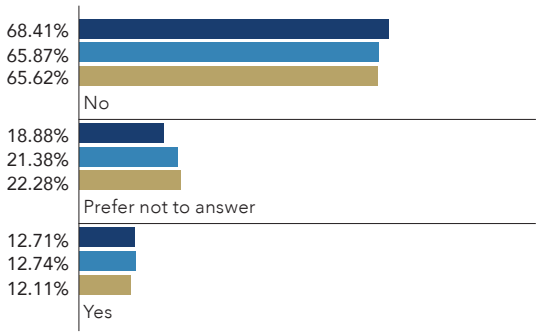
Gender Identity



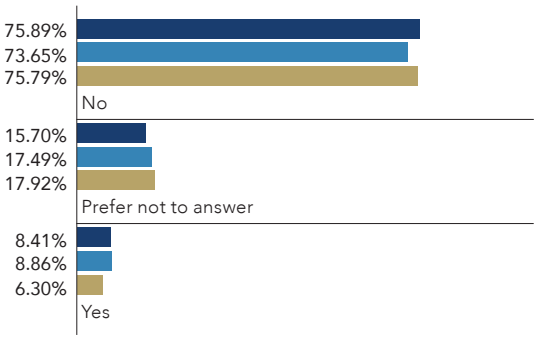
Sexual Identity



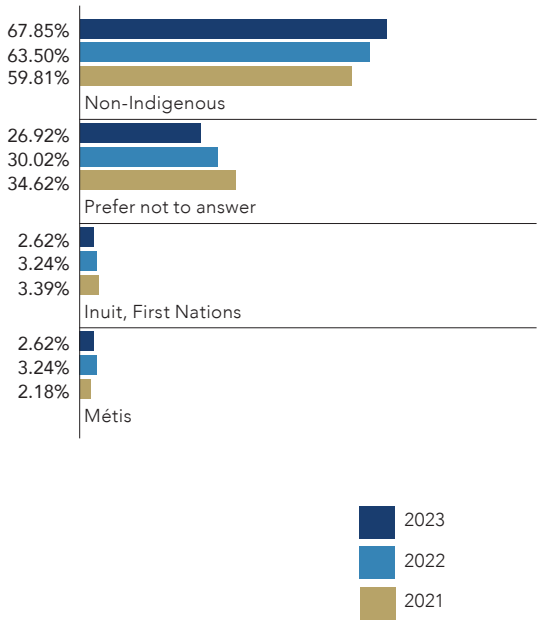
Race/Ethnicity



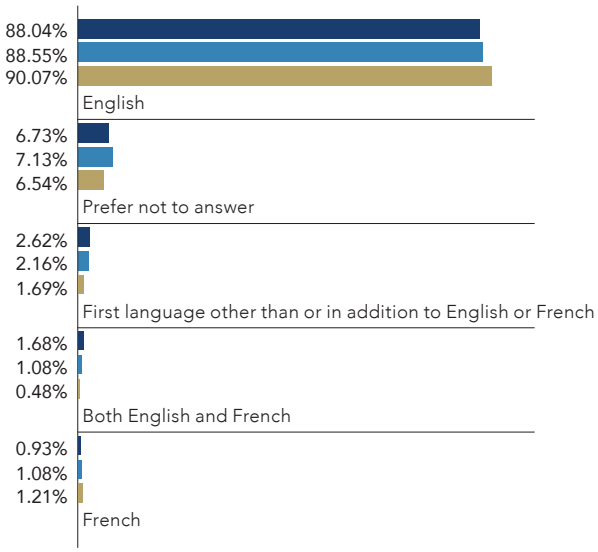
Disability



Indigeneity



First Language



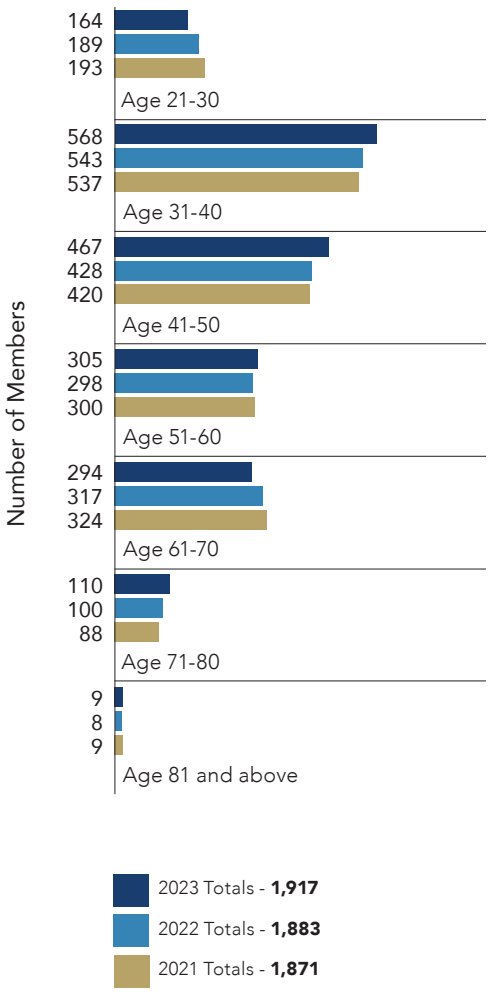
Data in 2023

Active Members

As of December 31, 2023, membership data is reported related to age, years as a member, type of practice and private practice for the 1,917 Active members residing within Saskatchewan. Geographic location is reported for the 1,876 Active members with a Saskatchewan firm or organization indicated in their Law Society employment profile.

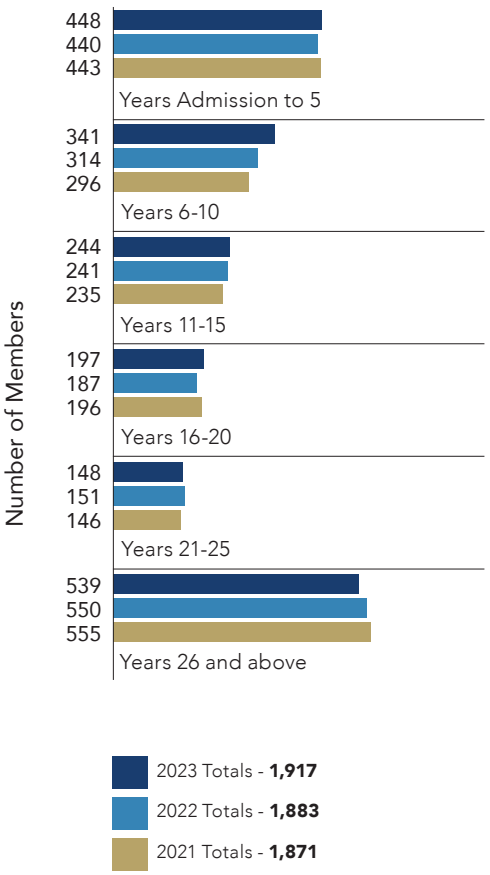
Ages

- Active Members Residing Within Saskatchewan



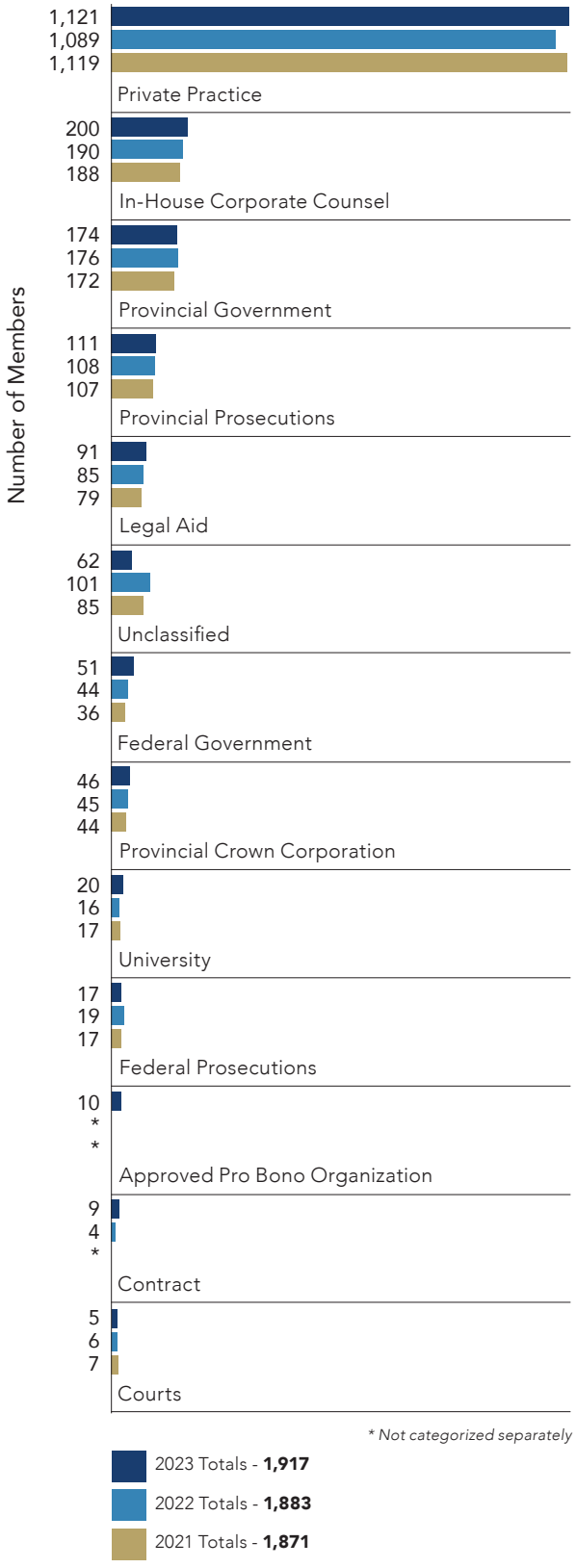
Years as a Member

- Active Members Residing Within Saskatchewan



Type of Practice

- Active Members Residing Within Saskatchewan



Private Practice

- Active Members Residing Within Saskatchewan

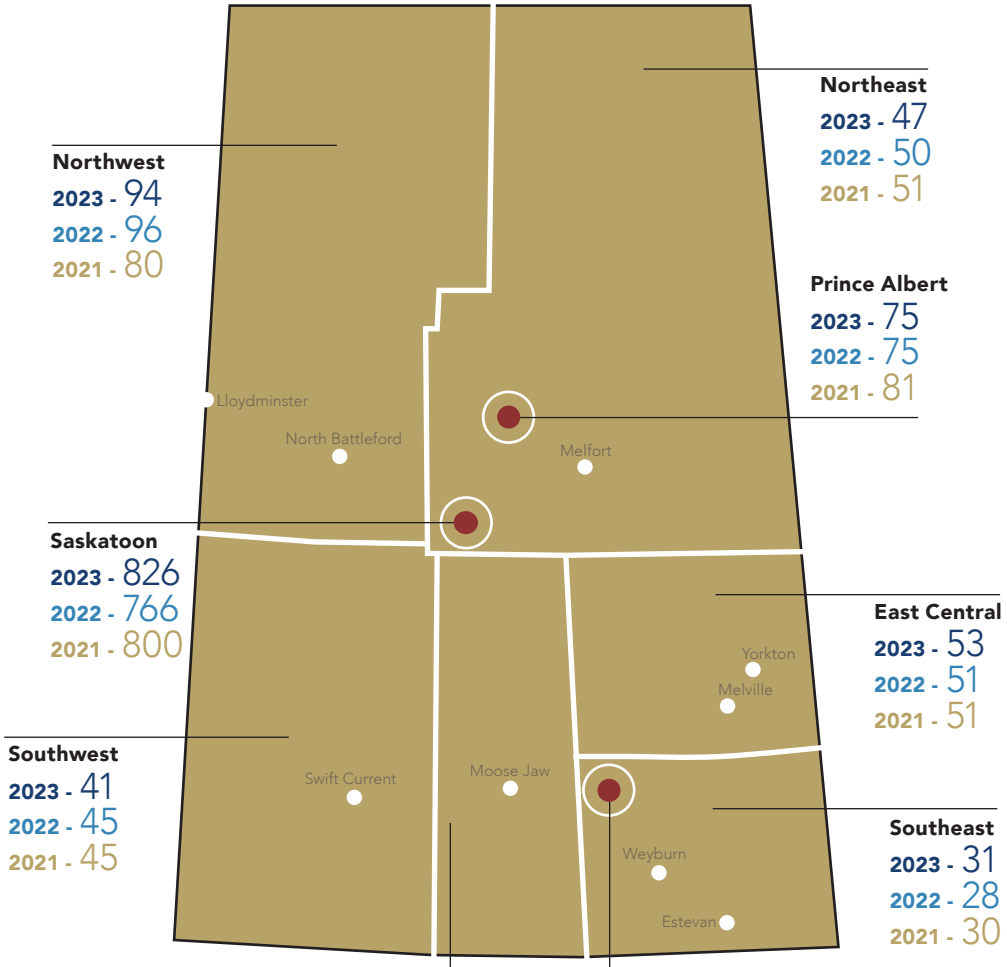
Number of Members in Firm	Number of Firms	Total Members
1	180	180
2	47	94
3	32	96
4	17	68
5	8	40
6	5	30
7	3	21
8	2	16
10	5	50
11	1	11
12	1	12
14	2	28
17	2	34
18	3	54
19	1	19
24	2	48
25	1	25
30	1	30
77	1	77
89	1	89
99	1	99
Total	**316**	**1,121**

Geographic Location

- Active Members Practising Within Saskatchewan

Geographic location data in 2023 is reported for 1,876 Active members based on their employment profile indicating a Saskatchewan firm or organization or practice within Saskatchewan.

- *Practising within Saskatchewan:* Refers to an Active member who has indicated a Saskatchewan firm or organization in their Law Society employment profile. In some circumstances, an Active member may not list a firm or organization of employment in Saskatchewan: for example, an Active member who works at an out-of-province firm, or an Active member who is not employed with a firm or organization but retains Active member status.



TOTAL

2023 - 1,876
2022 - 1,802
2021 - 1,871

Data in 2023

Admissions

The Law Society has established rules and standards for assessing applicants who apply for admission to the legal profession. Applicants have the onus of proving that:

- they are suitable to practise;
- they are competent to perform the required duties, as applicable; and
- granting admission would not be inimical to the public interest or members and would not harm the standing of the legal profession generally.

The Law Society assesses the suitability of applicants in a variety of ways, but the following factors are particularly relevant:

- respect for the rule of law and administration of justice;
- honesty;
- governability; and
- financial responsibility.

When assessing an applicant, the Law Society considers the historical and social factors that have affected the applicant.

During 2023, 74 students-at-law, 86 lawyers and 65 transfer applicants were admitted in Saskatchewan.

Student Data	2023	2022	2021
Students admitted to the Practice Readiness Education Program	69	89	92
• Students admitted to the Practice Readiness Education Program with a Canadian law degree	62	73	80
• Students admitted to the Practice Readiness Education Program with a Certificate of Qualification from the National Committee on Accreditation (internationally trained)	7	16	12
Applicants admitted as students-at-law	74	98	97
Applicants not admitted as students-at-law	0	0	0
Students-at-law who secured articles	70	90	89
Principals approved (including secondments)	88	106	101

Bar Admissions Data	2023	2022	2021
New lawyers admitted	86	79	82
Transfer lawyers admitted	65	57	47
Applicants not admitted as a lawyer	0	0	0

Data in 2023

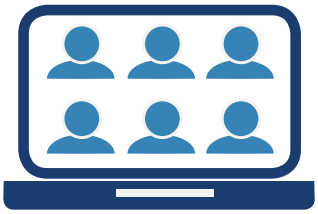
Competency

Continuing Professional Development

The Law Society provides educational programs to assist with the delivery of ethical and competent legal services to the public. In planning continuing professional development (CPD) programs, the Law Society is guided by a holistic understanding of competence and the Law Society's mission and strategic goals and objectives. The Law Society delivers programs in a variety of formats to facilitate learning and to enhance availability and convenience of learning opportunities. During 2023, 82 online courses, live programs or videos were delivered.

By Format

34
Live Programs



1
Online Course
(Principal Training)

47
Bite Size Videos

By Selected Topics for Live Programs

TOTAL HOURS 74.5 hours

TOTAL ETHICS HOURS 35 hours (47%)

THEMES IN FOCUS:

Access to Justice
2 hours

Civil Litigation
20 hours

Criminal Law
2 hours

Equity, Diversity and Inclusion
3.5 hours

General Practice
12.5 hours

Family Law
6.5 hours

Law Reform
3 hours

Practice Management
6.5 hours

Truth and Reconciliation
3 hours

Wellness
10 hours

Wills and Estates
6 hours

Technology
9 hours

Skills
26 hours

Data in 2023

Continuing Professional Development Registration and Top Programs in 2023

Total Registration for Live Programs – **2,785**

Total Views for Bite Size Videos – **2,752**

TOP FIVE PAID PROGRAMMING

1. CPD 368
When Estates Go to Court: Recent Saskatchewan Decisions
118

2. CPD 370
Managing Your Electronic Files
106

3. CPD 348
Boundaries for Lawyers
99

4. CPD 373
How to Better Manage Your Workload and Your Time
94

5. CPD 349
Excel for Family Lawyers
85

TOP FIVE FREE PROGRAMMING

1. CPD 366
Indigenous Judges Speak: Indigenous Experience in the Legal Profession and Beyond
294

2. CPD 367
Mental Health and the Legal Profession: Improving Lawyer Well-being
269

3. CPD 350
Violet King Henry First Black Woman Lawyer in Canada
195

4. CPD 365
Introducing the Gladue Submission Guide: A Practical Resource for Indigenous Clients and their Legal Counsel
177

5. CPD 371
Discover YOUR vLex: Artificial Intelligence, eBooks and Case Law
174

TOP FIVE BITE SIZE VIDEOS

1. Episode 115
Must Lawyers Store Wills Forever?
129

2. Episode 79
Should Lawyers Fear ChatGPT?
112

3. Episode 91
Email Tricks
84

4. Episode 128
AI Tools for Lawyers
81

5. Episode 100
OneNote for Meetings
79

Data in 2023

Legal Resources

The Law Society supports access to high quality and affordable legal services by providing Active members with access to one of Canada's best online legal resource collections, cost-effective and free legal publications, information expertise, and a library. In 2023, Law Society staff responded to 808 questions from lawyers over 316 hours.

Legal Resources Indicators

Indicator	Volume		
	2023	2022	2021
Case digests published *	386	469	529
Lawyer inquiries responded to	808	722	676
Time assisting lawyers (hours)	316	330	291
Member Resource section website visits (as reported by Google Analytics)**	131,283	185,031	182,731

**The drop in the number of case digests published from 2021 to 2023 reflects backlog in publishing related to the COVID-19 pandemic.*
*** The drop in website visits beginning in 2023 reflects an update to reporting in a new version of Google Analytics (GA4).*

Practice Supports

The Law Society provides each new solo or small law firm with a Practice Advisor to conduct a practice review to assist in developing an efficient and low-risk practice. This includes a series of resources and checklists for effective practice.

	Volume		
	2023	2022	2021
New Solo or Small Firm Practice Review	22	34	31

Data in 2023

Professional Responsibility

Among the Law Society's responsibilities are the investigation and determination of complaints regarding the conduct and competence of members and law firms operating in the province. All complaints are taken seriously and handled as expeditiously as possible.

Any person may submit to the Law Society a complaint against a member or firm. Most complaints are received from the public, but complaints may also be received from other members, the judiciary or through self-reporting by a member. The Law Society may also initiate a complaint after becoming aware of incompetence, conduct unbecoming, lack of cooperation or deficiencies raising concerns regarding ethical obligations. A Special Fund is maintained by the Law Society to respond to claims where a member has misappropriated client funds.

Complaint Matters

During 2023, the Law Society received

379
CONTACTS RELATED TO COMPLAINT MATTERS:

Year-Over-Year Comparisons for Complaint Matters

Information is provided on the year-over-year comparison of incoming complaint files within the year and the outcome/status of those files at the end of the calendar year in which they were received. Given that processing time for some files can take several months, some matters (especially those received later in a calendar year) are commonly carried over to the following year.

Complaint Matters as at December 31	2023	2022	2021
Ruling request from member	0	1	1
Bankruptcy self-report by member	1	0	0
Special Fund (defalcation) claim	1	0	2
Contacts remaining as potential complaint matters	128	125	114
Complaint files opened	**249**	**232**	**155**

Complaint Files Opened in 2023 - Outcomes/Status to December 31	2023	2022	2021
Mediated	1	N/A	N/A
Referred to Ethics Committee	2	0	1
Referred to Competency Committee	3	N/A	N/A
Issued Formal Caution	4	9	2
Referred to Conduct Investigation Committee	6	3	5
Appointed a Practice Advisor	7	1	4
Placed in abeyance due to ongoing related court matter	7	2	N/A
Closed after being withdrawn, determined as incomplete or repetitive of a prior complaint	14	27	N/A
Dismissed with no further action after investigation	43	60	45
Dismissed summarily	57	N/A	N/A
Remained open and carried forward to completion after December 31	107	130	98
Totals	**251***	**232**	**155**

**Total outcomes reported are higher than the number of complaint files opened, as some files may have more than one outcome. For example, a file may be referred to a committee and have a Practice Advisor appointed.*

Complaints Resolved or Referred and Outcomes

275
complaints (received in 2023 or earlier) were resolved or referred for further disciplinary or remedial response during 2023.

85%
resolved or referred within **12 months** from the date received

95%
resolved or referred within **18 months** from the date received

The outcomes were as follows:

1 referred to Ethics Committee

3 referred to Competency Committee

7 referred to Conduct Investigation Committee

12 closed after being withdrawn, determined as incomplete or repetitive of a prior complaint

19 issued formal caution

21 appointed a Practice Advisor

66 dismissed summarily

146 dismissed with no further action after investigation

Practice Supports

The Law Society offers informal ethics assistance to members and provides confidential assistance in interpreting the *Law Society of Saskatchewan Code of Professional Conduct*.

Informal Ethics Opinions

Volume

2023 - **151** | 2022 - **170** | 2021 - **N/A**

Data in 2023

Trust Accounts

The Law Society regulates the trust accounts of members through accounting and reporting standards that are set out in Parts 15 and 16 of the *Law Society of Saskatchewan Rules*. To support adherence to the *Rules* and provide proactive oversight, the Law Society receives annual reporting from all firms providing legal services to the public. The Law Society also conducts compliance audits on law firms located in Saskatchewan that are selected on a risk or random basis throughout the year. The focus is on identifying rule breaches and ensuring good office procedures are in place.

During 2023

44

compliance audits were conducted

32

compliance audits required follow-up

2

files were referred to Professional Responsibility

Finances in 2023

The 2023 financial statements are available on the Law Society website.

Active Member Fees

The annual Active member fee for 2023 was $2,675. These funds were allocated as follows:

• Regulation and governance of the legal profession	$ 1,850
• Legal Resources	$ 447
• Special Fund Assessment	$ 200
• Practice Readiness Education Program	$ 111
• Pro Bono Law Saskatchewan	$ 30
• Federation of Law Societies of Canada	$ 27
• Lawyers Concerned for Lawyers	$ 10

Funding Support

In 2023, contributions were made to partner organizations to support the Law Society's strategic goals and objectives, especially as related to competency, equity, diversity and inclusion, Truth and Reconciliation, access to justice and wellness.

Contributions to Partner Organizations	
Gladue Rights Research Database	Goal 4
Indigenous Bar Association National Conference	Goals 3 and 4
Indigenous Law Students Association	Goals 3 and 4
Pro Bono Law Saskatchewan	Goal 5
Saskatchewan Law Review	Goal 2
University of Saskatchewan Scholarship *(kwayeskāstasowin)*	Goals 3 and 4

People in 2023

Board

Front row (L-R): James Korpan, K.C., Suzanne Lalonde, K.C., Andrea Argue, K.C. and Adam Touet

Middle row (L-R): Tiffany Paulsen, K.C., Martin Phillipson, Christopher Triggs, William Lane, Laura Klemmer and Julie Ann Wriston

Back row (L-R): Idowu Adetogun, Nolan Kondratoff, Keith Amyotte and Rochelle Wempe

Absent: Jonathan Bodvarson, Sonia Eggerman, James Fyfe, K.C., Foluke Laosebikan, K.C., Jeff Lee, K.C., James Morrison, K.C. and Lynda Kushnir Pekrul

Board Executive

Andrea Argue, K.C.,
President

Suzanne Lalonde, K.C.,
Vice-President

James Korpan, K.C.,
Past President

Board Members

Idowu Adetogun *(appointed April 28, 2023)*

Keith Amyotte *(appointed April 28, 2023)*

Jonathan Bodvarson

Sonia Eggerman

James Fyfe, K.C.

Laura Klemmer *(appointed April 28, 2023)*

Nolan Kondratoff

Lynda Kushnir Pekrul

William Lane

Foluke Laosebikan, K.C.

Jeff Lee, K.C.

James Morrison, K.C.

Tiffany Paulsen, K.C.

Martin Phillipson

Zachery Solomon *(to February 2023)*

Adam Touet

Christopher Triggs *(appointed April 28, 2023)*

Rochelle Wempe

Julie Ann Wriston

Executive Leadership Team

Tim Brown, K.C.,
Executive Director

Tim Huber, K.C.,
Deputy Executive Director and General Counsel

Kara-Dawn Jordan, K.C.,
Deputy Executive Director and Director of Strategy and Governance

Laurie Johnson,
Director of Human Resources

Andrea Johnston,
Director of Admissions and Education

Jody Martin,
Director of Regulation

Staff

Alma Aldana Pinto,
Administrative Assistant

Ruth Armstrong,
Office Administrator *(to October 2023)*

Laura Cahill,
Stakeholder Relations Liaison

Cheryl Eberle,
Membership Officer

Pamela Elford,
Professional Responsibility Investigator

Jenna Faris,
Administrative Assistant

Savanna Fisher,
Professional Responsibility Assistant

Ken Fox,
Co-Director of Legal Resources

Pamela Harmon,
Director of Finance and Chief Financial Officer

Amanda Irvine,
Library Technician

Christine Johnston,
Admissions and Education Counsel

Alan Kilpatrick,
Co-Director of Legal Resources

Stephanie Kievits,
Director of Trust Safety

Pamela Kovacs,
Senior Policy Counsel

Liz Lynchuk,
Corporate Executive Assistant

Kiran Mand,
Admissions and Education Counsel

Christine Muldoon,
Resource Coordinator

Chinye Nwanze,
Communications and Project Coordinator

Michelle Owolagba,
Professional Responsibility Counsel

Shane Parker,
Professional Responsibility Counsel *(to April 2023)*

Valerie Payne,
Director of Professional Responsibility

Pamela Slessor Hay,
Professional Responsibility Assistant

Julie Sobowale,
Director of Communications *(to March 2023)*

Sara Stanley,
Library Technician

Jennifer Van Der Velden,
Administrative Assistant

Bonnie Wagman,
Accounting Analyst

Melissa Warren,
Continuing Professional Development Program Coordinator

Paul Westgate,
Project Director

Allison Williamson,
Manager of Member Services

People in 2023

Indigenous Elders and Knowledge Keepers

Elder Sidney Fiddler, **Waterhen Lake First Nation**
Elder and Knowledge Keeper Doug Pee-Ace, **Yellow Quill First Nation**

Advisory Groups

Truth and Reconciliation Advisory Group

Members:
Sidney Fiddler **(Elder and Co-Facilitator)**
Mary Culbertson **(Facilitator)**
Foluke Laosebikan, K.C. **(Facilitator)** *(ex officio - Chair of Equity and Access Committee)*
Keith Amyotte **(Co-Facilitator)**
Nordika Dussion **(Co-Facilitator)**
Dr. Jaime Lavallee **(Co-Facilitator)**
Cara-Faye Merasty **(Co-Facilitator)**
Stephen Mussell **(Co-Facilitator)**
Riva Farrell Racette **(Co-Facilitator)**
Eleanore Sunchild, K.C. **(Co-Facilitator)**

Staff:
Kara-Dawn Jordan, K.C. **(Staff Lead)**
Pamela Kovacs **(Staff Lead)**
Christine Johnston

Committees – Ad Hoc

Firm Regulation

Members:
Lynda Kushnir Pekrul **(Chair)**
Erin Kleisinger, K.C. **(Vice-Chair)**
James Morrison, K.C. **(Vice-Chair)**
Kathryn Gilliss
William Lane

Staff:
Jody Martin **(Staff Lead)**
Michelle Owolagba

Future of Legal Services

Members:
Gerald Tegart, K.C. **(Chair)**
Jeff Lee, K.C. **(Vice-Chair)**
Idowu Adetogun
Jonathan Bodvarson
James Fyfe, K.C.
Laura Klemmer
Nolan Kondratoff
William Lane
Martin Phillipson
Christopher Triggs
Rochelle Wempe

Staff:
Pamela Kovacs **(Staff Lead)**
Jody Martin **(Staff Lead)**
Tim Brown, K.C.
Tim Huber, K.C.
Andrea Johnston
Kara-Dawn Jordan, K.C.
Julie Sobowale *(to March 2023)*

Trust Safety

Members:
Nolan Kondratoff **(Chair)**
Idowu Adetogun
Keith Amyotte
Sonia Eggerman

Staff:
Jody Martin **(Staff Lead)**
Pamela Harmon
Tim Huber, K.C.
Stephanie Kievits

Committees – Standing

Executive Committee

Members:
Andrea Argue, K.C., **President**
Suzanne Lalonde, K.C., **Vice-President**
James Korpan, K.C., **Past President**
Tim Brown, K.C., **Executive Director**

Staff:
Tim Huber, K.C.
Kara-Dawn Jordan, K.C.

Audit Committee

Members:
Sonia Eggerman **(Chair)**
Jeff Lee, K.C.
Tiffany Paulsen, K.C.
Craig Zawada, K.C.

Staff:
Pamela Harmon **(Staff Lead)**
Tim Brown, K.C.
Kara-Dawn Jordan, K.C.

Competency Committee

Members:
Jonathan Bodvarson **(Chair)**
Idowu Adetogun **(Vice-Chair)**
Laura Klemmer **(Vice-Chair)**
William Lane **(Vice-Chair)**
James Morrison, K.C. **(Vice-Chair)**
Tiffany Paulsen, K.C. **(Vice-Chair)**
Martin Phillipson **(Vice-Chair)**
Adam Touet **(Vice-Chair)**
Rochelle Wempe **(Vice-Chair)**

Staff:
Andrea Johnston **(Staff Lead)**
Christine Johnston
Kiran Mand

Conduct Investigation Committee

Members:
Adam Touet **(Chair)**
Jeff Lee, K.C. **(Vice-Chair)**
Keith Amyotte
Jeff Baldwin
James Fyfe, K.C.
Laura Klemmer
James Korpan, K.C.
Suzanne Lalonde, K.C.
Julie Ann Wriston

Staff:
Tim Huber, K.C. **(Staff Lead)**
Valerie Payne **(Staff Lead)**
Michelle Owolagba
Shane Parker *(to April 2023)*

Discipline Policy Committee

Members:
Rochelle Wempe **(Chair)**
James Korpan, K.C. **(Vice-Chair)**
Keith Amyotte
James Fyfe, K.C.
Lynda Kushnir Pekrul
James Morrison, K.C.
Adam Touet *(ex officio – Chair of Conduct Investigation Committee)*

Staff:
Tim Huber, K.C. **(Staff Lead)**
Valerie Payne **(Staff Lead)**
Jody Martin **(Staff Lead)**
Michelle Owolagba
Shane Parker *(to April 2023)*

Equity and Access Committee

Members:
Foluke Laosebikan, K.C. **(Chair)**
Martin Phillipson **(Vice-Chair)**
Adam Touet **(Vice-Chair)**
Keith Amyotte
Sonia Eggerman
James Fyfe, K.C.
Habibat Kasim
Stephen Mussell
Christopher Triggs
Dr. Stephen Yusuff

Staff:
Kara-Dawn Jordan, K.C. **(Staff Lead)**
Pamela Kovacs **(Staff Lead)**
Kiran Mand
Julie Sobowale *(to March 2023)*

Ethics Committee

Members:

Jeff Lee, K.C. **(Chair)**
Jonathan Bodvarson **(Vice-Chair)**
Laura Klemmer
Lynda Kushnir Pekrul
James Morrison, K.C.
Tiffany Paulsen, K.C.
Christopher Triggs
Julie Ann Wriston

Staff:

Michelle Owolagba **(Staff Lead)**
Shane Parker *(to April 2023)*
Valerie Payne

Governance Committee

Members:

Nolan Kondratoff **(Chair)**
Rochelle Wempe **(Vice-Chair)**
William Lane
Jeff Lee, K.C.
Tiffany Paulsen, K.C.
Adam Touet
James Korpan, K.C.
Christopher Triggs
Julie Ann Wriston

Staff:

Kara-Dawn Jordan, K.C. **(Staff Lead)**
Tim Brown, K.C.
Tim Huber, K.C.

Nominations Committee

Members:

William Lane **(Chair)**
Sonia Eggerman **(Vice Chair)**
Andrea Argue, K.C.
Jonathan Bodvarson
Nolan Kondratoff
Rochelle Wempe

Staff:

Tim Huber, K.C. **(Staff Lead)**
Tim Brown, K.C.
Kara-Dawn Jordan, K.C.

Law Society
of Saskatchewan

1100-2002 Victoria Avenue
Regina, Saskatchewan S4P 0R7
1-833-733-0133 or 306-569-8242
reception@lawsociety.sk.ca

Annex: Saskatchewan Lawyers' Insurance Association Inc. Report

Saskatchewan Lawyers' Insurance Association Inc. (SLIA) is a non-profit corporation and a wholly owned subsidiary of the Law Society of Saskatchewan. SLIA provides mandatory errors and omissions insurance to the members of the Law Society pursuant to *The Legal Profession Act, 1990.* SLIA is a member of the Canadian Lawyers Insurance Association (CLIA). CLIA is a reciprocal insurance exchange, which offers mandatory liability insurance and cyber insurance to lawyers licenced by law societies in nine Canadian jurisdictions, and a voluntary excess insurance program. The SLIA program is run by in-house counsel and a claims coordinator, who report to a board of directors composed of both Bencher and non-Bencher members.

2023 Committee Members

Board

James Morrison, K.C. **(Chair)**
Tiffany Paulsen, K.C. **(Vice-Chair)**
Idowu Adetogun
Perry Erhardt, K.C.
Michael Milani, K.C.
Tom Schonhoffer, K.C.
Craig Zawada, K.C.

Staff

Dave McCashin
Stephen McLellan
Linda-Marie Straza

By establishing local control of files within the limits of the group deductible, lawyers insured through SLIA are assured that:

- their files are being both assessed and litigated by local counsel;
- their interests are being represented as stakeholders on the advisory board of their insurer;
- profits following any given claims years are retained locally for their benefit.

SLIA has continued to maintain one of the lowest insurance levies across all Canadian jurisdictions.

The 2022-2023 policy period saw a slight decrease in the number of claims opened over the year before and an increase in the severity of the claims to an average of $53,000 per claim. As the frequency and severity of claims has a direct impact on the amount of the levy, SLIA continues to stress the importance of loss prevention and continues to work to support its members to avoid or reduce claims.

SLIA, together with the Law Society, fund the Practice Advisor Program, which in addition to complaint reviews and recommendations to members, also facilitates advisors to meet with each new solo practitioner and new small firm to provide assistance and recommendations to assist members in developing a low-risk practice. The Expanded Practice Advisor Program has been made available to any members who need help working through practice management issues. Members are encouraged to contact practice advisors with questions or concerns about practice standards or management issues. Under this confidential program, the practice advisor and member will work together to address the issue at no cost to the member and no formal report will be provided to the Law Society or SLIA.

SLIA also contributes to the Trusteeship Program which provides oversight to members who do not have a succession plan in place. The Trusteeship Program is a loss prevention measure which allows early detection of matters which could become potential clams and allows an opportunity to remedy those matters before they progress.

SLIA has annually made a grant to the Law Society's Legal Resources department to support member competency and help ensure that members have access to the practice resources they need. Access to mental health resources and assistance continues to be a priority for SLIA. Members are encouraged to make use of the free confidential assistance offered through Lawyers Concerned for Lawyers for personal counselling, as well as online learning and resources through HomeWeb. Highlights of resources available are provided to members bi-monthly through SLIA News.

SLIA manages the Law Society Outside Directorship Liability Insurance Policy for members involved as a Director or Officer of an outside organization. This Policy covers various types of claims made by reason of such services.

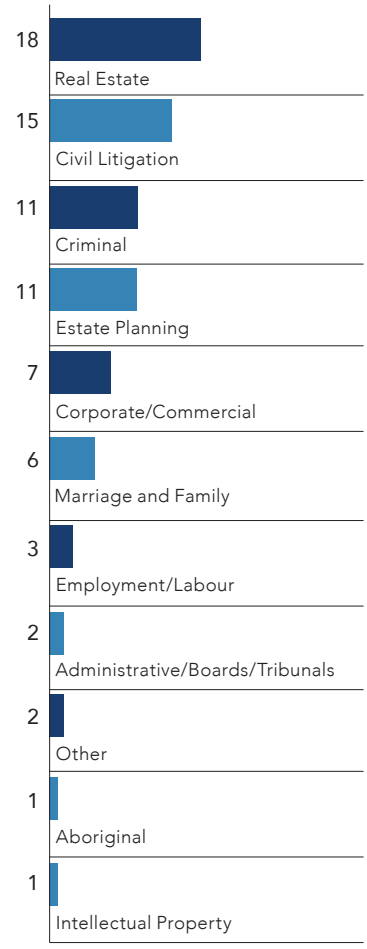
2022-2023 Policy Period Data

New Claims: **119** *(77 full claims and 42 pre-claim files)*

Insurance Assessment: **$1,303**

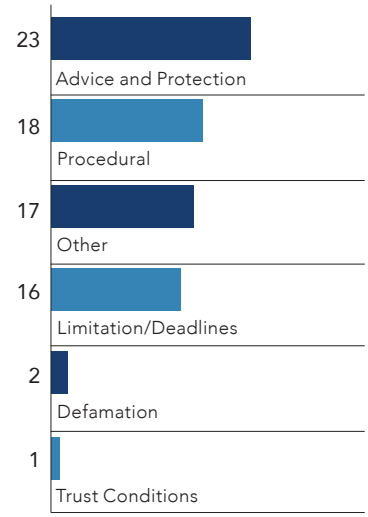
Severity of the claims: **$53,000** *per claim*

New Claims by Area of Practice:



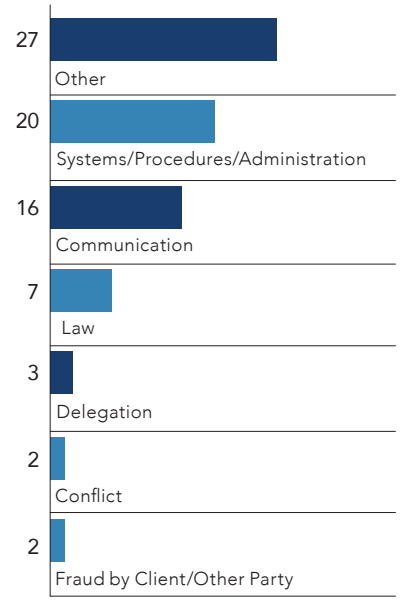
Total: **77** *Full Claims*

New Claims by Error Category:



Total: **77** *Full Claims*

New Claims by Cause Category:



Total: **77** *Full Claims*

SUPREME COURT OF BRITISH COLUMBIA

ANNUAL REPORT 2023

TABLE OF CONTENTS

The expansion of the Court's online booking service is part of the Court's work to expand its digital services.

REPORT OF THE CHIEF JUSTICE AND THE ASSOCIATE CHIEF JUSTICE

INTRODUCTION

The Supreme Court of British Columbia is a court of inherent jurisdiction and the superior trial court in the province. Through its day-to-day work, the Court fulfills its constitutional role in our democracy as a neutral and impartial arbiter of disputes in a wide range of subject areas, ensuring that the law is upheld, applied to all persons equally, and respected. The judges, associate judges, and registrar of the Court preside over chambers applications of numerous types, various conferences involving counsel and parties, appeals from decisions of judges of the Provincial Court of British Columbia and from some administrative tribunals, and, of course, trials. It is often necessary for the judges, associate judges, and registrar to write rulings or reserved judgments to explain the result of the proceeding and to set precedents for future litigants. The Court also works with other bodies and organizations in the justice system to strengthen respect for and understanding of the importance of the rule of law.

THE WORK OF THE COURT

Change of Title from Master to Associate Judge

Amendments to the *Supreme Court Act* to change the title of master to associate judge were brought into force on January 15, 2024. Accordingly, judicial officers formerly known as masters are referred to as associate judges in this annual report. The modernization of this title more accurately captures the important role of associate judges and promotes a more inclusive and accessible justice system.

On January 15, 2024, Chief Justice Hinkson issued *Practice Direction 64 - Form of Address* which updated the form of address for judges, associate judges, the registrar and district registrars. Necessary updates were made to other practice directions, administrative notices, policies, and other content on the Court's website.

Online Booking for Civil and Family Matters

Since 2020, counsel and parties have had the option of booking case planning conferences, judicial case conferences, and trial management conferences through the Supreme Court's online booking system. In 2023, the Court continued its work to expand the availability of online booking for trials and long chambers hearings in civil and family matters. The Court expects to transition to a fully online booking system in the Fall of 2024. The expansion of the Court's online booking service is part of the Court's work to expand its digital services. In addition, online booking will free up significant staff time, both for the Court and for law firms booking hearings. The online scheduling tool will ensure that all parties and counsel who are seeking to book trials and lengthy chambers hearings have an equal opportunity to do so.

In order to provide better support and information for French and bilingual criminal proceedings, the Court published French translations of its criminal practice directions, other procedural notices and some information sheets on its website.

Trial Management Conferences

In September 2023, the *Supreme Court Civil Rules* and *Supreme Court Family Rules* were amended to provide that trial management conferences are no longer mandatory in all cases. Prior to the amendments, trial management conferences were required for all scheduled trials, and a significant amount of judicial time was expended managing trials that ultimately did not proceed. It is anticipated that reducing the amount of judicial time spent on trial management conferences will free up time for the hearing of other types of matters. The amended rules provide that a trial management conference will be held at the request of a party, or by order of the Court. A trial management conference is also required if a trial is set for longer than 15 days, if a party is not represented by a lawyer, or if a trial is to be heard by a jury.

Associate Judges Chambers Pilot Project Expands Electronic Delivery of Materials

The Associate Judges Chambers Pilot Project allows for the submission of electronic application records for some matters using Court Services Online. The Project applies to applications scheduled for 30 minutes or less in associate judges chambers. The Project, which commenced in August 2022, was rolled out gradually and is now available in all registries with associate judges sittings.

French and Bilingual Criminal Proceedings

Associate Chief Justice Holmes issued *Criminal Practice Direction 5 – French or Bilingual Criminal Jury Trials* effective September 1, 2023, expanding the locations available for French or bilingual criminal jury trials to include Vancouver. Previously, such trials were only available in New Westminster. The expansion reflects the availability of French-speaking potential jurors. In order to provide better support and information for French and bilingual criminal proceedings, the Court published French translations of its criminal practice directions, other procedural notices and some information sheets on its website. The Court also prepared French versions of memoranda that provide procedural information about criminal trials and are used by trial judges assigned to criminal proceedings with self-represented accused.

Criminal Jury Selection in One Stage

Between September 2020 and September 2023, the Court held criminal jury selections in two stages. The two-stage selection process allowed the Court to conduct jury selections in a safe way during the COVID-19 pandemic, while preserving the essential legal aspects of a criminal jury selection. After the pandemic related public health restrictions were lifted, the Court decided it was no longer necessary to retain the two-stage process, and in September 2023, the Court adopted a one-stage jury selection process that completes within a day.

Increasing Number of Criminal Jury Trials

There has been a general increase in the number of criminal jury trials booked over the past five years, with 218 criminal jury trials booked to start in 2023, 202 in 2022, 154 in

2021, 172 in 2020, and 127 in 2019. A large number of criminal jury trials do not proceed as scheduled for various reasons, however, the rate at which they do proceed has remained roughly consistent over the past five years, at about 22%, leading to an increase in the over all number of criminal jury trials proceeding in the Court during this period. In 2023 there were 54 criminal jury trials, compared with 39 in 2022, 38 in 2021, 21 in 2020 (lower than normal due to the temporary suspension of criminal jury trials from March to September 2020 as a result of the COVID-19 pandemic), and 35 in 2019.

Length of Trials Increasing

There appears to be a general increase in the length of trials booked over the past two years, with a larger proportion of trials being booked for more than five days. Longer trials result in judges not being available to preside over additional matters.

Transition Away from Remaining COVID-19 Processes

Over the course of 2023, the Court continued to review its remaining COVID-19 Notices, which were issued between 2020-2023 as temporary measures to respond to the procedural challenges of the pandemic. Nearly all of the remaining COVID-19 notices have been rescinded, and various practice directions and an administrative notices have been developed for practices and procedures that will continue indefinitely. The COVID-19 notices remaining in effect at the end of 2023 were:

- **COVID-19 Notice 44** - Notice to the Public and Profession regarding Use of the File Transfer Server – Insolvency and Other Proceedings; and
- **COVID-19 Notice 2** - Affidavits for Use in Court Proceedings.

Courthouse Closures

Golden Law Courts

A fire on March 13, 2023 destroyed the Golden Law Courts. In response, court registry services were provided from the Ministry of Children and Family Development Office in Golden, and trials, chambers applications and other appearances were relocated to Cranbrook Law Courts. Facilities staff from the Ministry of Attorney General and the Real Property Division of the Ministry of Citizens' Services have begun to work on the replacement of the Golden Law Courts.

Impact of Wildfires on Court Service Across the Province

Wildfires in a number of locations across the province during the summer of 2023 temporarily disrupted court services. Similar or increasing disruptions are expected in the future. When these occur, the Court works with the Attorney General's Court Services Branch to arrange alternative ways to provide access to court registry services and court proceedings, including by providing remote or virtual hearing options for court participants, rescheduling hearings, and arranging for temporary registry services at other locations.

Artificial Intelligence and the Court

The Court expects litigants, lawyers, and others who participate in court proceedings to inform themselves of the current issues and advice regarding artificial intelligence in relation to court proceedings, and to ensure that the materials they produce to the Court are authentic and accurate.

The Court is closely monitoring the significant developments in artificial intelligence technology which may assist court processes and increase access to justice, but which also present potential risks, including to accuracy and transparency in court proceedings. The Court expects litigants, lawyers, and others who participate in court proceedings to inform themselves of the current issues and advice regarding artificial intelligence in relation to court proceedings, and to ensure that the materials they produce to the Court are authentic and accurate.

Bumping of Long Chambers Applications and Trials

The Court continues to struggle with having too few judges to meet the demand for hearings and trials, and continues to have to bump unacceptably large numbers of long chambers applications and trials. A scheduled hearing or trial is considered "bumped" if it cannot be rescheduled within a week of its original date because no judge is available to preside. The Court recognizes the burden on litigants when cases do not proceed as scheduled, including stress and the expense of wasted preparation time, and travel costs for witnesses and experts. The main cause of bumping continues to be the shortage of judges available to assign to scheduled proceedings.

In 2023, 16.3% of all long chambers applications in British Columbia were bumped. This is the highest bumping rate that the Court has experienced since 2019, and is a significant increase from the bumping trends from 2020-2022. In Vancouver, which has the highest volume of long chambers applications, the bumping rate in 2023 was 15.8%. This is the worst bumping rate since 2019 and is significantly higher than the 10 year average bumping rate of 8.7%.

The bumping of trials is also concerning. In 2023, 15.9% of trials were bumped across the province. While this rate is lower than in 2022, when the rate was 17.1%, it is significantly higher than the 10-year provincial average bumping rate of 10.6%.

The Lower Mainland continued to be the region with the most trials heard at 499 and the most bumped trials at 85, which accounted for 63% of the province's bumped trials. The Southern Interior region, which includes Kamloops, Kelowna, Vernon, and several other locations, had the most bumped trials after the Lower Mainland. In 2023, that region accounted for 19% of the bumped trials in the province, which is essentially the same as in 2022; however, it is considerably higher than in 2021 when it was 8%. For more detailed information on bumping rates, please see Figures 7-11 in Appendix A.

The Court has been chronically short of its full complement of judges for several years. This has a significant impact on access to timely and effective justice for all British Columbians.

Judicial Vacancies

At the end of 2023, the Court had 82 full-time justices and 11 judicial vacancies. A judicial vacancy is created when a full-time judge retires, elects to become a supernumerary judge, or is appointed to the Court of Appeal. Judges who are retiring or electing to go supernumerary provide at least six months notice of their intention to the federal government. The Court has been chronically short of its full complement of judges for several years. This has a significant impact on access to timely and effective justice for all British Columbians. As noted in previous annual reports, the high rate of

judicial vacancies continues to impact the Court's capacity to provide hearing dates for litigants in a timely manner, resulting in bumping and rescheduling of trials and long chambers applications. For a number of years, many civil and family law litigants have had to wait approximately 18 months for a trial date. Further, the ongoing issue of judicial vacancies increases the already heavy burden on the Court's existing judges who are assigned more work in order to make up the shortfall. The chronic nature of this problem risks undermining public confidence in the judicial process, poses serious risks to the administration of justice, and over time threatens the quality of the justice system.

COURT GOVERNANCE

The Chief Justice and Associate Chief Justice, in their roles as administrators of the Court, rely on the assistance of a number of internal court committees. In addition to the Court's three substantive law committees (the Criminal Law Committee, the Family Law Committee, and the Civil Law Committee), the Chief Justice and the Associate Chief Justice are supported by the Executive Committee, which addresses matters of court administration, and a number of specialized committees including the Education Committee, the Law Clerks Committee, the Public Affairs Committee and the Courthouse Facilities Committee. In addition, a number of committees support the work of the Supreme Court and the Court of Appeal including the Joint Courts Technology Committee and the Library Committee, and committees which also include representatives of the Court Services Branch. The mandates of these committees vary; however, they all share a common purpose: to consider matters of general importance to the Court within their subject matter expertise, and to provide advice and guidance to the Chief Justice and the Associate Chief Justice generally. The Court membership of these committees is drawn from the judges, associate judges, registrars, legal counsel, and judicial staff. Through their work, the committees strengthen and enhance the Court's effective and efficient management. Reports from the Court's committees begin on page 18 of this report.

SUPREME COURT PRACTICE DIRECTIONS & ADMINISTRATIVE NOTICES

The Court issued four new practice directions and one administrative notice in 2023:

PD-63 – Trial Management Conferences, Trial Briefs, and Trial Certificates – Transitional Guidance

Practice Direction 63 provided transitional guidance to parties about filing trial briefs and trial certificates, and adjourning trial management conferences, in light of changes to the *Supreme Court Civil Rules* and the *Supreme Court Family Rules* that took effect on September 1, 2023. PD-63 was rescinded on January 15, 2024.

FPD-19 – Applications made by Requisition – Supreme Court Family Rules 22-1(3) and (4) – Judicial Case Conference

Family Practice Direction 19 replaces Family Practice Direction 18 - Applications made by Requisition pursuant to *Supreme Court Family Rules* 7-1(4), 14-3(4), 22-1(3) and (4)

and 22-6(4). It sets out the procedure for applying to attend a judicial case conference remotely, and for seeking directions with respect to the manner in which a judicial case conference is to be conducted.

CPD-5 – French or Bilingual Criminal Jury Trials

Criminal Practice Direction 5 expands the locations available for French or bilingual criminal jury trials to include Vancouver. Previously, these were available only in New Westminster. Criminal Practice Direction 5 rescinds and replaces the December 1, 2000, *Notice Re: Criminal Jury Trials in French*.

CPD-6 - Appearances by Counsel and Accused Persons in Criminal Proceedings

Criminal Practice Direction 6 sets out the current and ongoing "default" methods of appearance by counsel and accused persons for various types of court appearances in criminal proceedings, subject to the discretion of the presiding judge to direct a different method of appearance. CPD-6 replaces COVID-19 Notice 51 (Method of Attendance for Criminal Proceedings) and COVID-19 Notice 30 (Applications under s. 490 of the Criminal Code (Further Detention of Things Seized)), which provided guidance on these matters during the pandemic.

AN-18 – General Requirements for Microsoft Teams Hearings

Administrative Notice 18 sets out requirements for participating in a hearing by Microsoft Teams video and provides information on how members of the media and the public can attend such proceedings. This information was previously included in the Court's COVID-19 Notice No. 47, which was rescinded as part of the Court's transition away from the temporary guidance issued during the pandemic.

The Court also revised a number of practice directions in 2023:

PD-27 – Communicating with the Court

Practice Direction 27 was revised to confirm that the appropriate way to communicate with the Court is through its formal processes, and to update the guidelines parties and counsel are to follow in the limited circumstances when corresponding with the Court is permitted.

PD-58 – Sealing Orders in Civil and Family Proceedings

Practice Direction 58 was revised to provide that a draft sealing order must be vetted by the registry and to clarify the process for applying to amend a sealing order. The revisions also set out steps the applicant must take after obtaining a sealing order.

PD-61 – Applications to Commence Proceedings Anonymously

Practice Direction 61 was revised to update the requirements regarding materials filed in support of an application.

PD-28 – Chambers Practice

Practice Direction 28 was revised to remove the limit on the earliest time that application records and petition records may be provided to the registry, in light of changes to the *Supreme Court Civil Rules* and the *Supreme Court Family Rules* that took effect on September 1, 2023.

PD-4 – Judicial Management and Early Assignment of a Trial Judge or Hearing Judge in Civil and Family Proceedings

Practice Direction 4 was revised on September 1, 2023 to clarify that case planning is available in family actions. It was further revised on October 17, 2023 to update the procedure for requesting judicial management and/or early assignment of a trial judge, and to include proceedings commenced under the *Class Proceedings Act*.

PD-5 – Class Proceedings

Practice Direction 5 was updated to clarify the process for setting a certification application for hearing, and to reflect that a party may seek judicial management of a proceeding by following the process in Practice Direction 4.

PD-55 – Canadian Judicial Protocol for the Management of Multi-jurisdictional Class Actions and the Provision of Class Action Notice

Practice Direction 55 was updated to note that it should be read together with Practice Direction 4 and Practice Direction 5.

CPD-4 – Procedure for Detention Reviews Under s. 525 of the Criminal Code

Criminal Practice Direction 4 was amended to improve certain aspects of the procedure based on experience with the existing process. Amendments of note include:

- a new procedure to apply to end the s. 525 detention review process due to ineligibility;
- a limit on the use of the Adjournment Form to adjourn the Scheduling Hearing; and
- a new process to expedite the transcript ordering process at the Scheduling Hearing.

EXTRA-JUDICIAL ACTIVITIES

In addition to the normal workload of hearing cases and applications, deciding issues, writing and issuing reasons for judgment, issuing desk order divorces and electronic orders, and presiding at case conferences, members of the Court participate in a wide variety of other activities in their communities. Some judges also regularly preside at moot court competitions, and speak at educational programs and lay and professional conferences.

Members of the Court welcome opportunities to engage in public education and to contribute to a greater understanding of the justice system and its role in Canadian society. In 2023, the judges, associate judges, and registrars of the Court continued to volunteer their time with local, provincial, federal and international organizations, including the following:

Aboriginal Lawyers' Forum
Access Pro Bono
Allard School of Law, UBC Alumni Association
American College of Trial Lawyers.
Amici Curiae Friends of Court Society
Annual Review of Insolvency Law and Society
BGuiled Debate Society
Black Law Students' Association of Canada - Julius Alexander Isaac Moot

British Columbia Bankruptcy Practice Committee
British Columbia Council of Administrative Tribunals
British Columbia Law Schools Moot Program
British Columbia Model Insolvency Order Committee
Canadian Association of Insolvency and Restructuring Professionals
Canadian Bar Association, BC Branch
Canadian Insolvency Judges - *Bankruptcy and Insolvency Act/Companies' Creditors Arrangement Act* Working Group
Canadian Institute for the Administration of Justice
Canadian Judicial Council
Canadian Judicial Council, Model Criminal Jury Charges Working Group
Canadian Superior Courts Judges Association
Capilano University
Commonwealth Lawyers Association
Continuing Legal Education BC
Courthouse Libraries
Department of Justice National Litigation Symposium
Federation of Asian Canadian Lawyers
Fraser Valley Bar Association
Gale Cup Moot
Immigration and Refugee Board, Immigration Appeal Division
Inns of Court
Insolvency Institute of Canada
International Association of Women Judges
International Insolvency Institute
International Organization of Judicial Training
International Society for the Reform of Criminal Law
International Society of Barristers
International Women's Insolvency & Restructuring Confederation
Judging: Rule of Law Committee LSBC
Justice Education Society
Kamloops Bar Association
Kelowna Bar Association
L'Association des juristes d'expression française de la Colombie-Britannique
Law Society of British Columbia
Law Students Legal Advice Program
Medical Legal Society of B.C.
National Advisory Committee on Judicial Ethics
National Judicial Institute
National Judicial Institute, Criminal Jury Charge Program
National Judicial Institute, Criminal Law Program
National Judicial Institute, Sexual Assault Trial Program
New Westminster Bar Association
Osgoode Hall Law School
Rise Women's Legal Centre
Sedona Canada Steering Committee
Selkirk College
Sopinka Cup Moot
Superior Court Judges Association
The Advocates' Society
Thompson Rivers University, Faculty of Law
Trial Lawyers Association of British Columbia
Turnaround Management Association
University of British Columbia Allard School of Law
University of Victoria, Faculty of Law
Vancouver Bar Association
Vancouver Foundation
Wilson Moot
Women's Probus Club of Vancouver
Young Insolvency Professionals

ACKNOWLEDGEMENTS

The Chief Justice and the Associate Chief Justice would like to acknowledge the hard work, many and diverse contributions, and continued dedication of the Court's staff including the Judicial Administrative Assistants, the Document Management Clerks, the Judicial Law Clerks, the Library Staff, and the Judicial Administration team. The Court relies on their professionalism, diligence and commitment to facilitating, supporting and managing the delivery of justice for British Columbians on a daily basis.

The Chief Justice and Associate Chief Justice are particularly grateful to Heidi McBride, Executive Director and Senior Counsel of the Superior Courts Judiciary, for her work overseeing many aspects of the Court's operations; to Supreme Court Legal Counsel, for their legal advice and support; to Supreme Court Scheduling Director Cindy Friesen and her staff, who tirelessly manage the scheduling of all of the Court's hearings; and to the Superior Courts Director of Information Technology, Ryan Wirth, and the Court's IT department for their support of the Court's technology needs.

The Court is also appreciative of the Attorney General and Ministry staff including the court clerks, the registry staff, the sheriffs and other Court Services Branch staff for their dedication to supporting the Court's work including maintaining and managing the court record, supporting the work of the registries, providing security for anyone attending a courthouse, and for their ongoing assistance in developing solutions and efficiencies in court processes to improve access to justice for British Columbians.

Finally, the Chief Justice and the Associate Chief Justice wish to express their thanks to the judges, associate judges, and registrars of the Court, for their unfailing support and advice with respect to the Court's administration.

Christopher E. Hinkson
Chief Justice

Heather J. Holmes
Associate Chief Justice

As of December 31, 2023, the Supreme Court had 104 justices: the Chief Justice, the Associate Chief Justice, 83 full-time justices, and 19 supernumerary justices.

JURISDICTION OF THE COURT

Superior Court

The Supreme Court of British Columbia has jurisdiction to hear and decide any matter that comes before it, unless a statute or rule limits that authority or grants exclusive jurisdiction to some other court or tribunal. The Supreme Court's inherent jurisdiction allows it to control its own processes and procedures in order to ensure fairness and to prevent abuses of process. The Supreme Court hears civil, family, and criminal cases, as well as appeals from the Provincial Court. The Supreme Court also reviews the decisions of certain administrative tribunals, including the Labour Relations Board, Workers Compensation Appeal Tribunal, the British Columbia Human Rights Tribunal, and residential tenancies arbitration decisions.

Supreme Court Registries and Locations

The Supreme Court is a circuit court in which all the judges and associate judges travel throughout the province to preside over cases. The Supreme Court sits in seven judicial districts and has resident judges in Abbotsford, Chilliwack, Kamloops, Kelowna, Nanaimo, Nelson, New Westminster, Prince George, Prince Rupert, Vancouver, Vernon, Victoria, and Williams Lake. The Supreme Court also sits as required in other locations where there is no resident judge or associate judge, including Campbell River, Cranbrook, Courtenay, Dawson Creek, Duncan, Fort St. John, Golden, Penticton, Port Alberni, Port Coquitlam, Powell River, Quesnel, Revelstoke, Rossland, Salmon Arm, Smithers, and Terrace.

Chief Justice and Associate Chief Justice

The Chief Justice is responsible for the management and direction of matters related to judicial functions, which includes matters related to the preparation, management, and adjudication of proceedings in the Court, as well as the assignment of judges. From time to time, these responsibilities are delegated to the Associate Chief Justice.

Supreme Court Justices

As of December 31, 2023, the Supreme Court had 104 justices: the Chief Justice, the Associate Chief Justice, 83 full-time justices, and 19 supernumerary justices. As of December 31, 2023, 12 of the full-time judicial positions on the Supreme Court were vacant.[1] This represents approximately 13% of the Supreme Court's judicial complement.

[1] Section 2(2) of the *Supreme Court Act*, R.S.B.C. 1996, c. 443 provides that the Supreme Court consists of 95 full time justices in addition to the Chief Justice and the Associate Chief Justice. A judicial vacancy is created when a full time judge retires, elects to become a supernumerary judge or is appointed to a different court; the retirement of a supernumerary judge does not create a judicial vacancy.

[The] new title of associate judges more accurately reflects the important role of associate judges in the conduct of civil and family litigation in the province and promotes a more inclusive and accessible justice system.

Section 2(2) of the *Supreme Court Act*, R.S.B.C. 1996, c. 443 provides that the Supreme Court consists of 95 full time justices in addition to the Chief Justice and the Associate Chief Justice. A judicial vacancy is created when a full time judge retires or elects to become a supernumerary judge. The retirement of a supernumerary judge does not create a judicial vacancy on the Supreme Court.

Supreme Court Associate Judges

The Supreme Court has 14 associate judges who are resident in Abbotsford, Kamloops, Kelowna, Nanaimo, New Westminster, Vancouver, and Victoria. Associate judges sit in all of the registries throughout the province on a regular basis and also conduct hearings using audio and videoconferencing.

Associate judges are judicial officers appointed by the provincial government by Order in Council after it has received recommendations from an ad hoc committee consisting of the Chief Justice, the Deputy Attorney General, the President of the Law Society of British Columbia, and the President of the B.C. Branch of the Canadian Bar Association.

Associate judges preside in civil chambers and registrar hearings. They hear applications in chambers on a wide variety of matters, including interim orders in family proceedings, interlocutory applications in civil proceedings such as production of documents, and foreclosure proceedings. Associate judges also have the jurisdiction of registrars and preside as registrars throughout the province as required.

Prior to January 2024, associate judges were known as masters. In 2024, the *Supreme Court Act* was amended to create the new title of associate judge to more accurately reflect the important role of associate judges in the conduct of civil and family litigation in the province and to promote a more inclusive and accessible justice system.

Supreme Court Registrar

The Supreme Court has one registrar who is resident in Vancouver but regularly sits in other registries. Like judges and associate judges, the registrar also conducts hearings using audio and videoconferencing.

The registrar is appointed pursuant to s. 13 of the *Supreme Court Act* and is under the general direction of the Chief Justice. The registrar hears a wide variety of matters, including reviews of lawyers' accounts, bankruptcy discharge applications and bankruptcy taxations, assessments of bills of costs, subpoenas to debtors, passing of accounts, and references of various types. The registrar also settles orders.

The registrar is also responsible for overseeing the province's deputy district registrars, who work in court registries across the province. The registrar serves as a liaison between the Court and the Ministry of Attorney General Court Services Branch in regard to registry issues including practice, procedure and policy.

CHANGES TO THE COURT'S COMPLEMENT

In 2023, the Court welcomed the appointment of four new judges and acknowledged the retirement of four judges and one associate judge. Additionally, one judge of the Supreme Court was appointed to the Court of Appeal.

APPOINTMENTS

The Honourable Justice Bradford F. Smith

Justice Smith, formerly a sole practitioner in Kamloops, was appointed a judge of the Supreme Court of British Columbia at Kamloops on June 1, 2023. Justice Smith's appointment fills the vacancy created by Justice S.D. Dley (Kamloops), who elected to become a supernumerary judge effective November 1, 2021.

Justice Smith was born in South Africa and moved to Canada at age 20. He received a Bachelor of Laws from Osgoode Hall in 1999, followed by a Master of Laws in Criminal Law and Procedure in 2009. While attending Osgoode, he led the law school's community legal aid clinic and was a member of the inaugural Innocence Project group. Justice Smith was called to the bar in 2000 and went on to spend 13 years as Crown counsel, prosecuting cases involving clandestine synthetic drug labs, complex drug conspiracies, and organized crime. After leaving the Crown in 2013, he established his own defence practice based in Kamloops, defending clients in a variety of criminal cases and working as *amicus curiae* in two murder cases. Justice Smith was appointed King's Counsel in 2019.

In addition to his work as counsel, Justice Smith has been a member of the Organizing Committee of the Kamloops Inns of Court Program and at Thompson Rivers University's Faculty of Law. He has also served on the Board of the Association of Legal Aid Lawyers and with the Overlander Ski Club.

The Honourable Justice David K. Jones

Justice Jones, formerly partner at Bernard LLP in Vancouver, was appointed a judge of the Supreme Court of British Columbia at Vancouver on August 14, 2023. Justice Jones' appointment fills the vacancy created by Justice G.C. Weatherill (Vancouver), who elected to become a supernumerary judge effective August 7, 2022.

Justice Jones was born and raised in Vancouver, earning a B.A. and M.A. from Simon Fraser University before obtaining his LL.B. from the University of Victoria and subsequently an LL.M. from the University of Wales. He was called to the bar in 1995. Justice Jones began his career at Campney & Murphy before joining Bernard LLP, where his civil and commercial litigation practice focused on maritime law, environmental law, and occupational health and safety. During his time as counsel, he appeared before all levels of court in British Columbia, at various administrative tribunals, and the Federal Court.

Justice Jones has been actively involved in the Canadian Maritime Law Association and the National Maritime Law Section of the Canadian Bar Association, serving on the Executive for both for many years. He has also shared his expertise as a contributor to CLEBC's Due Diligence Deskbook, annually updating the Fisheries and Oceans chapter, and authored numerous articles on various marine and environmental issues for local marine industry publications. In addition to his work, Justice Jones is an avid sailor with extensive offshore experience, and a dedicated skier and cyclist.

The Honourable Justice Jennifer L. Whately

Justice Whately, formerly Manager, Litigation, Enforcement at the British Columbia Securities Commission in Vancouver, was appointed a judge of the Supreme Court of British Columbia at Vancouver on August 14, 2023. Justice Whately's appointment fills the vacancy created by Justice R.A. Skolrood (Vancouver), who was elevated to the Court of Appeal effective October 20, 2022.

Justice Whately was born in Victoria and grew up in Smithers, eventually returning to Victoria to receive a B.A. in English from the University of Victoria followed by a J.D. in 2002. After graduating, she moved to Vancouver to clerk at the Supreme Court of British Columbia before being called to the bar in 2004 Justice Whately began her career as a civil litigator in Vancouver before joining the BC Securities Commission in 2010, where she worked in the Enforcement division. Her files included insider trading, fraud, and other securities misconduct, and she appeared as counsel for the Commission at the Court of Appeal and the Supreme Court of Canada. Justice Whately also served as internal advice counsel for the Commission's Investigation division and as legal counsel in Corporate Finance Legal Services, eventually becoming Manager of Litigation at the Commission.

Outside of her legal career, Justice Whately has been a board member for Growing Chefs, a not-for-profit organization that connects school-aged kids, chefs, and growers to foster food knowledge and sustainable food practices. She has also stayed involved with the University of Victoria, where she sat on a Senate committee for several years, and presented guest lectures on securities enforcement at the Peter A. Allard School of Law at the University of British Columbia.

The Honourable Justice J. Gareth Morley

Justice Morley, formerly senior counsel at the Ministry of Attorney General of British Columbia in Victoria, was appointed a judge of the Supreme Court of British Columbia at Vancouver on August 28, 2023. Justice Morley's appointment fills the vacancy created by Justice J. Steeves (Victoria), who retired effective June 11, 2022.

Justice Morley was born in Toronto and grew up in Victoria. After receiving a B.A. from the University of Victoria, Justice Morley obtained his LL.B. from the University of Toronto and an LL.M. from Osgoode Hall. He was called to the bar in 1999, and began his career at the Ministry of Attorney General of British Columbia's Legal Services Branch, where he spent more than 20 years. His work involved litigation, providing advice, and

legislative drafting. Prior to his judicial appointment, Justice Morley acted as Senior Counsel, representing the provincial government in constitutional matters.

Justice Morley was an active member of the BC Government Lawyers Association for two decades, serving as its President from 2019 until his appointment, and taught Canadian constitutional law at Thompson Rivers University in Kamloops. He also published a number of law review articles and co-edited Government Liability: Law and Practice with Justice Karen Horsman of the Court of Appeal.

APPOINTMENTS TO THE COURT OF APPEAL

The Honourable Justice Janet Winteringham

Justice Janet Winteringham was appointed a Justice of the Court of Appeal for British Columbia on December 4, 2023. Justice Winteringham replaces Justice G.M. Dickson (Vancouver), who elected to become a supernumerary judge effective December 1, 2022. Justice Winteringham was appointed to the Supreme Court in Vancouver on August 15, 2017.

RETIREMENTS

The Honourable Mr. Justice James Williams

Mr. Justice James Williams retired from the Supreme Court of British Columbia at Vancouver on January 18, 2023. He was appointed to the Supreme Court on October 10, 2002.

The Honourable Mr. Justice Brian MacKenzie

Mr. Justice Brian MacKenzie retired from the Supreme Court of British Columbia at Victoria on March 21, 2023. He was appointed to the Supreme Court on October 23, 2009.

The Honourable Mr. Justice George Macintosh

Mr. Justice George Macintosh retired from the Supreme Court of British Columbia at Vancouver on April 30, 2023. He was appointed to the Supreme Court on December 17, 2013.

The Honourable Mr. Justice Robert Punnett

Mr. Justice Robert Punnett retired from the Supreme Court of British Columbia at Prince Rupert on November 30, 2023. He was appointed to the Supreme Court on June 19, 2009.

Associate Judge Peter Keighley

Associate Judge Peter Keighley retired from the Supreme Court of British Columbia at New Westminster on December 31, 2023. He was appointed Associate Judge of the Supreme Court on March 8, 2004.

COMMITTEE REPORTS

EXECUTIVE COMMITTEE

Members

Justice Maisonville (Chair)
Chief Justice Hinkson (*ex officio*)
Associate Chief Justice Holmes (*ex officio*)
Justice Caldwell
Justice Devlin
Justice Donegan
Justice Jackson
Justice MacNaughton
Justice Thompson
Justice Warren
Justice Wilson
Associate Judge Harper
Associate Judge Muir
Heidi McBride, *Executive Director and Senior Counsel* (*ex officio*)
Brenda Belak, *Legal Counsel*
Jennifer Millerd, *Legal Counsel*

Mandate

The Executive Committee of the Supreme Court of British Columbia meets monthly to assist the Chief Justice and Associate Chief Justice in formulating and implementing policy initiatives and in coordinating the work of Court committees.

Membership

The judicial membership of the Committee represents their regions (Vancouver, New Westminster and the Fraser Valley, Vancouver Island, Okanagan/Kootenays, Kamloops/North), with the Associate Judges and Registrars also having a representative. Members are elected to three-year terms, with a two-term limit.

Work of the Committee

In 2023, the Committee's work included the ongoing liaison of the Court with government and external organizations such as the Canadian Bar Association and the Law Society. Issues addressed by the Committee included the membership of Court committees, enhancing the Court's readiness to conduct French language criminal trials and proceedings under the *Divorce Act*, the possible use of the File Transfer Server system for acceptance of submissions on draft jury charges outside of court hours, sheriff staffing issues as they impact courtroom availability and security, and legislative changes likely to impact court operations.

The Committee is grateful to Brenda Belak and Jennifer Millerd for their support of its work.

CIVIL LAW COMMITTEE

Members

Justice Warren (Chair)
Justice Baker
Justice Beames
Mr. Justice Caldwell
Justice Gomery
Justice Matthews
Justice Milman
Justice Smith
Justice Stephens
Justice Thompson
Justice Veenstra
Justice Verhoeven
Mr. Justice Walker
Associate Judge Vos
Lisa Phillips, *Legal Counsel*

Mandate

The role of the Civil Law Committee is to consider developments in civil practice and procedure and to provide input on these matters to the Chief Justice, Associate Chief Justice and other members of the Court.

Work of the Committee

In 2023, the Committee considered a wide range of civil law matters. The Committee provided feedback to the Chief Justice and Associate Chief Justice regarding changes to Practice Direction 4 (Judicial Management and Early Assignment of a Trial Judge or Hearing Judge in Civil and Family Proceedings) and Practice Direction 5 (Class Proceedings). The Committee also recommended revisions to Practice Direction 61 (Applications to Commence Proceedings Anonymously). It provided input to the Chief Justice about lengthy chambers proceedings and consulted on a proposal regarding hearings in regular chambers. In collaboration with the Family Law Committee, the Committee developed an informational memorandum about trial procedure for judges to provide to self-represented litigants.

Other issues the Committee considered include changes to the enforcement of money judgments in Bill 27 – *Money Judgment Enforcement Act*, the use of endorsements and the procedure for receiving submissions on jury charges.

The Committee continued to support the work of the Court through providing guidance about significant appellate decisions and developments in civil law.

The Committee is grateful to Lisa Phillips for her support of its work.

COURTHOUSE FACILITIES COMMITTEE

Members

Justice A. Ross (Chair)
Mr. Justice Baird
Justice Betton
Madam Justice Church
Justice Douglas
Justice Mayer
Heidi McBride, *Executive Director and Senior Counsel*

Mandate

The mandate of the Committee is to provide facilities-related assistance, support and advice to the Chief Justice and the Associate Chief Justice.

Work of the Committee

In 2023, the Committee's work included discussions about three courthouses, Victoria Law Courts, Williams Lake Law Courts and Ft. St. John Law Courts, which are all in need of replacement, expansion or serious renovations. Progress on these priority locations depends on capital funding and the Committee continues to advocate for the provincial government to provide the needed funding.

The Committee also worked on a number of smaller, but no less important facilities issues at a number of courthouse locations including the Abbotsford Law Courts (ongoing issues with the water supply), the Kamloops Law Courts (a lifecycle extension projects involving security enhancements and improvements to courtroom accessibility, courtroom and registry technology infrastructure updates), the New Westminster Law Courts (replacement of the exterior cladding and windows, curtain walls and skylights and significant repairs to the concrete and electrical services in the secure parking areas) and the Vancouver Law Courts (renovations to the space formerly occupied by the Law Courts Inn as well as upgrades and repairs to some of the large building systems including mechanical and electrical upgrades, and escalator modernization, concrete repair work, Great Hall glass replacement and millwork repairs).

Finally, the Committee considered renovations to the Port Coquitlam Law Courts which will support the use of excess courtroom and chambers capacity in that location by the Supreme Court. These renovations also include the creation of a criminal jury courtroom and renovations in the registry so that litigants can receive full Supreme Court registry services in Port Coquitlam.

CRIMINAL LAW COMMITTEE

Members

Justice Devlin (Chair)
Mr. Justice Riley (Vice Chair)
Associate Chief Justice Holmes
Justice Brundrett
Madam Justice Church
Mr. Justice Crossin
Justice Dley
Justice Donegan
Madam Justice Duncan
Mr. Justice Gaul
Justice Ker
Justice Maisonville
Justice Tammen
Madam Justice Watchuk
Justice Wedge
Justice Winteringham
Claire Wilson, *Legal Counsel*
Natasha Edgar, *Legal Counsel*

Mandate

The role of the Criminal Law Committee is to consider developments in criminal practice and procedure and to provide input on these matters to the Chief Justice, the Associate Chief Justice, and other members of the Court.

Work of the Committee

In 2023, the Committee provided support and advice to the Associate Chief Justice regarding the impact of *Criminal Code* amendments, including amendments to provisions regarding bail, publication bans, and orders to comply with the *Sex Offender Information Registration Act* made at the sentencing stage. The Committee also developed resources for judges in relation to these changes and updated the Supreme Court picklists. The Committee consulted on revisions to *CPD-4 - Procedure for Detention Reviews Under s. 525 of the Criminal Code*, on a new process for ordering transcripts for detention review hearings under s. 525 of the *Criminal Code*, and on the development of *CPD-7 - Procedure for Applications to Vary or Revoke a Publication Ban Under s. 486.51 of the Criminal Code*. The Committee also provided advice to the Associate Chief Justice regarding emerging issues in criminal procedure at the Court, including the timing of scheduling pretrial conferences in sexual offence cases and the return to conducting criminal jury selections in one stage.

Madam Justice Duncan stepped down as Chair in September after two years of service.

The Committee is grateful for her valuable contributions as Chair. Justice Devlin was appointed as Chair and Mr. Justice Riley was appointed as Vice-Chair. Justice Dley stepped down from the Committee at the end of 2023 after many years of service and Justice Winteringham resigned from the Committee as a result of her appointment to the Court of Appeal. The Committee is grateful for the many contributions of both Justice Dley and Justice Winteringham to the Committee's work.

The Committee is grateful to Supreme Court Legal Counsel, Claire Wilson and Natasha Edgar, for their support of its work.

EDUCATION COMMITTEE

Members

Justice MacNaughton (Chair)
Mr. Justice Ball
Justice Burke
Justice Crerar
Madam Justice Francis
Justice McDonald
Justice Mayer
Madam Justice Morellato
Madam Justice Murray
Mr. Justice Riley
Justice Tammen
Associate Judge Keim
Leah Pence, *Legal Counsel*

Mandate

The Education Committee's mandate is to organize and present continuing education programs in order to assist the judges, associate judges and registrars of the Court to stay on top of current developments in substantive law, enhance judicial skills, and learn about social context and philosophical and ethical issues which relate to the Court's work.

Work of the Committee

The Committee delivers its main programs at judicial education conferences held in May and November of each year. These conferences are developed and presented in partnership with the National Judicial Institute (NJI). The Committee is grateful for the assistance received from the staff at the NJI who support the development of our programs and also provide administrative, logistical and technical support for the conferences.

2023 Conferences

The May 2023 conference was held in Whistler and included sessions about: complex financial issues in family matters, the admissibility and treatment of surreptitious recordings, chambers practice, and various pre-trial matters. In addition, there was discussion with senior members of the bench on a variety of criminal matters, and presentations from various Indigenous justice organizations on innovative approaches to sentencing. The conference also included a judicial wellness component providing judges with tools to aid in understanding and building resilience, especially when dealing with difficult family and criminal matters.

The November 2023 British Columbia All Courts Education Conference was held in

Vancouver. The theme for this conference was The New Era of Judging. The conference is an opportunity for dialogue among the Provincial and Supreme Court and the Court of Appeal and we heard from speakers from across Canada and other countries. The conference addressed questions relevant for all three levels of court including: how courts can contribute to increasing access to justice; how courts and the judiciary should engage with social media in order to contribute to respect for the administration of justice; what challenges and opportunities artificial intelligence poses for the judiciary; what role courts play in reconciliation with Indigenous peoples in Canada; New Zealand's approach to reconciliation and what lessons we can learn from it; and what issues are emerging in criminal, civil and family law. Optional training was provided on the use of DivorceMate software for calculating child and spousal support.

New Judges Training

Starting in 2017, the Committee developed a program for newly appointed judges and associate judges designed to support them as they transition to our court from their prior legal careers. The new appointees training program is in addition to the opportunity provided to newly appointed judges to shadow one or more judicial colleagues for five days prior to beginning to sit and to the ongoing mentorship program.

In November 2023, the Committee delivered the eighth session of new judges training. Eight of our new appointees attended. The training covered a wide variety of topics including: writing and delivering decisions and managing reserve lists, managing chambers, the unique challenges presented in family law proceedings, tips, resources for being on the road, and an "ask us anything" session. The Committee is grateful to the senior members of the Court who agreed to serve as faculty again in 2023.

In addition, in 2021, the Criminal Law Committee and the Education Committee developed a multi-day self study course focusing on the law of sexual assault. Drawing on materials prepared by the Ontario Superior Court and the NJI, the course covers the substantive law of sexual assault, interim motions, procedure, common myths and stereotypes, social context, decision making, and sentencing. In 2023, 15 judges completed the course bringing the total number of judges to have done so to over 60.

Law at Lunch

The Committee facilitated regular online lunchtime seminars on topics including: section 7 of the *Charter*, civil jury trials, publication bans and anonymity orders, independent medical examinations, the law of hearsay, judicial reviews of Residential Tenancy Board decisions and interim stays, as well as post hearing and post-judgment matters.

Mentoring

Finally, the Committee has organized various online networking events to introduce the Court's newest appointees and provide opportunities for informal discussion and mentoring.

The Committee is grateful to members of the Court for their enthusiastic participation as speakers and facilitators in its programs, and for their receptiveness to its programs.

The Committee also thanks Leah Pence for supporting its work.

FAMILY LAW COMMITTEE

Members

Justice Tindale *(Chair)*
Justice Fleming (*Vice-Chair*)
Justice Armstrong
Justice Shergill
Justice Brundrett
Justice Lamb
Justice Caldwell
Justice Francis
Associate Judge Dick
Associate Judge Harper
Associate Judge Hughes
Nikki Hair, *Legal Counsel*
Line B. Williams, *Legal Counsel*

Mandate

The role of the Family Law Committee is to consider developments in family law practice and procedure and to provide input relating to these matters to the Chief Justice and other members of the Court.

Work of the Committee

The Committee dealt with a variety of family law issues in 2023. The Committee provided recommendations and comments to Chief Justice Hinkson, the Attorney General, and the British Columbia Supreme Court Civil & Family Rules Committee with respect to significant amendments to the *Family Orders and Agreements Enforcement Assistance Act,* the *Family Law Act* and the *Supreme Court Family Rules*.

In collaboration with the Civil Law Committee, the Committee developed an informational memorandum about trial procedure for judges to provide to self-represented litigants. The Committee also updated the Supreme Court Family Picklist of Orders, which is available on the court's website. The Committee provided information and recommendations to the Court on both internal and external resources, as well as on issues of law.

In 2023, the Committee bid farewell to Associate Judge Harper and welcomed Justice Caldwell, Justice Francis and Associate Judge Hughes as new members of the Committee.

The Committee is grateful to Nikki Hair and Line Williams for their support of its work.

LAW CLERKS COMMITTEE

Members

Mr. Justice Blok (Chair)
Justice Basran
Justice Iyer
Justice D. MacDonald
Madam Justice Murray
Brenda Belak, *Legal Counsel*
Jennifer Millerd, *Legal Counsel*

Mandate

The Law Clerks Committee is responsible for the management of the Judicial Law Clerks Program, which provides both a valuable resource for judges and a unique learning opportunity for new law school graduates who have achieved a high academic standard. The Committee is directly involved in the recruitment and hiring of judicial law clerks each year. The Committee is assisted in its work by the Court's legal counsel, to whom the day-to-day management and administration of the program is delegated. The Committee is also assisted by the 22 judges of the Court who act as principals to the law clerks.

Work of the Committee

The recruitment process begins two years before the start of the clerking term when the Committee sends materials to all Canadian law schools. The application and interview process takes place about 18 months before the start of the clerking term. In the early spring, Committee members interview up to 40 applicants from a group that has been shortlisted through screening interviews conducted by the Court's legal counsel.

At present, there are 17 law clerks in Vancouver, three in New Westminster and two in Victoria. In 2023, the following clerks began their clerkships with the Court:

Vancouver	Michaela Aeberhardt, Myim Bakan Kline, Lisa Chaudhry, Tom Gilmour, Merran Hergert, Stephanie Lee, Melissa Liauw, Frances Miltimore, Whitney Morrison, Verukah Poirier, Olga Shaporenko, Reed Smith, Spencer Taylor-Robins, Alie Teachman, Thea Udwadia, Adam Walsh and Maddison Zapach.
New Westminster	Claire Qiu, Siobhán Rempel and Patrick Sheppard
Victoria	Chloe Ducluzeau and Ben Turner

One of the Committee's continuing priorities is to increase diversity in our law clerk group. Through various outreach initiatives we have greatly improved both the number of diverse

applicants and the number of diverse persons we have hired. This year, about half of our law clerks identify as racialized, Indigenous or 2SLGBTQI+, or as a person with a disability.

The Committee wishes to extend its gratitude and appreciation to the Court's law clerks for the assistance that they provide to the judges of the Court. The enthusiasm, commitment, and dedication they bring to their work and to the work of the Court are invaluable.

The Committee would also like to express its gratitude to the judges of the Court who serve as principals to the law clerks. They provide great mentorship to our law clerks and allow the Judicial Law Clerks Program to continue to provide a rich educational experience.

Finally, the Committee expresses its thanks to Brenda Belak, Jennifer Millerd and the Court's other legal counsel for their efforts in recruiting, training and supervising the law clerks.

PUBLIC AFFAIRS COMMITTEE

Members

Justice N. Smith (Chair)
Chief Justice Hinkson
The Honourable Bruce Cohen, *Superior Courts Communications Officer*
Mr. Justice Gaul
Justice Milman
Justice Tindale
Justice Wedge
Associate Judge Vos
Heidi McBride, *Executive Director and Senior Counsel*
Jennifer Millerd, *Legal Counsel*
Diana Foxall, *Communications Coordinator*

Mandate

In keeping with the open court principle, the mandate of the Committee is primarily to promote activities that enhance public and media understanding of the Court's processes and to address matters concerning public legal education, media and public relations. The PAC is also involved in initiatives respecting Supreme Court Policies and Practice Directions relating to such matters as access to court records, communications with the Court, cameras in the courtroom, and the use of electronic devices in courtrooms.

Work of the Committee

In 2023, the Committee's work involved meeting with the media, engaging with court communications officers from across Canada, and continuing with projects aimed to assist media in obtaining access to court proceedings and court records. The Committee was also involved in initiatives respecting Supreme Court policies and practice directions relating to court records, communications with the Court, cameras in the courtroom, and the use of electronic devices in courtrooms.

The Committee is grateful for the court communications, and media and public relations services performed by the Superior Courts Communications Officer, the Honourable Bruce Cohen, and the Communications Coordinator, Diana Foxall, who interact with members of the Superior Courts, judicial administration staff, courts legal counsel, registry staff and members of the media and public as well as government representatives, other courts across the country and bar organizations. The Committee is also appreciative of the support it receives from the Court's legal counsel and other judicial staff whose assistance and advice have been indispensable in communicating with the public and media. As well, the Committee expresses its thanks to Miki Lee who maintains the list of accredited media.

LIBRARY COMMITTEE

Members

Justice Ker (Chair)
Justice Skolrood
Justice Edelmann
Sylvia Ranspach, *Head Librarian*
Heidi McBride, *Executive Director and Senior Counsel*

Work of the Committee

In 2023, library staff, under the leadership of head librarian Sylvia Ranspach, advanced a number of key projects, including implementing a new Sharepoint library site and updated library catalogue, developing subject matter resource guides, working with legal publishers, and redirecting budget funds to continue the transition from print to electronic resources. Ms. Ranspach also continues to provide regular training to judges, law clerks, and other judicial staff. The Library also continues to cull old and unused print volumes from various courthouses. Throughout the summer, our co-op student, Shelby Colling, catalogued historical photographs and assisted with the Judicial History Project.

The judiciary continues to be very well served by Ms. Ranspach, along with library technician, Connie Kang.

JOINT COURTS TECHNOLOGY COMMITTEE

Members

Mr. Justice Masuhara (Chair)
Mr. Justice Hunter
Justice Branch
Justice Edelmann
Justice Myers
Madam Justice Fitzpatrick
Mr. Justice Punnett
Associate Judge Nielsen
Timothy Outerbridge, *Registrar, Court of Appeal*
Heidi McBride, *Executive Director and Senior Counsel*
Cindy Friesen, *Director, Supreme Court Scheduling*
Ryan Wirth, *Director, Information Technology*
Brenda Belak, *Legal Counsel*
Line B. Williams, *Legal Counsel*

Mandate

The Committee's mandate is to review developments in technology and their impacts on the work of the Court of Appeal and the Supreme Court.

Work of the Committee

In 2023, the Committee considered the impacts of the rapid development and expansion of functionality of artificial intelligence and, specifically, large language models on the Courts' work. The Committee is concerned about professional and ethical issues arising with the use of AI-based tools.
The Committee continued to be involved in supporting the move to a new VOIP phone system for the judiciary and judicial staff, which provides high quality audio that is easily incorporated into the Courts' infrastructure. Work is also ongoing to upgrade computer screens for the judiciary.

The Committee was involved in, and supportive of, ongoing work to expand electronic document management, electronic filing of documents, and online booking in both the Court of Appeal and Supreme Court. Following strong public support, the Court of Appeal returned to broadcasting appeals publicly by Zoom on January 3, 2023.

In collaboration with Court Services Branch, the Supreme Court expanded the Associate Judges Chambers Pilot Project to all registries outside Vancouver with associate judge sittings, except for Vancouver Law Courts, in 2023. The Project permits electronic submission of application records for applications scheduled for 30 minutes or less in associate judges' chambers.

The Committee was involved in a pilot project on digital signatures being trialed in the Court of Appeal. If successful, the pilot will be expanded to the Supreme Court to further evaluate the use of digital signatures.

Work is ongoing through Court Services Branch to update microphones in courtrooms to improve audio recordings.

JUDICIAL ACCESS POLICY WORKING COMMITTEE

Members

Shirley Smiley, *Legal Counsel, Court of Appeal (Chair)*
Leah Pence, *Legal Counsel, Supreme Court*
Karen Leung, *Legal Counsel, Provincial Court*
Trevor Fik, *Legal Counsel, Provincial Court*
Grant Marchand, *Manager, Judicial Resource Analysis & Management Information Systems, Provincial Court*
Dan Chiddell, *Executive Director, Corporate Support, Court Services Branch (CSB)*
Stephanie Delacretaz*, Director, Strategic Information & Business Applications, Corporate Support, CSB*
Erin Turner, *Director, Policy, Legislation and Planning, Policy and Service Reform Unit, CSB*
Shelley Gin, *Senior Policy Analyst, Policy, Legislation and Planning, Policy and Service Reform Unit, CSB*
Robert Richardson, *Secretariat and Senior Policy Analyst, Policy, Legislation and Planning, Policy and Service Reform Unit, CSB*
Margot Tubman, *CSB Consultant*

Mandate

The Chief Justices and Chief Judge of British Columbia's courts have responsibility for the supervision and control of court records and judicial administration records. The Judicial Access Policy Working Committee (APWC) is a joint committee consisting of representatives from all three courts and Court Services Branch employees. The APWC reviews applications for bulk and/or electronic access to court record information.

The APWC is not a decision making-body, but rather a review and discussion forum for judicial representatives and CSB senior staff involved in policy, legislation, data custodianship, statistics and court systems management. Final decisions on access applications made to the APWC for access to court records or court record information are made by the judiciary and communicated to the applicant through the APWC.

In addition, the APWC develops and revises policies relating to access to court records, particularly those in bulk and electronic format, and seeks guidance and approval for such policies. The Chief Justices and Chief Judge give approval before a policy is adopted.

Work of the Committee

In 2023, the work of the APWC included the following:

Access Applications

In 2023, the APWC received, considered, and made recommendations in respect of

applications for access to court record information from a variety of government, public and private agencies and departments related to their statutory mandates, operations, or legal research and analysis services. The Three Courts Policy on Bulk and Electronic Access to Court Records, approved in September 2021, guided consideration of these requests. The policy describes protocols for administering bulk access to court records and electronic information that is not available at the registry counter. Access agreements were created for applications approved by the judiciary.

Policy Work

In 2023, the APWC reviewed and updated its protocols and processes for logging and tracking applications as well as existing access agreements. Members of the Committee also contributed to the Canadian Judicial Council's Pilot Project on bulk access to published reasons for judgment.

MEMBERS OF THE SUPREME COURT

CHIEF JUSTICE OF THE SUPREME COURT

THE HONOURABLE CHIEF JUSTICE CHRISTOPHER E. HINKSON

- Appointed to the Supreme Court March 2, 2007
- Appointed to the Court of Appeal March 18, 2010
- Appointed Chief Justice of the Supreme Court November 7, 2013

ASSOCIATE CHIEF JUSTICE OF THE SUPREME COURT

THE HONOURABLE ASSOCIATE CHIEF JUSTICE HEATHER J. HOLMES

- Appointed to the Supreme Court March 21, 2001
- Appointed Associate Chief Justice of the Supreme Court - June 21, 2018

JUSTICES OF THE SUPREME COURT

THE HONOURABLE JUSTICE ALISON J. BEAMES ► (Kelowna)

- Appointed to the Supreme Court August 7, 1996

THE HONOURABLE JUSTICE CAROL J. ROSS ► (*Vancouver*)

- Appointed to the Supreme Court March 21, 2001

THE HONOURABLE JUSTICE CATHERINE A. WEDGE ► (*Vancouver*)

- Appointed to the Supreme Court April 4, 2001

THE HONOURABLE JUSTICE BRENDA BROWN ► (*New Westminster*)

- Appointed to the Supreme Court April 18, 2002

THE HONOURABLE MR. JUSTICE JAMES W. WILLIAMS ▼ (*Vancouver*)

- Appointed to the Supreme Court October 10, 2002
- Retired January 18, 2023

THE HONOURABLE MR. JUSTICE DAVID M. MASUHARA ►(*Vancouver*)

- Appointed to the Supreme Court October 11, 2002

THE HONOURABLE JUSTICE LANCE W. BERNARD ► (*New Westminster*)

- Appointed to the Supreme Court July 24, 2003

THE HONOURABLE JUSTICE J. MIRIAM GROPPER ► (*Vancouver*)

- Appointed to the Supreme Court April 14, 2005

THE HONOURABLE JUSTICE NATHAN H. SMITH ► (*Vancouver*)

- Appointed to the Supreme Court May 19, 2005

THE HONOURABLE JUSTICE JOEL R. GROVES ► (*Vancouver*)

- Appointed Associate Judge of the Supreme Court May 4, 2000
- Appointed to the Supreme Court May 19, 2005

THE HONOURABLE JUSTICE ELLIOTT M. MYERS ► (*Vancouver*)

- Appointed to the Supreme Court November 22, 2005

THE HONOURABLE MR. JUSTICE GEOFFREY R.J. GAUL (*Victoria*)

- Appointed to the Supreme Court January 31, 2008

THE HONOURABLE MR. JUSTICE PAUL W. WALKER ► (*Vancouver*)

- Appointed to the Supreme Court June 18, 2008

THE HONOURABLE JUSTICE KATE KER (*Vancouver*)

- Appointed to the Supreme Court June 18, 2008

THE HONOURABLE JUSTICE JOHN S. HARVEY ► (*New Westminster*)

- Appointed to the Supreme Court January 22, 2009

THE HONOURABLE JUSTICE FRITS VERHOEVEN (*New Westminster*)

- Appointed to the Supreme Court January 22, 2009

THE HONOURABLE JUSTICE TERENCE A. SCHULTES (*New Westminster*)

- Appointed to the Supreme Court May 15, 2009

THE HONOURABLE JUSTICE ROBERT D. PUNNETT ▼ (*Prince Rupert*)

- Appointed to the Supreme Court June 19, 2009
- Retired November 30, 2023

THE HONOURABLE JUSTICE BRIAN D. MACKENZIE ▼ (*Victoria*)

- Appointed to the Provincial Court October 30, 1990
- Appointed to the Supreme Court October 23, 2009
- Retired March 21, 2023

THE HONOURABLE JUSTICE ANTHONY SAUNDERS (*Victoria*)

- Appointed to the Supreme Court November 27, 2009

THE HONOURABLE JUSTICE S. DEV DLEY ► (*Abbotsford*)

- Appointed to the Provincial Court June 23, 2008
- Appointed to the Supreme Court March 19, 2010

THE HONOURABLE JUSTICE MIRIAM A. MAISONVILLE (*Vancouver*)

- Appointed to the Supreme Court March 19, 2010

THE HONOURABLE MADAM JUSTICE SHELLEY C. FITZPATRICK (*Vancouver*)

- Appointed to the Supreme Court June 18, 2010

THE HONOURABLE MADAM JUSTICE JENNIFER A. POWER (*Victoria*)

- Appointed to the Supreme Court August 6, 2010

THE HONOURABLE JUSTICE TREVOR C. ARMSTRONG ► (*New Westminster*)

- Appointed to the Supreme Court October 1, 2010

THE HONOURABLE MADAM JUSTICE JEANNE E. WATCHUK ►(*Vancouver*)

- Appointed to the Provincial Court October 3, 1994
- Appointed to the Supreme Court October 28, 2010

THE HONOURABLE MR. JUSTICE MURRAY B. BLOK (*New Westminster*)

- Appointed District Registrar March 25, 2002
- Appointed to the Supreme Court October 28, 2010

THE HONOURABLE JUSTICE D. ALLAN BETTON (*Vernon*)

- Appointed to the Provincial Court March 19, 2007
- Appointed to the Supreme Court June 24, 2011

THE HONOURABLE JUSTICE RONALD S. TINDALE (*Prince George*)

- Appointed to the Provincial Court February 15, 2010
- Appointed to the Supreme Court October 20, 2011

THE HONOURABLE JUSTICE GORDON C. WEATHERILL ► (*Vancouver*)

- Appointed to the Supreme Court May 31, 2012

THE HONOURABLE MR. JUSTICE ROBIN A.M. BAIRD (*Nanaimo*)

- Appointed to the Provincial Court August 22, 2011
- Appointed to the Supreme Court October 5, 2012

THE HONOURABLE JUSTICE GORDON S. FUNT ► (*Vancouver*)

- Appointed to the Supreme Court October 5, 2012

THE HONOURABLE MR. JUSTICE KENNETH W. BALL ► (*New Westminster*)

- Appointed to the Provincial Court January 6, 2003
- Appointed to the Supreme Court November 2, 2012

THE HONOURABLE JUSTICE DOUGLAS W. THOMPSON (*Nanaimo*)

- Appointed to the Supreme Court December 13, 2012

THE HONOURABLE JUSTICE SHERI ANN DONEGAN (*Kamloops*)

- Appointed to the Provincial Court October 4, 2010
- Appointed to the Supreme Court June 6, 2013

THE HONOURABLE JUSTICE LISA WARREN (*Vancouver*)

- Appointed to the Supreme Court June 6, 2013

THE HONOURABLE JUSTICE MARGOT L. FLEMING (*Vancouver*)

- Appointed to the Supreme Court June 6, 2013

THE HONOURABLE JUSTICE GARY P. WEATHERILL ► (*Kelowna*)

- Appointed to the Supreme Court October 2, 2013

THE HONOURABLE JUSTICE GEORGE K. MACINTOSH ▼ (*Vancouver*)

- Appointed to the Supreme Court December 17, 2013
- Retired April 30, 2023

THE HONOURABLE JUSTICE NIGEL P. KENT (*Vancouver*)

- Appointed to the Supreme Court December 17, 2013

THE HONOURABLE MADAM JUSTICE JENNIFER M.I. DUNCAN (*Vancouver*)

- Appointed to the Supreme Court December 17, 2013

THE HONOURABLE MADAM JUSTICE NEENA SHARMA (*Vancouver*)

- Appointed to the Supreme Court December 17, 2013

THE HONOURABLE JUSTICE EMILY M. BURKE (*Vancouver*)

- Appointed to the Supreme Court May 13, 2014

THE HONOURABLE JUSTICE MARTHA M. DEVLIN (*New Westminster*)

- Appointed to the Supreme Court December 11, 2014

THE HONOURABLE MADAM JUSTICE BARBARA M. YOUNG (*Victoria*)

- Appointed Associate Judge of the Supreme Court December 6, 2006
- Appointed to the Supreme Court June 19, 2015

THE HONOURABLE MADAM JUSTICE MARGUERITE H. CHURCH (*Williams Lake*)

- Appointed to the Supreme Court June 16, 2016

THE HONOURABLE MADAM JUSTICE MARIA MORELLATO (*Vancouver*)

- Appointed to the Supreme Court June 16, 2016

THE HONOURABLE JUSTICE HEATHER MACNAUGHTON (*Vancouver*)

- Appointed Associate Judge of the Supreme Court June 1, 2011
- Appointed to the Supreme Court October 19, 2016

THE HONOURABLE MADAM JUSTICE CATHERINE MURRAY (*Vancouver*)

- Appointed to the Supreme Court October 19, 2016

THE HONOURABLE JUSTICE ANDREW P.A. MAYER (*Vancouver*)

- Appointed to the Supreme Court April 12, 2017

THE HONOURABLE MR. JUSTICE W. PAUL RILEY (*New Westminster*)

- Appointed to the Supreme Court May 11, 2017

THE HONOURABLE JUSTICE WARD K. BRANCH (*Vancouver*)

- Appointed to the Supreme Court June 8, 2017

THE HONOURABLE JUSTICE CARLA FORTH (*Vancouver*)

- Appointed to the Supreme Court June 14, 2017

THE HONOURABLE JUSTICE MICHAEL J. TAMMEN (*Vancouver*)

- Appointed to the Supreme Court June 14, 2017

THE HONOURABLE JUSTICE WARREN B. MILMAN (*Vancouver*)

- Appointed to the Supreme Court June 14, 2017

THE HONOURABLE JUSTICE NITYA IYER (*Vancouver*)

- Appointed to the Supreme Court June 14, 2017

THE HONOURABLE JUSTICE PALBINDER KAUR SHERGILL (*Vancouver*)

- Appointed to the Supreme Court June 23, 2017

THE HONOURABLE JUSTICE MICHAEL J. BRUNDRETT (*Vancouver*)

- Appointed to the Supreme Court June 21, 2017

THE HONOURABLE JUSTICE JANET WINTERINGHAM ▲ (*Vancouver*)

- Appointed to the Supreme Court August 15, 2017
- Appointed to the Court of Appeal December 4, 2023

THE HONOURABLE MR. JUSTICE E. DAVID CROSSIN (*Vancouver*)

- Appointed to the Supreme Court September 29, 2017

THE HONOURABLE JUSTICE FRANCESCA MARZARI (*Vancouver*)

- Appointed to the Supreme Court December 19, 2017

THE HONOURABLE JUSTICE JASVINDER S. (BILL) BASRAN (*Vancouver*)

- Appointed to the Supreme Court January 19, 2018

THE HONOURABLE JUSTICE DIANE C. MACDONALD (*Vancouver*)

- Appointed to the Supreme Court February 7, 2018

THE HONOURABLE JUSTICE BARBARA NORELL (*New Westminster*)

- Appointed to the Supreme Court February 22, 2018

THE HONOURABLE JUSTICE WENDY A. BAKER (*Vancouver*)

- Appointed to the Supreme Court February 22, 2018

THE HONOURABLE JUSTICE SHARON MATTHEWS (*Vancouver*)

- Appointed to the Supreme Court February 22, 2018

THE HONOURABLE JUSTICE THOMAS CRABTREE (*Chilliwack*)

- Appointed to the Provincial Court February 15, 1999
- Appointed to the Supreme Court May 4, 2018

THE HONOURABLE JUSTICE GEOFFREY B. GOMERY (*Vancouver*)

- Appointed to the Supreme Court June 15, 2018

THE HONOURABLE JUSTICE CHRISTOPHER J. GIASCHI (*Vancouver*)

- Appointed to the Supreme Court September 4, 2018

THE HONOURABLE JUSTICE VERONICA JACKSON (*Victoria*)

- Appointed to the Supreme Court October 9, 2018

THE HONOURABLE JUSTICE STEPHEN WILSON (*Kelowna*)

- Appointed Associate Judge of the Supreme Court November 23, 2015
- Appointed to the Supreme Court October 19, 2018

THE HONOURABLE MR. JUSTICE DENNIS HORI (*Kamloops*)

- Appointed to the Supreme Court February 8, 2019

THE HONOURABLE JUSTICE KAREN DOUGLAS (*Vancouver*)

- Appointed to the Supreme Court March 8, 2019

THE HONOURABLE MADAM JUSTICE AMY FRANCIS (*Vancouver*)

- Appointed to the Supreme Court March 8, 2019

THE HONOURABLE JUSTICE ELIZABETH MCDONALD (*Vancouver*)

- Appointed to the Supreme Court June 4, 2019

THE HONOURABLE JUSTICE ALAN ROSS (*Vancouver*)

- Appointed to the Supreme Court June 24, 2019

THE HONOURABLE MADAM JUSTICE SHEILA TUCKER (*Vancouver*)

- Appointed to the Supreme Court June 24, 2019

THE HONOURABLE JUSTICE DAVID CRERAR (*Vancouver*)

- Appointed to the Supreme Court June 24, 2019

THE HONOURABLE JUSTICE PETER EDELMANN (*Vancouver*)

- Appointed to the Supreme Court December 20, 2019

THE HONOURABLE JUSTICE MATTHEW TAYLOR (*New Westminster*)

- Appointed to the Supreme Court March 16, 2020

THE HONOURABLE JUSTICE ANDREW MAJAWA (*Vancouver*)

- Appointed to the Supreme Court March 16, 2020

THE HONOURABLE MADAM JUSTICE SANDRA WILKINSON (*Vancouver*)

- Appointed to the Supreme Court May 1, 2020

THE HONOURABLE JUSTICE WILLIAM VEENSTRA (*Vancouver*)

- Appointed to the Supreme Court June 23, 2020

THE HONOURABLE MADAM JUSTICE LYNDSAY LYSTER (*Nelson*)

- Appointed to the Supreme Court July 3, 2020

THE HONOURABLE MR. JUSTICE IAN CALDWELL (*Abbotsford*)

- Appointed Associate Judge of the Supreme Court March 24, 2005
- Appointed to the Supreme Court September 9, 2020

THE HONOURABLE JUSTICE JASMIN AHMAD (*Vancouver*)

- Appointed to the Supreme Court September 9, 2020

THE HONOURABLE MADAM JUSTICE ARDITH WALKEM (*Chilliwack*)

- Appointed to the Supreme Court December 14, 2020

THE HONOURABLE JUSTICE SIMON COVAL (*Vancouver*)

- Appointed to the Supreme Court December 21, 2020

THE HONOURABLE JUSTICE F. MATTHEW KIRCHNER (*Vancouver*)

- Appointed to the Supreme Court March 24, 2021

THE HONOURABLE JUSTICE JULIANNE K. LAMB (*New Westminster*)

- Appointed to the Supreme Court April 27, 2021

THE HONOURABLE JUSTICE LAUREN BLAKE (*Vancouver*)

- Appointed to the Supreme Court April 27, 2021

THE HONOURABLE JUSTICE JAN BRONGERS (*Vancouver*)

- Appointed to the Supreme Court April 27, 2021

THE HONOURABLE JUSTICE BRUCE ELWOOD (*New Westminster*)

- Appointed Associate Judge of the Supreme Court February 19, 2019
- Appointed to the Supreme Court February 7, 2022

THE HONOURABLE JUSTICE K. MICHAEL STEPHENS (*Vancouver*)

- Appointed to the Supreme Court February 7, 2022

THE HONOURABLE JUSTICE MICHAEL G. THOMAS (*Vancouver*)

- Appointed to the Supreme Court February 7, 2022

THE HONOURABLE JUSTICE BALJINDER KAUR GIRN (*New Westminster*)

- Appointed to the Supreme Court February 7, 2022

THE HONOURABLE JUSTICE JOHN GIBB-CARSLEY (*New Westminster*)

- Appointed to the Supreme Court February 7, 2022

THE HONOURABLE JUSTICE JACQUELINE D. HUGHES (*Vancouver*)

- Appointed to the Supreme Court February 7, 2022

THE HONOURABLE JUSTICE BRIANA HARDWICK (*Kelowna*)

- Appointed to the Supreme Court February 7, 2022

THE HONOURABLE JUSTICE JOSEPH M. DOYLE (*Vancouver*)

- Appointed to the Supreme Court October 24, 2022

THE HONOURABLE JUSTICE KEVIN D. LOO (*Vancouver*)

- Appointed to the Supreme Court October 24, 2022

THE HONOURABLE JUSTICE ANITA CHAN (*Vancouver*)

- Appointed to the Supreme Court October 24, 2022

THE HONOURABLE JUSTICE BRADFORD F. SMITH (*Kamloops*)

- Appointed to the Supreme Court June 1, 2023

THE HONOURABLE JUSTICE DAVID K. JONES (*Vancouver*)

- Appointed to the Supreme Court August 7, 2023

THE HONOURABLE JUSTICE JENNIFER L. WHATELY (*Vancouver*)

- Appointed to the Supreme Court August 14, 2023

THE HONOURABLE JUSTICE J. GARETH MORLEY (*Victoria)*

- Appointed to the Supreme Court August 28, 2023

▲ *Appointed to the Court of Appeal*
► *Supernumerary Justice*
▼ *Retired*

ASSOCIATE JUDGES OF THE SUPREME COURT

ASSOCIATE JUDGE SHELAGH SCARTH ► (*Vancouver*)

- Appointed District Registrar August 17, 1998
- Appointed Associate Judge of the Supreme Court November 6, 2000

ASSOCIATE JUDGE PETER KEIGHLEY ▼ (*New Westminster*)

- Appointed Associate Judge of the Supreme Court March 8, 2004
- Retired December 31, 2023

ASSOCIATE JUDGE CAROLYN P. BOUCK ► (*Victoria*)

- Appointed District Registrar April 2, 2002
- Appointed Associate Judge of the Supreme Court December 11, 2009

ASSOCIATE JUDGE LESLIE MUIR ► (*Vancouver*)

- Appointed Associate Judge of the Supreme Court May 7, 2012

ASSOCIATE JUDGE SANDRA HARPER (*Vancouver*)

- Appointed Associate Judge of the Supreme Court August 5, 2014

ASSOCIATE JUDGE SANDRA DICK (*Nanaimo*)

- Appointed Associate Judge of the Supreme Court January 1, 2016

ASSOCIATE JUDGE TERRY VOS (*Vancouver*)

- Appointed Associate Judge of the Supreme Court March 20, 2017

ASSOCIATE JUDGE STEVEN SCHWARTZ (*Kelowna*)

- Appointed Associate Judge of the Supreme Court February 19, 2019

ASSOCIATE JUDGE JENNIFER KEIM (*Kamloops*)

- Appointed Associate Judge of the Supreme Court July 31, 2019

ASSOCIATE JUDGE JOHN BILAWICH (*Vancouver*)

- Appointed Associate Judge of the Supreme Court December 21, 2020

ASSOCIATE JUDGE KIMBERLEY ROBERTSON (*New Westminster*)

- Appointed Associate Judge of the Supreme Court December 21, 2020

ASSOCIATE JUDGE RORY KRENTZ (*Abbotsford*)

- Appointed Associate Judge of the Supreme Court April 8, 2022

ASSOCIATE JUDGE SCOTT NIELSEN (*New Westminster*)

- Appointed District Registrar July 14, 2014
- Appointed Registrar December 1, 2018
- Appointed Associate Judge of the Supreme Court April 8, 2022

ASSOCIATE JUDGE SUSANNA HUGHES (*Vancouver*)

- Appointed Associate Judge of the Supreme Court May 2, 2022

▲ *Appointed Judge of the Supreme Court of British Columbia*
► *Senior Associate Judge*
▼ *Retired*

REGISTRAR OF THE SUPREME COURT

REGISTRAR MEG GAILY (*Vancouver*)

- Appointed Registrar of the Supreme Court October 12, 2022

JUDICIAL STAFF

Office of the Chief Justice and Associate Chief Justice

Judicial Coordinator, Chief Justice Hinkson	Carrie Wilke
Judicial Coordinator, Associate Chief Justice Holmes	Linda Peter
Supreme Court Legal Counsel	Brenda Belak, Natasha Edgar, Nikki Hair, Jennifer Millerd, Leah Pence, Lisa Phillips Line Williams, Claire Wilson

Judicial Administration

Executive Director and Senior Counsel	Heidi McBride
Director, Information Technology	Ryan Wirth
Manager, Finance	Caroline Nguyen
Manager, Human Resources	Tracy Norman
Accounting Coordinator	Cheryl Steele
Accounting Clerks	Gurjot Kaur, Simran Sangha
Communications Coordinator	Diana Foxall
Document Management Clerks	Elle Collman, Jas Dosanj, Nav Dosanj, Daniel Kuster, Aaron Wong
Facilities Officer	Ryan Jongenburger
Human Resources Recruitment Coordinator	Michelle Sam
Human Resources Coordinator	Charles Manuel
Office Manager	Andrea Mueller
Office Clerk	Ethan McMullen
Website Support and Business Information Analyst	Cynthia Dale
Manager, Provincial Registrar's Program	Kristen Day

Supreme Court Scheduling

Director, Supreme Court Scheduling	Cindy Friesen
Deputy Director, Supreme Court Scheduling	Trevor Woo
Assistant to Director, Supreme Court Scheduling	Katherine Castaneda Arenas
Scheduling Training Manager	Ben Bautista
Vancouver	
Manager, Supreme Court Scheduling, Civil	William Gallagher
Manager, Supreme Court Scheduling, Family	Rebecca Stock
Manager, Supreme Court Scheduling, Criminal	Rhona Ogston
Team Leaders	Elsa Peralta, Leah Walden
Scheduling Coordinators	Mikayla Bischoff, Kate Curry, Jennie Ho, Jay Nguyen, Trevor Woo, Debbie Pham, Wynne Li

Scheduling Clerks	Amani Abukhadra, Min Jee, Emely Tadena, Jerry Ku, Nav Dosanjh

New Westminster *(includes Abbotsford, Chilliwack and Port Coquitlam***)**

Manager, Supreme Court Scheduling	Tanya Dixon
Team Leader	Leslie Martin
Scheduling Coordinators	Allison Donnelly, Renuka Pumbhak, Owen Li, Rapinder Mehat, Angelina Slootweg, Cynthia Ferrer, Carly Lafave
Scheduling Clerk	Kirby Harris

Kamloops *(includes Cranbrook, Golden, Nelson, Revelstoke, Rossland, Salmon Arm)*

Manager, Supreme Court Scheduling	Brenda Strain
Scheduling Coordinators	Marnie Manula, Beckie Allen

Kelowna *(includes Penticton, Vernon)*

Manager, Supreme Court Scheduling	Janine Benson
Scheduling Coordinators	Sandeep Johal, Dyllan Siebert, Eryn Dumonte, Alisa Anthony

Nanaimo *(includes Campbell River, Courtenay, Port Alberni and Powell River)*

Manager, Supreme Court Scheduling	Michelle Schley
Scheduling Coordinators	Leanne Cyr, Katherine Marriott

Prince George *(includes, Dawson Creek, Fort St. John, Quesnel, Williams Lake)*

Manager, Supreme Court Scheduling	Pamela Wallin
Scheduling Coordinators	Tara Bleich, Kelly Parmar

Victoria *(includes Duncan, Prince Rupert, Terrace, Smithers)*

Manager, Supreme Court Scheduling	Claudia Turner
Scheduling Coordinators	April Castillo, Sandra Skene

Section 525 Detention Reviews

Detention Review Coordinator	Kendra Kirkwood

Judicial Support Services

Manager, Judicial Support Services	Jessica Gill, Samantha Servis
Judicial Administrative Assistants	
Vancouver	Irem Akcan, Radovan Burdej, Antonia Chen, *Kirsten Floyd, Diane Goyengko, ^Diana Hatley, ^Bonnie Healy, Sasha Ionova, Raji Johal, Jaspreet Kaur, Simran Kooner, ^Wanda Lam, Queen Lee, ^Amanda Li, Israel Mbenza, Melissa Mendoza Alcocer, Akhtar Mohammed, Meena Puhl, Chelsea Salindong, Chiraz Sisrian, ^Vickie Siu, Lindy Tucker
Abbotsford	Christina Campbell
Chilliwack	^Yvonne Samek
Kamloops	Beckie Allen, *Jane Raggatt
Kelowna	Lana Pardue, ^Shannon Zorn
Nanaimo	^Melissa Lund
New Westminster	^Barbara Gourlay, Rasmeet Kaur, *Jesse Rathor, Andrea Walker
Prince George	Kelly Parmar
Victoria	Kathy Cook, ^Karen Gurney, Michelle McNeill
Judicial Administrative Clerks	Pedro Costa, Shivali Singla
One Judgment Office	Mandie Dhesi, Miki Lee

**Team Lead*
^Senior Judicial Administrative Assistant

Judges Library

Librarian	Sylvia Ranspach
Library Technician	Connie Kang
Co-Op Student	Shelby Colling

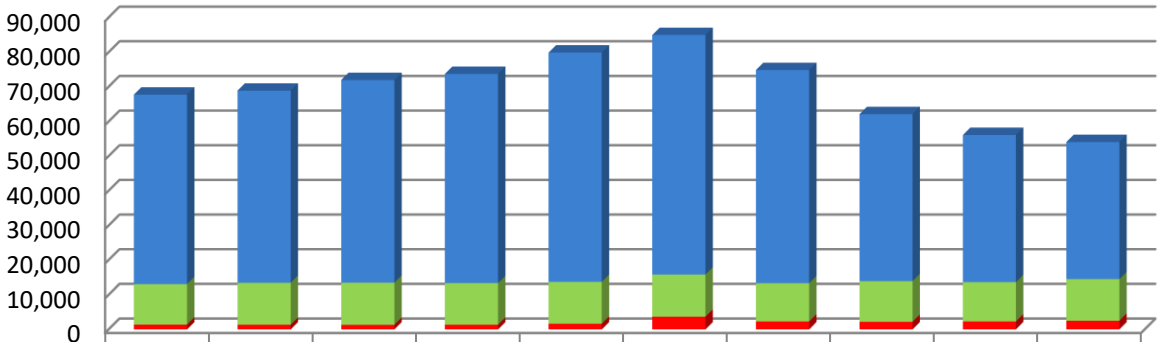
IT Services*

Service Delivery Manager	Lawrence Ho
Infrastructure Project Analyst	David Chow, Billy Huang
Help Desk and Operations Analyst	William Huang
Help Desk Technician	Priya Bageja, Guilherme Gianjope, Mike Larm, Ami Osame, Wayland Szeto
Senior Business Analyst and Project Manager	Lorne Lovett
Business Analyst	Joanne Chong
Software Developer	Jojo Ho

**IT services are provided by Microserve Business Computer Services*

APPENDIX - COURT STATISTICS

Figure 1: New Criminal, Family and Civil Filings



	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Civil	54,662	55,445	58,500	60,334	66,185	69,140	61,497	48,168	42,462	39,550
Family	11,682	12,085	12,130	12,038	12,062	12,152	11,043	11,737	11,351	11,995
Criminal	1,396	1,362	1,336	1,348	1,642	3,665	2,297	2,200	2,292	2,507

Data Source: Courthouse Activity Cube and Criminal BI Database, extracted February 16, 2024
Historical numbers are updated to current information. Data may change due to data settling and corrections.

Note: On May 1, 2021, the ICBC Enhanced Care program (no-fault insurance) came into effect. New filings, involving accidents that occurred before May 1, 2021, are expected to continue until April 30, 2023. After this date, only exceptional claims will be filed with the court. Exceptional claims include collisions involving drivers charged with certain criminal code offences and non-motorists who contribute to injuries.

Figure 2: New Filings by Category in 2023

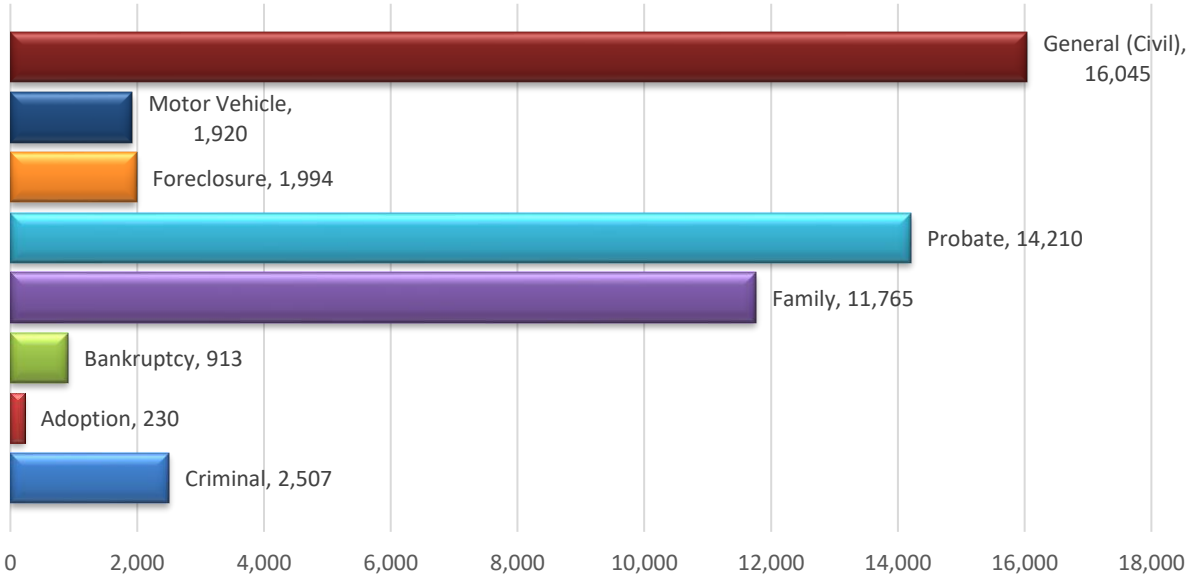


Figure 3: Number of Conferences by Type

Number of Conferences per Type, 2014 – 2023

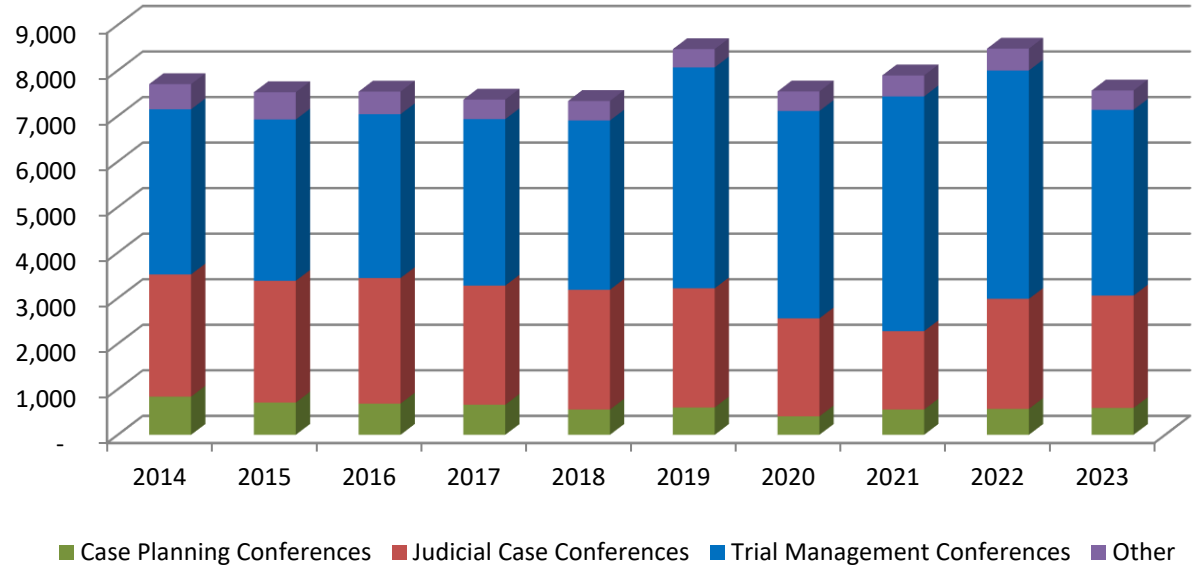


Figure 4: Hearing Hours by Conferences Type

Hours per Conference Type, 2014 - 2023

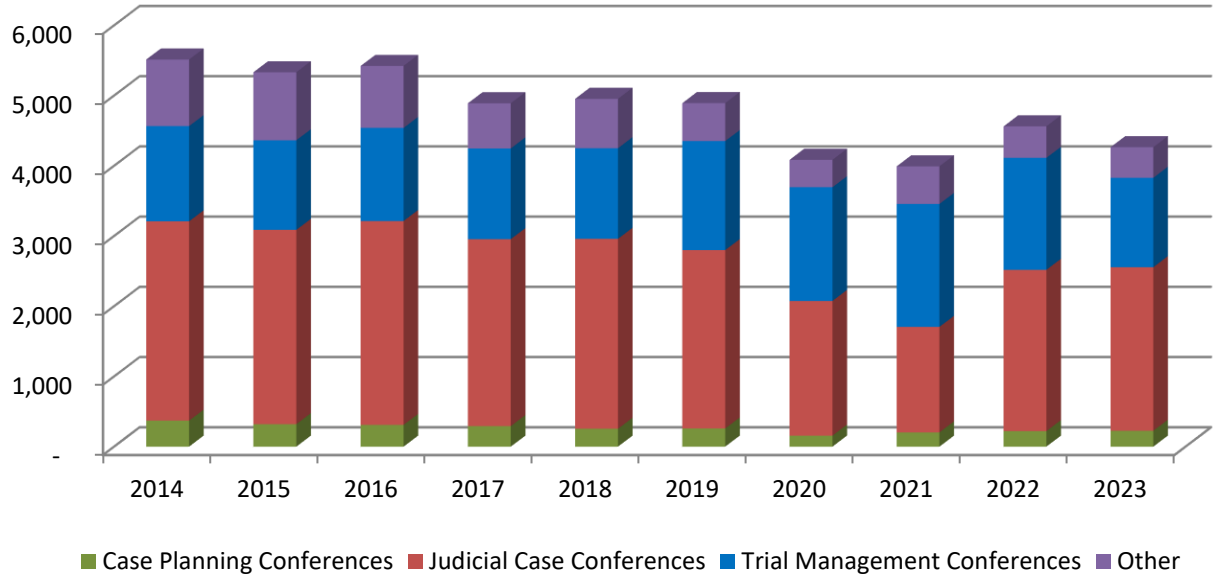
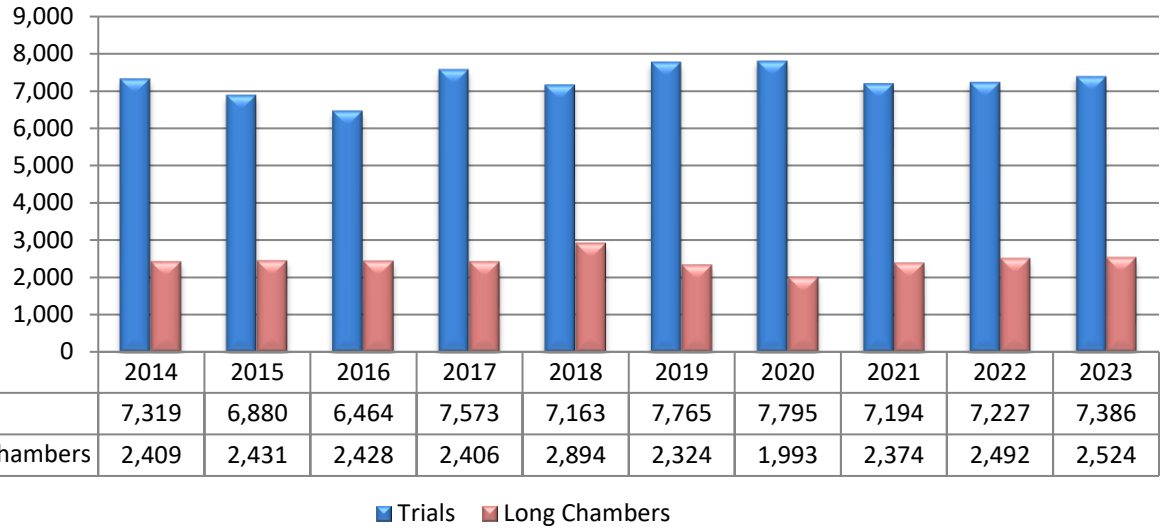
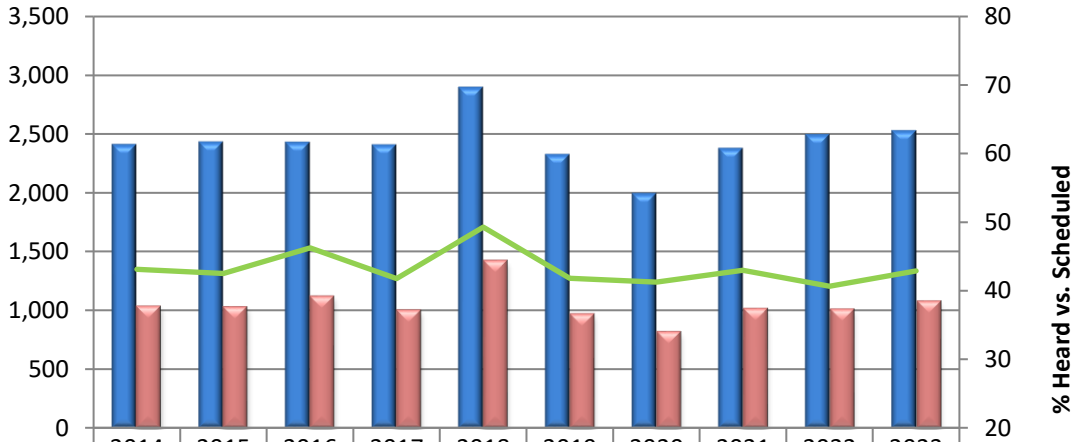


Figure 5: Civil Trials and Long Chambers Applications Scheduled in Vancouver



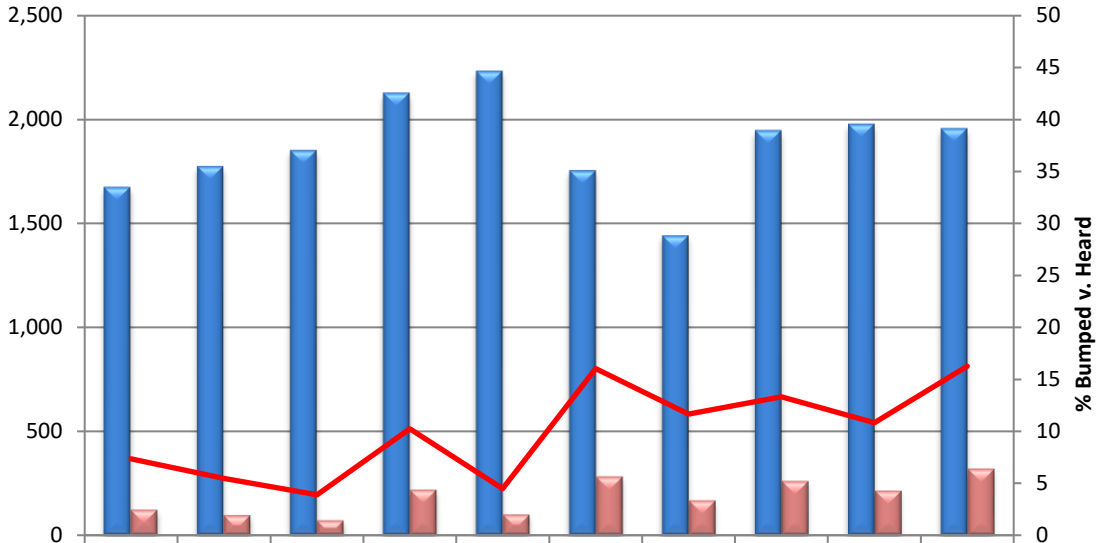
	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Trials	7,319	6,880	6,464	7,573	7,163	7,765	7,795	7,194	7,227	7,386
Long Chambers	2,409	2,431	2,428	2,406	2,894	2,324	1,993	2,374	2,492	2,524

Figure 6: Long Chambers Applications Scheduled and Heard in Vancouver



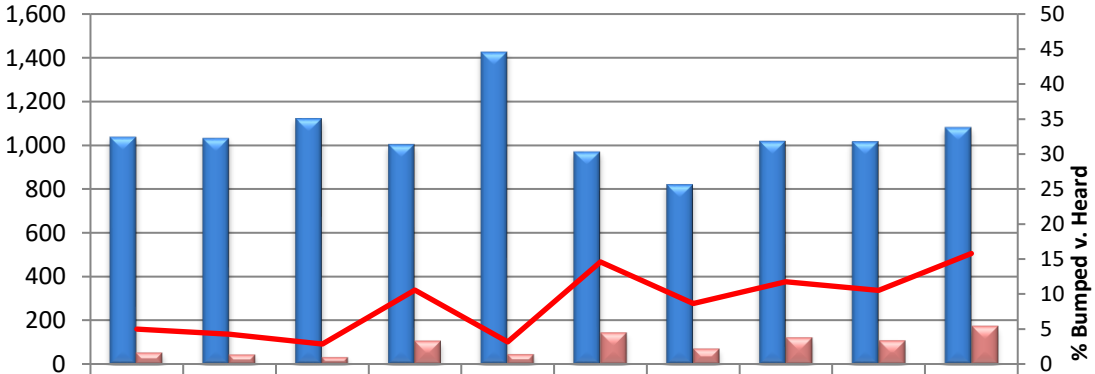
	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Scheduled	2,409	2,431	2,428	2,406	2,894	2,324	1,993	2,374	2,492	2,524
Heard	1,039	1,033	1,123	1,005	1,426	972	822	1,020	1,013	1,083
% Heard v. Scheduled	43	42	46	42	49	42	41	43	41	43

Figure 7: Long Chambers Applications Heard and Bumped in British Columbia



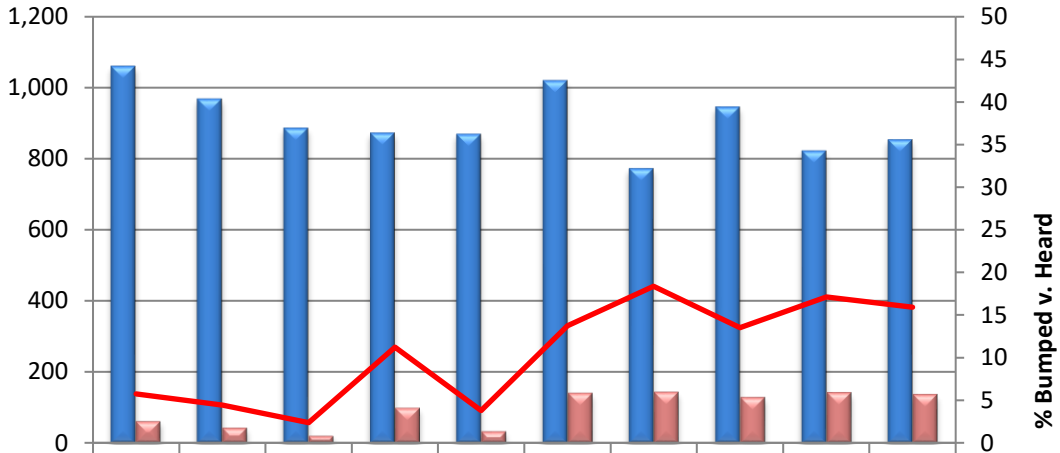
	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Heard	1,673	1,773	1,850	2,126	2,231	1,753	1,441	1,946	1,976	1,955
Bumped	123	97	72	218	100	281	168	259	214	318
% Bumped v. Heard	7.4	5.5	3.9	10.3	4.5	16.0	11.7	13.3	10.8	16.3

Figure 8: Long Chambers Applications Heard and Bumped in Vancouver



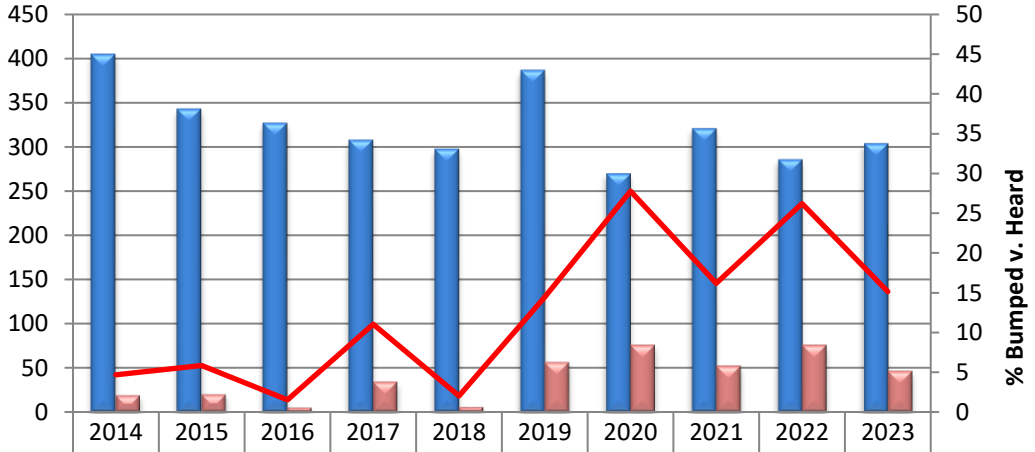
	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Heard	1,039	1,033	1,123	1,005	1,426	972	822	1,020	1,018	1,083
Bumped	52	44	32	106	45	142	71	120	107	171
% Bumped v. Heard	5.0	4.3	2.8	10.5	3.2	14.6	8.6	11.8	10.5	15.8

Figure 9: Trials Heard and Bumped in British Columbia



	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Heard	1,061	969	887	873	870	1,020	773	946	823	854
Bumped	61	43	21	98	33	140	142	128	141	136
% Bumped v. Heard	5.7	4.4	2.4	11.2	3.8	13.7	18.4	13.5	17.1	15.9

Figure 10: Trials Heard and Bumped in Vancouver



	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Heard	405	343	327	308	298	387	270	321	286	304
Bumped	19	20	5	34	6	56	75	52	75	46
% Bumped v. Heard	4.7	5.8	1.5	11.0	2.0	14.5	27.8	16.2	26.2	15.1

Figure 11: Trials Heard and Bumped by Type and Location in 2023

	HEARD 2023				BUMPED 2023			
	Civil	Criminal	Family	Total	Civil	Criminal	Family	Total
LOWER MAINLAND								
Abbotsford	8	10	12	30	4	0	1	5
Chilliwack	2	8	5	15	2	0	2	4
New Westminster	62	45	27	134	26	0	4	30
Port Coquitlam	6	0	10	16	0	0	0	0
Vancouver	183	44	77	304	37	1	8	46
Region Totals	261	107	131	499	69	1	15	85
Region %	82%	33%	61%	58%	70%	0%	63%	63%
VANCOUVER ISLAND								
Campbell River	0	4	3	7	0	0	0	0
Courtenay	2	7	4	13	0	1	0	1
Duncan	2	5	2	9	1	0	0	1
Nanaimo	5	21	10	36	3	3	0	6
Port Alberni	0	5	2	7	0	0	0	0
Powell River	2	4	0	6	0	0	0	0
Victoria	20	38	20	78	7	4	3	14
Region Totals	31	84	41	156	11	8	3	22
Region %	10%	26%	19%	18%	11%	0%	13%	16%
NORTHERN INTERIOR								
Dawson Creek	1	3	0	4	0	0	0	0
Fort St. John	1	2	3	6	1	0	0	1
Prince George	0	21	6	27	1	0	0	1
Prince Rupert	0	1	2	3	0	0	0	0
Quesnel	0	2	0	2	0	0	0	0
Smithers	2	5	2	9	1	0	0	1
Terrace	0	3	1	4	0	0	0	0
Williams Lake	0	5	3	8	0	0	0	0
Region Totals	4	42	17	63	3	0	0	3
Region %	1%	13%	8%	7%	3%	0%	0%	2%

	HEARD 2023				BUMPED 2023			
	Civil	Criminal	Family	Total	Civil	Criminal	Family	Total
SOUTHERN INTERIOR								
Kamloops	2	22	9	33	4	0	1	5
Kelowna	16	25	10	51	10	0	1	11
Vernon	1	9	3	13	0	1	0	1
Nelson	2	6	0	8	0	0	1	1
Cranbrook	0	9	1	10	2	0	0	2
Penticton	2	8	0	10	0	3	1	4
Salmon Arm	0	1	2	3	0	0	2	2
Rossland	0	7	0	7	0	0	0	0
Golden	0	1	0	1	0	0	0	0
Revelstoke	0	0	0	0	0	0	0	0
Region Totals	23	88	25	136	16	4	6	26
Region %	7%	27%	12%	16%	16%	0%	25%	19%
TOTAL	319	321	214	854	99	13	24	136
TOTAL %	37%	38%	25%		73%	10%	18%	

Figure 12: Trials Heard By Registry in 2023

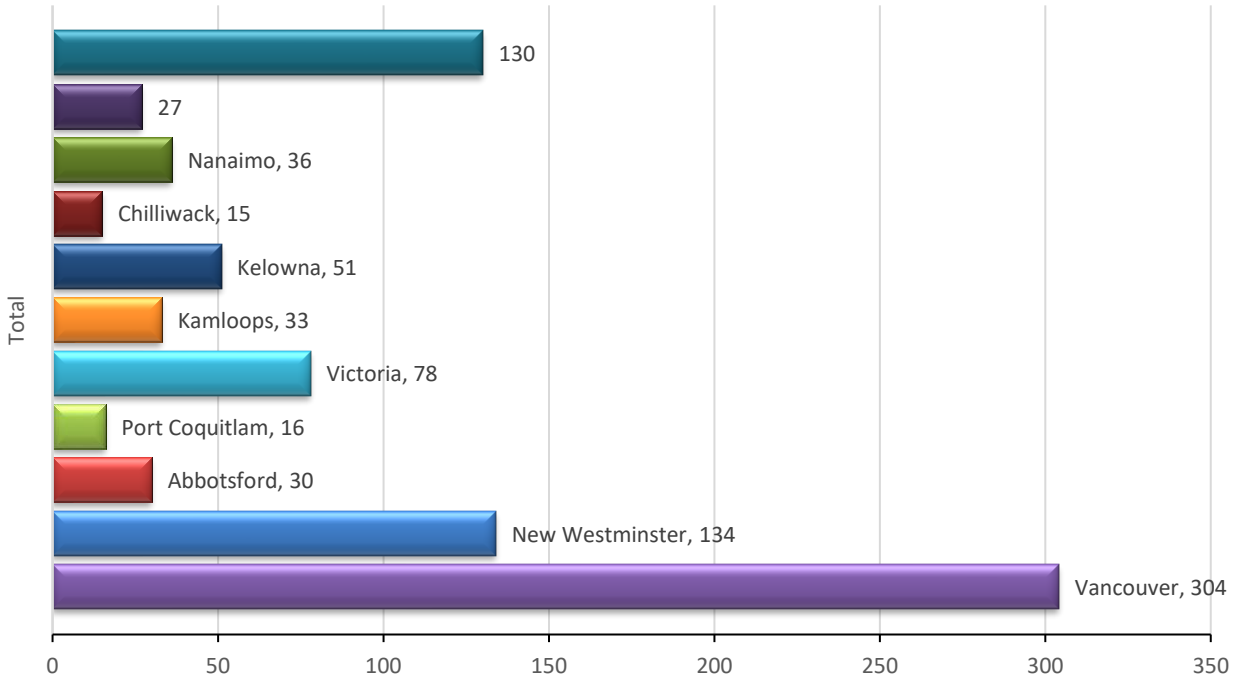


Figure 13: Trials Heard By Region in 2023

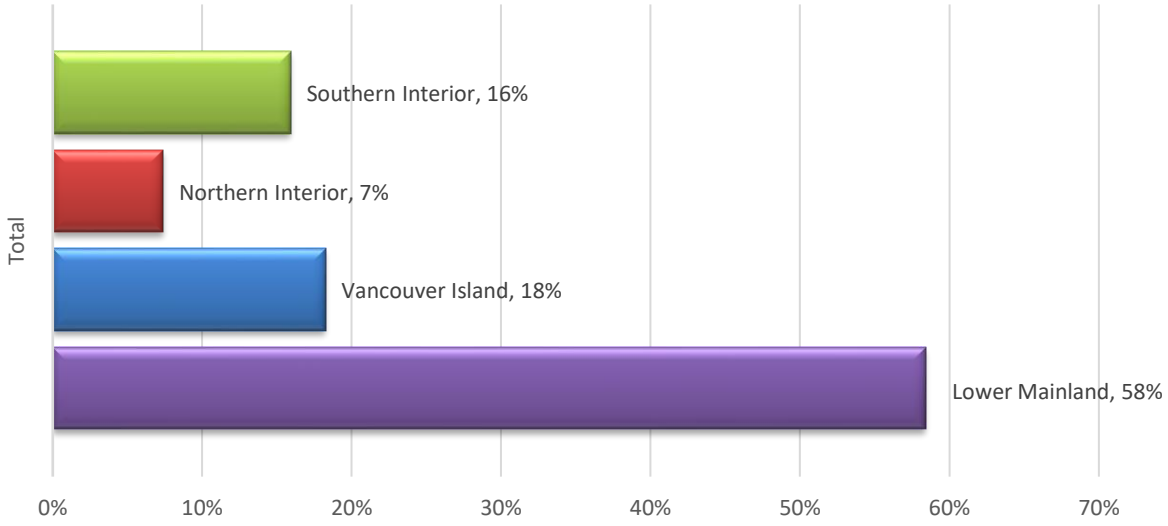
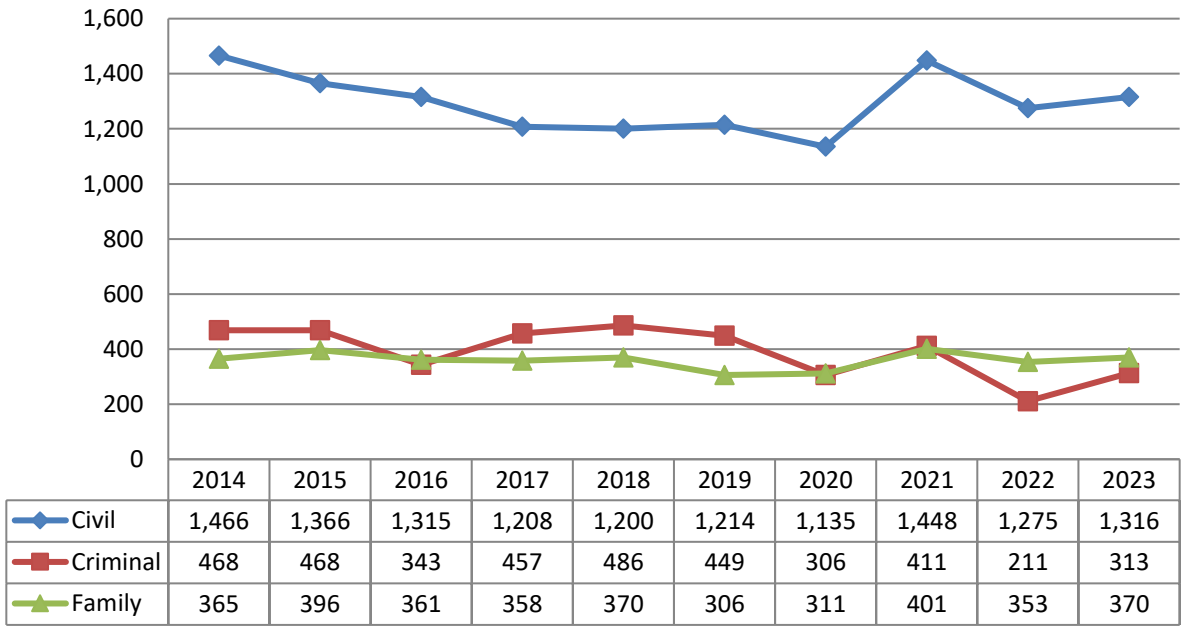


Figure 14: Published Reasons for Judgment by Subject, Type, and Year

	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
CIVIL										
Oral	285	316	306	340	305	309	267	379	327	389
Written	1,181	1,050	1,009	868	895	905	868	1069	948	927
Total	**1,466**	**1,366**	**1,315**	**1,208**	**1,200**	**1,214**	**1,135**	**1,448**	**1,275**	**1,316**
CRIMINAL										
Oral	348	354	280	344	377	371	248	314	163	246
Written	120	114	63	113	109	78	58	97	48	67
Total	**468**	**468**	**343**	**457**	**486**	**449**	**306**	**411**	**211**	**313**
FAMILY										
Oral	66	96	94	86	95	64	76	108	94	114
Written	299	300	267	272	275	242	235	293	259	256
Total	**365**	**396**	**361**	**358**	**370**	**306**	**311**	**401**	**353**	**370**
TOTAL	**2,299**	**2,230**	**2,019**	**2,023**	**2,056**	**1,969**	**1,752**	**2,260**	**1,839**	**1,999**

Figure 15: Published Reasons for Judgment by Year, 2014 – 2023



	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Civil	1,466	1,366	1,315	1,208	1,200	1,214	1,135	1,448	1,275	1,316
Criminal	468	468	343	457	486	449	306	411	211	313
Family	365	396	361	358	370	306	311	401	353	370

Figure 16: Published Reasons for Judgment by Subject, Type, and Year

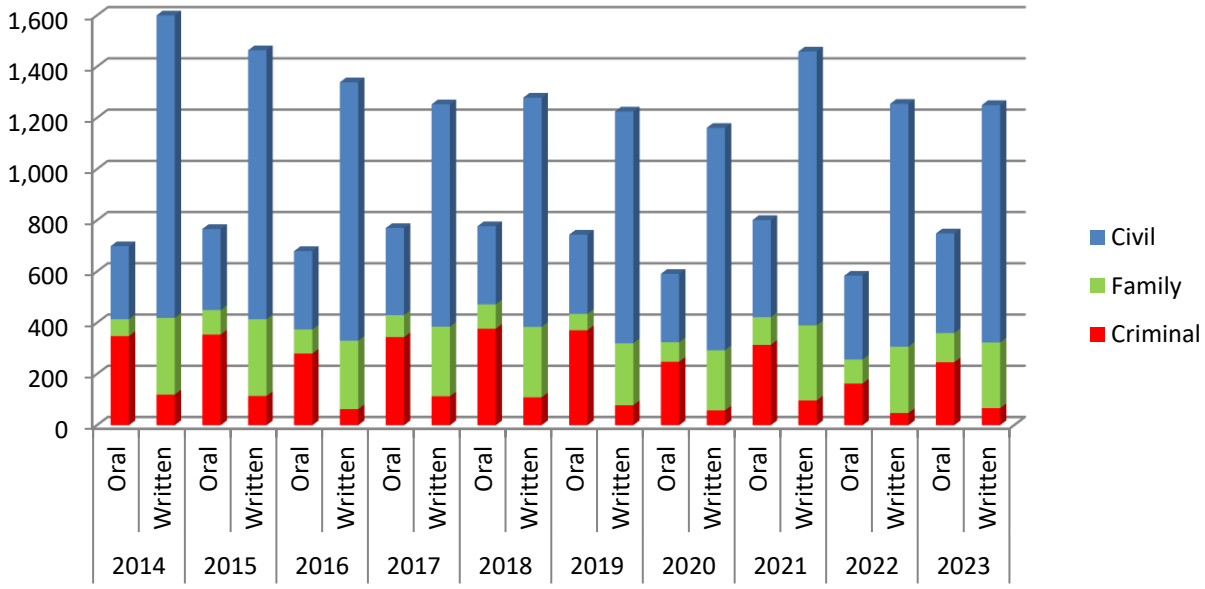


Figure 17: E-Filed Documents in Supreme Court

	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22	2022/23
Documents Filed	595,496	593,068	595,228	595,811	591,039	616,514	555,657	577,943	559,759
Documents E-Filed	218,788	232,974	246,026	259,148	262,846	279,645	346,203	314,293	297,546
% E-Filed	37%	39%	41%	43%	44%	45%	62%	54%	52%

Figure 18: E-Orders Processed in the Supreme Court

	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
E-Orders Processed	8,920	9,427	9,622	10,987	10,902	11,206	13,535	14,014	14,669	17,613

British Columbia
Judicial Compensation Commission
2022

FINAL REPORT

To the Attorney General and the Chief Judge of the Provincial Court

April 28, 2023

1 Overview

1.1 Introduction

The 2022 Judicial Compensation Commission ("2022 JCC") makes this report with our recommendations to the Attorney General and the Chief Judge of the Provincial Court. We have been mandated to make independent and objective recommendations regarding the remuneration, allowances, and benefits of British Columbia's Provincial Court judges and judicial justices. We have considered all the information placed before us[1] and assessed it with respect to each of the statutory factors (described below), and as a whole. We have looked back at the work of past judicial compensation commissions, and forward in making recommendations for the four fiscal years ahead.

Compensation of the judiciary—and the process by which changes to compensation occur—must respect the constitutional principle of judicial independence. The courts must "be free and appear to be free of political interference through economic manipulation by other branches of government" including the legislature.[2] While the legislative branch of government must authorize all public spending and may reduce, increase, or freeze judicial salaries, "the imperative of protecting the courts from political interference through economic manipulation requires that an independent body—a judicial compensation commission—be interposed between the judiciary and the other branches of government."[3]

The executive and legislative branches of government may decide on the "exact shape and powers" of such a commission; nevertheless, a judicial compensation commission must be independent, objective, and effective.[4] Its constitutional function is to depoliticize the process of determining judicial remuneration.

In British Columbia, the *Judicial Compensation Act* (the "Act") sets out the process for selecting an independent commission to make recommendations on all matters respecting the remuneration, allowances and benefits of Provincial Court judges and judicial justices.[5] The commissioners must

---

[1] See Appendices A, B, D, F, and G. The full citations for abbreviations used in the footnotes to this report are found in Appendices A, B, and D.

[2] *Reference re Remuneration of Judges of the Provincial Court of PEI; Reference re Independence and Impartiality of Judges of the Provincial Court of PEI*, [1997] 3 SCR 3 ["*PEI Reference*"], para. 131.

[3] *PEI Reference*, para. 147.

[4] *PEI Reference*, paras. 167, 170, 173, and 174.

[5] *Judicial Compensation Act*, SBC 2003, c. 59 [the "*Judicial Compensation Act*"], ss. 2(2), and 5(1).

make recommendations with reference to objective criteria—not political expediencies.[6] The Act provides objective criteria for the commission's use in the form of six factors for consideration:[7]

(a) the need to maintain a strong court by attracting highly qualified applicants;

(b) changes, if any, to the jurisdiction of judges or judicial justices;

(c) compensation provided in respect of similar judicial positions in Canada, having regard to the differences between those jurisdictions and British Columbia;

(d) changes in the compensation of others paid by provincial public funds in British Columbia;

(e) the generally accepted current and expected economic conditions in British Columbia; and

(f) the current and expected financial position of the government over the 4 fiscal years that are the subject of the report.

The commission may also consider other factors it considers relevant.[8]

In addition to being independent and objective, "most importantly, the commission must also be effective."[9] For the commission process to be effective, the government must not make changes to judicial compensation until it has received a report from a judicial compensation commission, and the commission must convene at regular intervals to protect against the reduction in judicial salaries due to inflation.[10] Further, the commission's report "must have a meaningful effect on the determination of judicial salaries."[11] "Meaningful effect" does not mean the commission's report is binding on government; the government retains the power to depart from the commission's recommendations as long as it justifies its decision to do so with "rational reasons."[12] However, the commission's recommendations must be given weight.[13]

---

[6] *PEI Reference*, para. 173.

[7] *Judicial Compensation Act*, s. 5(5).

[8] *Judicial Compensation Act*, s. 5(5.2).

[9] *PEI Reference*, para. 173.

[10] *PEI Reference*, para. 174.

[11] *PEI Reference*, para. 175.

[12] *Provincial Court Judges' Association of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Association v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 SCC 44, [2005] 2 SCR 286 ["*Bodner*"], paras. 20-22; *PEI Reference*, paras. 182-184.

[13] *Bodner*, para. 23.

1.2 Summary of Recommendations

1. *Salaries*: The Government should set the Provincial Court judges' and judicial justices' salaries for the next four fiscal years as follows:

Fiscal Year:	2023-24	2024-25	2025-26	2026-27
Provincial Court Judges	$343,000	$360,000	$360,000 + a percentage increase equivalent to the annual average percentage change in BC CPI for 2024[14]	2025-26 salary + a percentage increase equivalent to the annual average percentage change in BC CPI for 2025
Judicial Justices	$172,000	$177,000	$182,000	$187,000

2. *Salary Differentials:* Administrative judges should continue to receive the following percentages of a puisne judge's salary: Chief Judge 112%; Associate Chief Judges 108%; and Regional Administrative Judges 106%. Administrative Judicial Justices should receive 106% of judicial justice compensation.

3. *Judges' Pensions*: The 3% accrual rate for judge's pensions should be maintained.

4. *Non-judicial Pensions for Judges:* The *Judicial Compensation Act* should be amended to align the non-judicial pensionable service provisions with the Public Service Pension Plan rule changes made in 2018 and 2022, as detailed in Appendix F, in respect of the following:
   i. the benefit accrual rates for service between April 1, 2018 - March 31, 2022, and after April 1, 2022;
   ii. the past service benefit enhancement and the bridge benefit for the period of April 1, 2006 - March 31, 2018 and after April 1, 2018; and
   iii. the early retirement factor for non-judicial service earned on or after April 1, 2018.

5. *Flexible Benefits Program*: Effective January 1, 2024, Provincial Court judges should receive the enhancements to the flexible benefits program that were offered to excluded public sector employees on January 1, 2023. Future enhancements to the flexible benefits plan for excluded employees and appointees should be automatically implemented for the Provincial Court judges, with the judiciary having recourse to seek changes through future judicial compensation commissions.

[14] See footnote 261, *infra*, for remarks about the calculation of BC CPI.

6. *Part-time Judicial Justice Amount in lieu of Benefits:* The amount in lieu of benefits added to the per diem pay for part-time judicial justices should be increased from 20% to 22%.

7. *Shift Premiums for Judicial Justices*: As set out in Appendix G, new holidays should be added to the list of the holidays that attract a $245 shift premium, the shift premium for Christmas Day should be increased by $75, a weekend shift premium of $75 should be implemented and a court closure day shift premium of $75 should be implemented.

8. *Overhead Amount for Part-time Judicial Justices*: The overhead amount added to the per diem pay for part-time judicial justices should be increased from $75 to $100.

9. *Professional Development Allowance*: For the next four fiscal years, the professional development allowance for judges should remain at $4,500 per year, and the professional development allowance for judicial justices should remain at $3,250 per year.

10. *Travel Allowance*: The current travel allowance (or travel per diems) for judges and judicial justices should be maintained.

11. *Interest on Retroactive Salary Increases*: For retroactive salary increases, the Government should pay judges or judicial justices pre-judgment interest from April 1, 2023 to the date on which the increase is established and post-judgment interest thereafter until payment is made.

12. *Costs*: The Government should, by regulation pursuant to section 7.1(3) of the *Judicial Compensation Act*, reimburse 100% of the reasonable costs and disbursements, including expert witness costs, of the Provincial Court Judges Association (PCJA) and the Judicial Justices Association (JJA) for their participation in the 2022 Commission process.

2 The 2022 Commission and Its Process

2.1 Who Are We and What Was our Mandate?

The 2022 JCC consists of five Commissioners tasked with preparing a report to the Attorney General and the Chief Judge on "all matters respecting the remuneration, allowances and benefits of judges and judicial justices." The Commissioners make recommendations on those matters for each of the fiscal years 2023-24, 2024-25, 2025-26, and 2026-27.[15] The need to provide reasonable compensation for judges and judicial justices guides this mandate.[16]

The statutory appointment process resulted in the following appointments:[17]

1. **Vern Blair**, FCPA, FCA, FCBV, FRICS, is a Chartered Professional Accountant and a Chartered Business Valuator. He negotiates for and advises owners and management and is an arbitrator and mediator.

2. **Lisa Castle** is a part-time consultant specializing in supporting organizations to become stronger with their people. She worked in higher education for 28 years, with the majority of those holding the most senior Human Resources role including UBC's first Vice-President, Human Resources.

3. **Eric Gottardi**, KC, is a Vancouver lawyer and former chair of the CBA National Criminal Law Section and the Criminal Section of the Uniform Law Conference of Canada. He sits as a non-bencher adjudicator with the Law Society's Discipline Tribunal and on the Faculty (and as a planner) of the Federation of Law Societies' Criminal Law Program.

4. **Robert Lapper**, KC, is a lawyer and law professor. Currently Faculty Chair in Law and Public Policy at the University of Victoria, he previously served as CEO of the Law Society of Ontario, and in several Deputy Minister and Assistant Deputy Minister positions in the BC Government.

5. **Lynn Smith**, OC, KC, Commission Chair, is a retired Justice of the Supreme Court of British Columbia and a former law Professor and Dean of Law at the University of British Columbia.

The Commissioners retained Kathy L. Grant as their counsel.

---

[15] *Judicial Compensation Act*, ss. 2(2), and 5(1).

[16] *Judicial Compensation Act*, s. 5(5).

[17] *Judicial Compensation Act*, s. 2(2).

Independent of both government and the judiciary, the Commissioners strove to produce an objective report, based on evidence, and taking into account all the factors set out in section 5(5) of the Act.

2.2 What Did We Do?

After holding pre-hearing conferences with the main participants—the Government, the PCJA, the JJA, and the Chief Judge—we received written submissions from them and others, we held oral hearings, we visited several courts, and we deliberated and prepared this report.

As set out in Appendix A, we received written submissions from the main participants as well as the Judicial Council, Canadian Bar Association BC Branch, and the Law Society of British Columbia. The Government has made these submissions publicly available through the Commission's webpage, online: https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/judicial-compensation/2022-judicial-compensation-commission. Appendix B describes the books of documents from the main participants, most of which were jointly compiled.

We held four days of in-person oral hearings in Vancouver in mid-February 2023. We held two additional virtual oral hearings, through Zoom, on March 10, 2023 and March 13, 2023, to hear submissions about the provincial budget that was delivered on February 28, 2023 and to complete submissions on the issue of costs. During oral hearings, we heard submissions from the PCJA, the JJA, the Chief Judge (who also spoke for the Judicial Council), and the Government.

We also heard from three witnesses, as set out in Appendix C. Both Mr. Ian McKinnon, a consultant with Pacific Issues Partners, and Ms. Heather Wood, Deputy Minister of Finance for British Columbia, provided evidence concerning the current and expected economic conditions in British Columbia and the current and expected financial position of the government. Mr. André Sauvé, an actuary in private practice, provided us with a comparative analysis of judicial pension plans in Canada.

Documents provided to the Commission during the oral hearing were marked as exhibits, as set out in Appendix D.

To inform our understanding of the work of the Provincial Court, we visited various court locations (see Appendix E). A representative of the Government attended all the court visits. We were impressed by the wide range of cases coming before the court and the fast pace of the work. We saw many instances of the judges dealing with unrepresented litigants and observed the judges' and judicial justices' abilities to find the delicate balance between ensuring equal access to justice for unrepresented persons and maintaining judicial impartiality. We also witnessed the impressive innovations of the Provincial Court through, for example, the Indigenous Court and the Downtown Community Court.

We considered all the submissions, documents, witness evidence, and other information described above during our deliberations and report writing. In this report, we highlight the information that is most pertinent to understanding our recommendations.

2.3 What Challenges Did We Face?

We begin by acknowledging the extraordinary work of the participants and their counsel in preparing for and organizing the hearings, and then providing us with evidence, documentation, and detailed and careful submissions—all in an unforgiving timeframe, as described below.

However, we did face certain challenges in completing our mandate.

First, recent statutory amendments extended the timeline for the Commission's recommendations from three fiscal years to four fiscal years. The inherent uncertainty in forecasting future conditions, particularly with respect to the "expected" elements of the factors set out in subsections 5(5)(d) and 5(5)(e) of the Act, increases with the addition of another year to a commission's mandate.

Second, the Government delayed the appointment and reporting of the 2022 JCC such that, instead of the Commission operating in the March 1 to October 31 timeframe, it operated over the September 1 to April 30 timeframe.[18] The logical timing for hearings—midway during the commission process—could not be utilized as it fell during the December holiday season. Unfortunately, participants, counsel for the participants, and the Commissioners had prior commitments in January and early February that pushed the dates for oral hearings into mid-February 2023. This left only six weeks for the Commissioners to produce a preliminary report by April 1, 2023, instead of the 2.5 to three months usually available to judicial compensation commissions.

Third, this tight timeline became even more challenging due to the delivery of the 2023-24 provincial budget on February 28, 2023—after the Commission's oral hearings. As the budget contained forecasting of economic conditions and the Government's financial position through to later years of the Commission's mandate, it was important for the Commissioners to hear submissions on the budget. The Commission held additional virtual hearings on March 10 and March 13, 2023. Consequently, the Commissioners had only three weeks after final submissions to prepare their preliminary report.

In addition, in the late afternoon of March 30, 2023, the day before we delivered our Preliminary Report, we were advised that the Lieutenant Governor in Council had increased the maximum amounts for participation costs for the Provincial Court Judges' Association and the Judicial Justices' Association.[19]

---

[18] *Bill 30 – 2021 Attorney General Statutes Amendment Act, 2021*, third reading, s. 9.

[19] B.C. Reg. 83/2023, approved and ordered on March 30, 2023. Order in Council No. 194 sets higher amounts for the purposes of section 7.1(2) of the Judicial Compensation Act and effectively revises that section to read as follows:

> (2) The maximum amount that may be paid under subsection (1), which maximum amount applies separately to the Provincial Court Judges' Association of British Columbia and the Judicial Justices Association of British Columbia, is as follows:
> (a) the first $40,000 in costs;
> (b) 85% of the costs over $40,000 but under $150,000.

We were, however, able to consider whether this new regulation changed our conclusions regarding costs prior to issuing our Final Report.

The results of the 2019 Judicial Compensation Commission ("2019 JCC") with respect to Provincial Court judges' compensation were unknown at the time we delivered our Preliminary Report. A decision from the Supreme Court of British Columbia on judicial review was then outstanding.As it happens, that Supreme Court decision was delivered on April 3, 2023, two days after we delivered our Preliminary Report on the 2022 JCC.[20] The Supreme Court quashed two motions of the Legislative Assembly rejecting the salary and costs recommendations of the 2019 JCC. The matter has been remitted back to the Legislative Assembly for its reconsideration. Thus, the question of compensation for Provincial Court judges for the period covered by the 2019 JCC is still unsettled, as is the question of costs for the 2019 JCC.

Unfortunately, these timing issues are not unique to the 2022 JCC. For several cycles, judicial compensation commissions have had to deal with the same problem: not knowing the final result of the previous commission process. We do not yet know the "final" compensation that will be paid to judges over the 2019 JCC's mandate.

Finally, the issue of whether and in what circumstances a commission may make a recommendation that departs from the costs formula set out in section 7.1 of the *Judicial Compensation Act* was—at the time the Commission conducted its hearing and wrote its Preliminary Report—before the Supreme Court of British Columbia in the judicial review proceeding following the 2019 JCC. This Commission had to consider whether its recommendations on costs risked conflicting with the (then) anticipated court decision. Additionally, the Government delayed providing submissions on costs until the evening of March 4, 2023 to allow more time for the Court to deliver judgment.[21] (As it transpired, in our view our recommendations on costs in the Preliminary Report of April 1, 2023, are fully consistent with the April 3, 2023 Supreme Court decision.)

While understandable, this delay put further stress on the timing for the 2022 JCC's report.

Some of these challenges were unavoidable, but we make the following suggestions to aid future commissions in their work:

- Any change to the statutory timing for a judicial compensation commission should allow for hearings midway through the commission's process (and should only be made after consultation with the PCJA, JJA, and Chief Judge). This will ensure adequate time for report preparation following the hearings;

- Counsel for the Government, JJA, and PCJA, as well as the Chief Judge should come to the process with significant flexibility in their schedules for a mid-process hearing. In the normal process this would mean hearings at the end of June or early July;

[20] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2023 BCSC 520.

[21] Main Submission of Government, para. 71; Costs Submission of Government.

- Potential commissioners should be pre-screened, prior to their appointment, for their ability to participate in hearings midway through the process;

- The time frame for the commission's work should not overlap with a provincial budget; and

- Submissions on all substantive issues should be delivered to the commission prior to oral hearings. If necessary, the commission has the discretion to seek additional submissions or information if required.

3 The Role and Work of Provincial Court Judges and Judicial Justices

3.1 Jurisdiction and Composition of the Provincial Court

The Provincial Court's judges and judicial justices are the face of justice to most British Columbians. The Court has broad jurisdiction and operates at over 80 locations.

The Provincial Court is one of two trial courts in the province—the other being the Supreme Court of British Columbia. The Provincial Court is a statutory court, with broad jurisdiction.[22] The Court and every judge exercise "power" and "perform all the duties" conferred on them under federal and provincial legislation.[23] The Court exercises jurisdiction in six primary subject areas: adult criminal, youth criminal, family, child protection, civil (small claims), and traffic, ticket, and bylaw matters.

Previous judicial compensation commissions aptly described the Provincial Court as the "People's Court."[24] The Provincial Court hears 95% of the criminal cases in British Columbia. The only significant exceptions are where an accused elects to be tried by a Supreme Court Justice with or without a jury, murder cases, and extradition cases. In many such cases, a preliminary hearing may be held in Provincial Court. The Provincial Court has exclusive jurisdiction over child protection proceedings. It exercises concurrent jurisdiction with the Supreme Court under the *Family Law Act* over matters of guardianship, parenting arrangements and child and spousal support. It has broad civil jurisdiction over claims between $5,001 and $35,000, and it hears applications for exceptions from the Civil Resolution Tribunal (concerning matters of $5,000 or less).[25]

Certain matters before the court may only be heard by a Provincial Court judge.[26] Aside from these, the Chief Judge may assign the matters to be heard by either judges or judicial justices.[27] Currently, judicial justices hear the following: bail hearings outside court sitting hours, judicial

[22] Main Submission of Government, para. 31; Submissions of Chief Judge, paras. 15-20; Main Submission of PCJA, paras. 79-80; Submission of Judicial Council, para. 19.

[23] *Provincial Court Act*, RSBC 1996, c. 379 [*Provincial Court Act*], s. 2(3).

[24] See for example, Judicial Compensation Commission 2019 Final Report, October 24, 2019, JBD, Vol. 1, Tab 18, p. 10.

[25] See descriptions of jurisdiction in Main Submission of PCJA paras. 79-103; Main Submission of Government, paras. 29-31, 42; and Submission of Chief Judge, paras. 17-20.

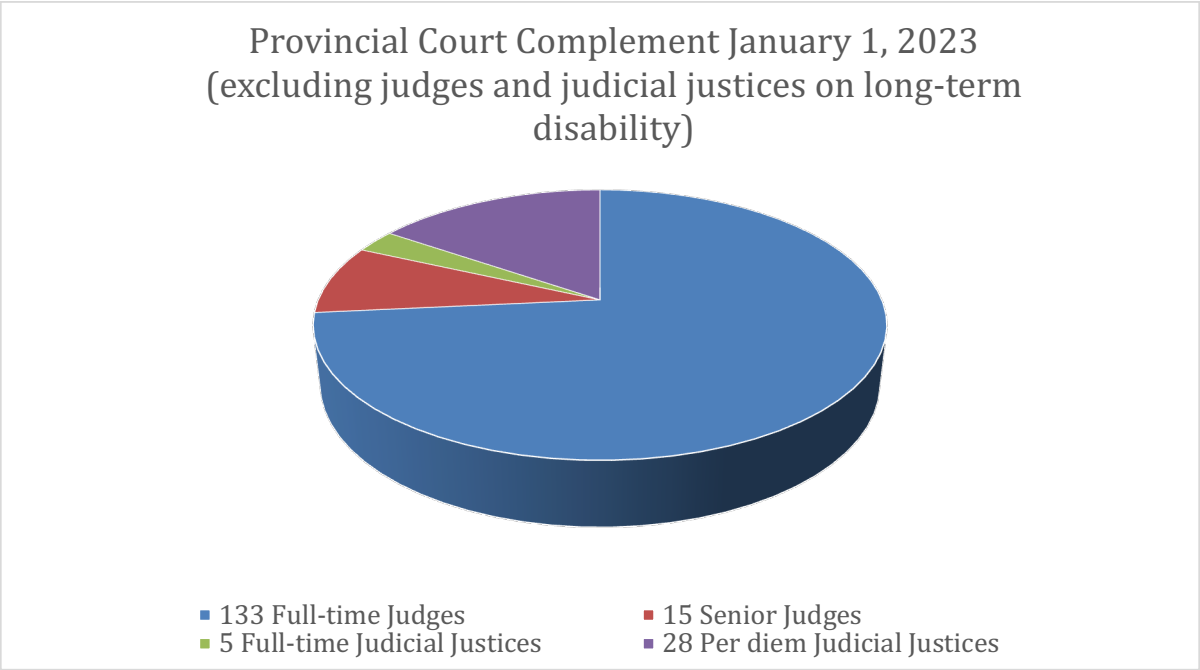
[26] *Provincial Court Act*, s. 2.1.

[27] *Provincial Court Act*, s. 11.

authorization applications (including for search warrants and production orders), payment hearings, ticket violation hearings, and traffic offences hearings.[28]

In short, most people who come to court in British Columbia, do so before a judge or judicial justice of the Provincial Court. These judges and judicial justices are the face of justice to most British Columbians.

As of January 1, 2023, there were 131 full-time Provincial Court judges and 15 senior judges (0.45 of a full-time judge) for a complement of roughly 138 full-time equivalent judges.[29] Five full-time judicial justices and 28 part-time or "per diem" judicial justices make a total of 33 judicial justices.[30]



The judges and judicial justices work at over 80 physical locations across the province, in five regions, as depicted in the figure below.[31] Full-time registries operate at 44 of these locations. Additionally, since the fall of 2020, the Court sits in six virtual bail courts that do not have a

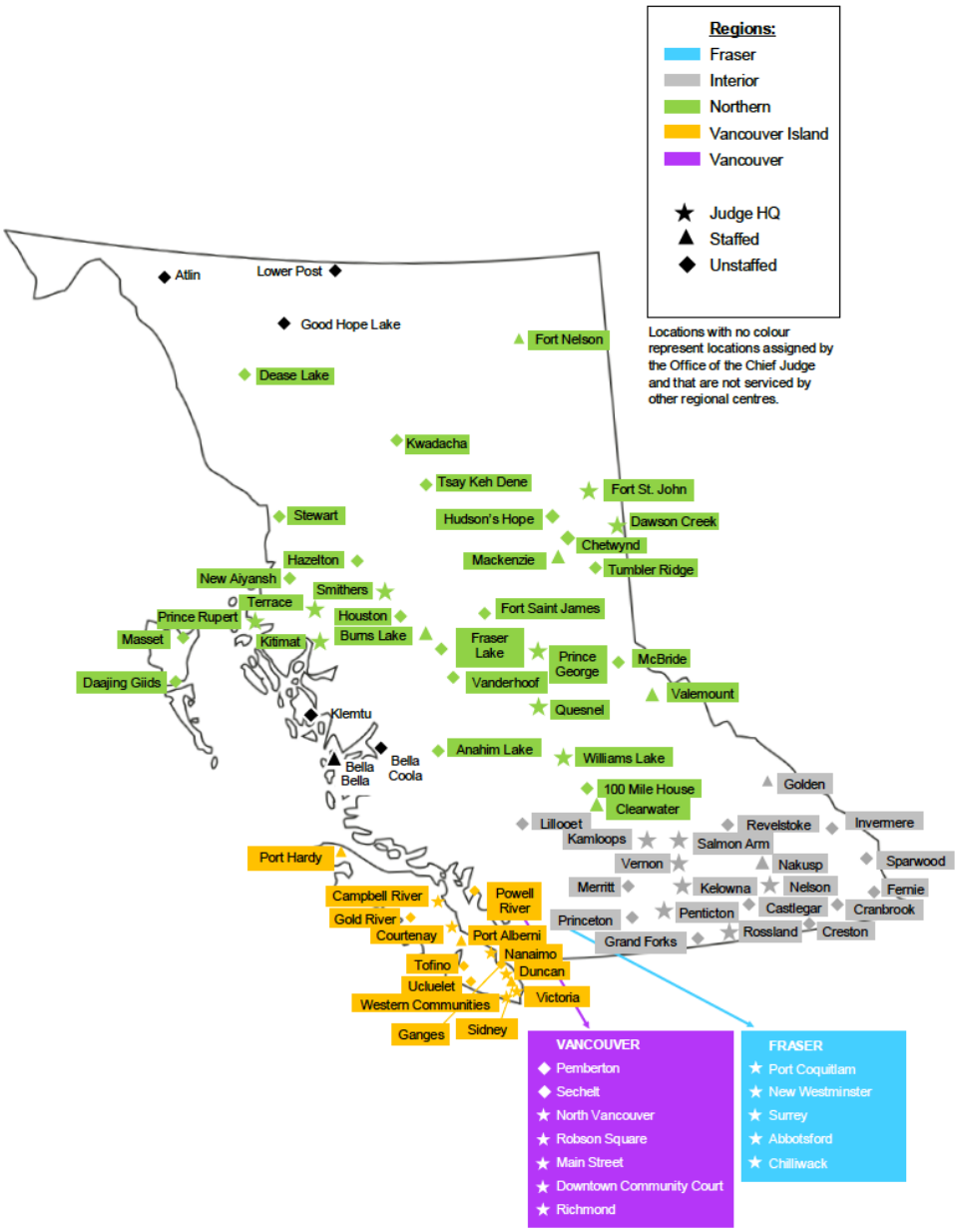
[28] Submission of Chief Judge, para. 137; Main Submission of JJA, paras. 40, 48, 58, 70, 74, and 78; Main Submission of Government, para. 60; Judicial Justices Assignment of Duties Pursuant to s. 11 of the *Provincial Court Act*, January 14, 2023, Supplemental Book of Documents of the JJA, Tab 7.

[29] Submission of Chief Judge, para. 31. Note these numbers do not include judges on long-term disability. The Chief Judge explained that these numbers are "constantly in flux" and that the number is expected to decline this year due to senior elections and retirements that are coming up: TR February 15, 2023, Chief Judge Gillespie, p. 162, ll. 15-19.

[30] Submission of Chief Judge, para. 135. Note these numbers do not include judicial justices on long-term disability. One of the full-time judicial justices is currently sitting part-time. Per diem judicial justices are guaranteed 40 working days per year under s. 30.2(4) of the *Provincial Court Act*, RSBC 1996, c. 379.

[31] This figure was taken from Submission of the Chief Judge, p. 12.

physical building and that are staffed by clerks and judges (or judicial justices) who may be working in any location in the province. Similarly, the counsel and accused in these virtual bail courts may be at any location in the province.[32]



Some judges hold administrative roles within the court. An administrative judge is paid more than a puisne judge because of their extra duties:

- The Chief Judge receives 112% of the puisne judge salary;

[32] TR, February 15, 2023, Chief Judge Gillespie, p. 136, l. 1 to p. 137, l. 6.

- Two Associate Chief Judges receive 108% of the puisne judge salary; and
- Five Regional Administrative Judges receive 106% of the puisne judge salary.[33]

Similarly, two Administrative Judicial Justices receive 106% of a judicial justice's remuneration.[34]

3.2 Current Work of the Court

On average, 65% of the Provincial Court's work is criminal, 25% is family law (including child protection), and 10% is civil.[35]

In 2021-22, the court received the following numbers of new or incoming cases:

- 79,458 new or incoming cases in the five subject areas heard by judges (adult criminal, youth criminal, family, child protection and small claims); and
- 69,346 new or incoming traffic, ticket and bylaw offences dealt with by judicial justices.[36]

These numbers are the lowest in the last five years. However, both the Chief Judge and the Government told us to view the numbers since 2020 with caution due to the impact of the COVID-19 pandemic.[37]

From 2017-18 to 2021-22, much of the drop in criminal cases—the largest portion of the Court's work—is explained by drops in property offences and administration of justice offences (e.g., failure to appear or breaches of conditions). The pandemic closures and restrictions on travel, the reduction in in-person hearings, and the shift to working from home all resulted in reduced opportunity to commit these types of offences.[38] However, violent crime and offences against the person—including sexual assaults—have increased slightly over the period from 2017-18 to 2021-22. Increased reporting of sexual assault cases likely accounts for this increase.[39] Offences against the person are among the most complicated cases heard by the Provincial Court. Sexual assault cases can involve multiple applications and complicated rulings on *voir dires*. They may require the appointment of legal aid counsel to assist the complainant, and commonly experience scheduling delays and lengthy trials.[40]

The number of self-represented litigants has declined over the last two years. However, again, the numbers need to be approached with caution due to the court shut-down and modifications made during the COVID-19 pandemic. Still, in 2021, there were close to 70,000 appearances made by

[33] Submission of Chief Judge, para. 124.

[34] Submission of Chief Judge, para. 165.

[35] TR, February 15, 2023, Chief Judge Gillespie, p. 138, ll. 20-24.

[36] Main Submission of Government, para. 44; Submission of Chief Judge, paras. 16 and 150.

[37] Submission of Chief Judge, para. 16; Main Submission of Government, paras. 46 and 48.

[38] TR February 15, 2023, Chief Judge Gillespie, p. 149, ll. 4-14; Exhibit 8 pp. 10 and 19-20.

[39] TR February 15, 2023, Chief Judge Gillespie, p. 149, ll. 15-21; Exhibit 8 pp. 10 and 19-20.

[40] TR February 15, 2023, Chief Judge Gillespie, p. 150, ll. 4-23.

self-represented litigants in the small claims, family, and criminal divisions[41]—that is hundreds of appearances by self-represented litigants every day the court is open. The Chief Judge told us that "the number of self-represented litigants has an impact on every step of the court process."[42]

Provincial Court Judges

The Chief Judge explained that the workload of judges is affected by several factors in addition to the volume of new cases.[43] BC Provincial Court judges do not specialize as they do in some other provinces.[44] Judges in British Columbia hear all types of cases—criminal, family, and civil—sometimes all in the same day. Judges need to come to the court with either "a diverse practice or the ability to learn and be conversant in multiple areas of the law quickly."[45] Sometimes, a judge may be the only judge at a court location and therefore must be capable of dealing with all subject matters and providing reasons on those matters in relatively quick order.[46] Judges working in the Northern Region often travel long distances in all types of weather to reach remote court locations. Judges assigned to chambers in the Northern Region may spend up to 30-40% of their sitting time on travel status.[47]

While Provincial Court judges may reserve judgment in a longer matter, most decisions are delivered orally at the end of the case following a brief opportunity to consider the material. The judges have little research assistance.[48] Still, where cases are appealed to the Court of Appeal, the judges' decisions face the same standard of appellate review as decisions of the Supreme Court of British Columbia, creating "a tension between the volume of the work and the desire to serve the public in a timely manner and to 'get it right'."[49]

Technological innovations, particularly the ability of judges to sit virtually, have affected how judges work. As the Chief Judge told us, "It used to be your day was not completed as a judge until the work in your courthouse was completed. Now your day may not be completed until the work in the province is completed because you can be hearing virtual matters, case conferences, taking matters from bail lists all over the province."[50] In 2021-22, 79% of all court appearances (excluding

[41] Main Submission of Government, para. 47.

[42] Submission of Chief Judge, para. 27.

[43] See full list of factors in Submission of Chief Judge, para. 21.

[44] TR February 15, 2023, Chief Judge Gillespie, p. 139, l. 1 to p. 140, l. 6; Submission of Judicial Council, para. 19.

[45] TR February 15, 2023, Chief Judge Gillespie, p. 140, l. 7 to p. 141, l. 4.

[46] *Ibid.*

[47] Submission of Judicial Council, para. 20.

[48] Submission of Judicial Council, para. 20.

[49] Submission of Chief Judge, para. 30.

[50] TR February 15, 2023, Chief Judge Gillespie, p. 156, l. 22 to p. 157, l. 7.

traffic and bylaw) were "technology enabled appearances" where one or more of the participants appeared remotely by audio- or video-conferencing or telephone.[51]

The Provincial Court has taken an innovative approach to the administration of justice, leading to national recognition for some of its specialized courts:[52]

- Vancouver's Downtown Community Court;
- Victoria's Integrated Court;
- Drug Treatment Court of Vancouver;
- Indigenous Courts (in eight locations);
- Aboriginal Family Healing Court Conferences (New Westminster);
- Domestic Violence Courts (Cowichan Valley, Nanaimo, Surrey, Kelowna, Penticton, and Kamloops); and
- Kelowna Integrated Court.

Judicial Justices

Judicial justices work in two areas: [53]

a. Traffic Division: these Judicial Justices sit in courthouses around the province, hearing disputed violation tickets, small claims payment hearings, disputed municipal bylaw tickets and applications for judicial authorizations brought in person before the court. These Judicial Justices work weekdays when the courthouses are open.

b. Justice Centre: located in Burnaby, the Justice Centre provides access to Judicial Justices from anywhere in the province using telephone and video conferencing. Twenty-three Judicial Justices work through the Justice Centre, either on site or remotely (those working remotely will "sit" at home). These Judicial Justices conduct bail hearings daily outside of court sitting hours, including on weekends and statutory holidays. They also consider judicial authorization applications such as those for search warrants and production orders 24 hours a day, seven days a week.

For traffic, ticket, and bylaw work, as noted above, total case numbers have declined over the last five years—though the numbers need to be understood in the context of the COVID-19 pandemic. The work of a judicial justice in traffic court can be very demanding, with court lists in the range of 60 matters per day, and without the assistance of support staff, a court clerk, or a sheriff.[54] The large number of self-represented litigants contributes to the intensity of the workload. Judicial

[51] Appendices for Submission of Government, Tab 1: Provincial Court of British Columbia Annual Report 2021/22, p. 34.

[52] See generally, Submission of Chief Judge, paras. 72-106.

[53] Main Submission of Government, para. 61, based on Provincial Court of British Columbia Annual Report 2021/22 p. 33.

[54] Submission of Chief Judge, paras. 151-152; Submission of Judicial Council, paras. 40-41.

justices often need to inform self-represented litigants about procedural matters.[55] Payment hearings can be very stressful for all concerned as the judgment debtor often has little financial resources but is legally obligated to satisfy a judgement.[56]

The number of bail hearings heard through the Justice Centre has declined somewhat over the last five years, with judicial justices conducting just over 18,000 bail hearings in 2021-22.[57] While judicial justices heard fewer search warrant/production order applications in 2021-22 than 2020-21, the total for 2021-22 (18,711) was considerably higher than for 2019-20 (16,297) and follows an upward trend in cases since 2015-16.[58]

Almost all of the Justice Centre's work is "unscheduled and is performed in 'real time', in a fast-paced environment with high expectations for timely decisions."[59] Bail hearings often proceed without the accused person having a lawyer. This makes the determination of whether to release an individual and, if so, under what conditions, more challenging.[60] Despite the "Crown-led bail" initiative, discussed in section 3.3, police-led bail hearings continue to occur. Because the police officers are not lawyers and may have difficulty shedding their investigative role for the purpose of the hearing, the judicial justice must be particularly vigilant to the requirements of the administration of justice including fairness to the person detained. In judicial authorization applications, judicial justices must "balance an individual's security against unreasonable search or seizure, weighed against the interest of the state to investigate crime."[61]

We heard evidence about how the federal Bill S-4[62] makes changes to the way in which judicial authorization applications are received and considered. More specifically, we heard about how this change is increasing the workload of judicial justices and how it is creating staffing challenges for the Chief Judge. This evidence is discussed in section 4.2.

3.3 Resilience and Resourcefulness of the Court

We heard much about the Provincial Court's resilience and resourcefulness in delivering access to justice. We also observed some of the court's innovations during our court visits.

In the area of family law, in collaboration with the Justice Services Branch of the Ministry of the Attorney General, the court has expanded an early resolution process, which launched in Victoria in 2019, to Surrey in 2020. This model provides families with early access to information and an

[55] Submission of Chief Judge, para. 153; Submission of Judicial Council, paras. 40-41.

[56] Submission of Chief Judge, para. 154.

[57] Submission of Chief Judge, para. 140.

[58] Submission of Chief Judge, para. 140.

[59] Submission of Chief Judge, para. 148.

[60] Submission of Chief Judge, para. 145; Submission of Judicial Council, para. 40-41.

[61] Submission of Chief Judge, para. 147.

[62] Bill S-4, *An Act to amend the Criminal Code and the Identification of Criminals Act and to make related amendments to other Acts (COVID-19 response and other measures)* received Royal Assent on December 15, 2022. It came into force on January 14, 2023.

opportunity to mediate. It has significantly reduced the cases that proceed to trial. In 2021, the court implemented new *Provincial Court Family Law Rules*, which are easier for litigants to understand, and which allow for streamlined appearances. Under the new Rules, the court launched the Informal Trial Pilot Project in Kamloops in 2022. If parties agree to the informal process, the judge may allow evidence that is relevant, material, and reliable, even if it might not be allowed under the strict rules of evidence. The judge may also help the parties settle issues.[63]

The court has implemented a desk order process under the new *Family Law Rules*, enabling applicants to apply for an order without having to make a court appearance. These applications are processed within two days, adding to the workload of judges outside of court sitting hours. Every rejected application requires reasons. Since the desk order process started in 2022, the court has received about 314 per month (roughly equating to 3,700 per year).[64]

On the criminal side, technological innovation, especially video technology and remote attendance, has enabled the court to optimize the deployment of judicial resources. It connects the Justice Centre to remote regions for bail hearings and allows for remand appearances and bail hearings from remand and custody centres.[65]

According to the Chief Judge, the British Columbia Provincial Court is a leader in the collection and reporting of court related data,[66] including data on "time to trial." These data enable the Chief Judge to make decisions about where in the province to send judicial resources. Currently "time to trial" delays are roughly the same as those experienced prior to the COVID-19 pandemic (but were longer during the pandemic). The Chief Judge said that, while there are declining caseloads, those declines need to be viewed in the context of increases in cases involving offences to the person, which take more time to proceed to trial. She suggested that the most significant reason for the reduction in case backlogs that occurred during the pandemic was "the innovative methods that were undertaken by this court during COVID to reduce times to trial delays, including virtual bail."[67] For example, at the beginning of the COVID pandemic, the delay to trial in Fort St. John was more than 18 months. Now it is down to 11 months. The Chief Judge attributed this reduction to the fact that bail has been moved to the virtual bail court, which started in 2020. Bail applications occurring within court sitting hours are assigned to be heard virtually by judges from within the Region or at another location, thereby freeing up local Provincial Court judges to do the trial work at a particular court location without interruption. Outside of court sitting hours bail applications are heard by judicial justices at the Justice Centre.[68]

[63] Submission of Chief Judge, paras. 49-54.

[64] Submission of Chief Judge, para. 56; TR February 15, 2023, Chief Judge Gillespie, p. 157, l. 8 to p. 158, l. 4.

[65] Submission of Chief Judge, para. 62.

[66] TR February 15, 2023, Chief Judge Gillespie, p. 152, ll. 2-3.

[67] TR February 15, 2023, Chief Judge Gillespie, p. 153, ll. 6-12.

[68] TR February 15, 2023, Chief Judge Gillespie, p. 153, ll. 21-24.

The implementation, in May 2020, of mandatory criminal pre-trial conferences has also reduced time to trial and been successful in resolving some cases or narrowing the issues in others.[69]

At the Justice Centre, since 2018, significant work and inter-agency collaboration has enabled transition of the bail system from "police-led" bail (where police represent the Crown) to "Crown-led" bail proceedings in which all bail matters are heard in clerked courts, with Crown Counsel conducting the charge assessment, and with duty counsel available to assist those in custody. The change has resulted in an increase in consent releases because Crown and defence counsel have an opportunity to discuss reasonable release terms. [70] Despite this initiative, some instances of police-led bail still occur.

The court has also been exploring technology to allow a clerk (or a judicial justice working without a clerk), to capture the official court record for proceedings, allowing the proceeding to be recorded from anywhere there is internet.[71]

Other initiatives underway to improve access to justice in traffic court include creating an online option for initiating traffic disputes; creating digital case files for traffic and ticket matters; enabling judicial justices to adjudicate online requests for time to pay and fine reductions that do not require in-person hearings; and to notify parties of hearings by email.[72] The court has also piloted a project in which parties volunteer to attend remote traffic hearings at certain court locations.[73] As well, judicial justices contributed to the government's 2021 online information tool called "Understand Your Ticket."[74]

[69] TR February 15, 2023, Chief Judge Gillespie, p. 163, ll. 8-17; Submission of Chief Judge, para. 68.

[70] Submission of Chief Judge, paras. 168-169.

[71] Submission of Chief Judge, para. 173.

[72] Submission of Chief Judge, para. 175.

[73] Submission of Chief Judge, para. 176.

[74] Submission of Chief Judge, para. 174.

4 Assessment of Reasonable Compensation

The Supreme Court of Canada describes the role of a judicial compensation commission in this way: "The commission must objectively consider the submissions of all parties and any relevant factors identified in the enabling statute and regulations. Its recommendations must result from a fair and objective hearing. Its report must explain and justify its position."[75]

In British Columbia, sections 5(1), 5(5) and 5(5.2) of the Act[76] set out our mandate and the specification of relevant factors as follows:

> (1) Not later than April 1, 2023 following its formation, the commission must, in a preliminary report to the minister and chief judge,
>
> (a) report on all matters respecting the remuneration, allowances and benefits of judges and judicial justices, and
>
> (b) make recommendations with respect to those matters for each of the next 4 fiscal years.
>
> …
>
> (5) In preparing a report, the commission must be guided by the need to provide reasonable compensation for judges and judicial justices in British Columbia over the 4 fiscal years that are the subject of the report, taking into account all of the following:
>
> (a) the need to maintain a strong court by attracting highly qualified applicants;
>
> (b) changes, if any, to the jurisdiction of judges or judicial justices;
>
> (c) compensation provided in respect of similar judicial positions in Canada, having regard to the differences between those jurisdictions and British Columbia;
>
> (d) changes in the compensation of others paid by provincial public funds in British Columbia;
>
> (e) the generally accepted current and expected economic conditions in British Columbia; and
>
> (f) the current and expected financial position of the government over the 4 fiscal years that are the subject of the report.
>
> (5.1) The report of the commission must demonstrate that the commission has considered all of the factors set out in subsection (5).
>
> (5.2) The commission may consider factors it considers relevant that are not set out in subsection (5), but if it relies on another factor, the report of the commission must explain the relevance of the factor.
>
> [Emphasis added.]

[75] *Bodner*, para. 17; *PEI Reference*, para. 173: "the objectivity of the commission be ensured by including in the enabling legislation or regulations a list of relevant factors to guide the commission's deliberations."

[76] As amended by *Attorney General Statutes Amendment Act, 2021*, concerning the date in s. 5(1).

Reasonable compensation is not merely "adequate" compensation, nor is it "generous" compensation. It is *reasonable* total compensation for the work performed. Reasonableness is measured against objective factors. The factors set out in sections 5(5)(a) to (f) provide us with useful objective markers indicating whether the compensation for judicial officers in British Columbia is reasonable. No single one of these factors is overriding, and these factors are not exclusive. Instead, considered together, along with other relevant factors as contemplated in section 5(5.2), they assist us in assessing the current state of judicial compensation in British Columbia and, importantly, guide us in determining what constitutes reasonable compensation for judges and judicial justices over the next four years.

The statute requires us to take a proactive, future-oriented approach to judicial compensation. Our job is to look at the current conditions, as well as what can be predicted about the future. We must make the best assessment we can about reasonable compensation for judges and judicial justices for the next four years.

In the sections that follow, we consider the evidence in relation to each of the statutory factors and determine what each factor tells us about the reasonable compensation of judges and judicial justices for their work over the next four fiscal years.

4.1 Factor 1: The need to maintain a strong court by attracting highly qualified applicants

The compensation offered judges and judicial justices must be at a level to attract highly qualified applicants and keep those who are appointed motivated to stay with the court in the face of other options or the prospect of early retirement.

The Provincial Court is the face of justice for the vast majority of British Columbians who engage with the justice system. As described above, judges and judicial justices work in a fast-paced environment with long court lists. They often face complex matters. They must consider the issues before them with care and attention, yet they must also do it with speed. Sometimes the subject matter is emotionally challenging and traumatic, such as cases involving child pornography and sexual assaults against children. The Provincial Court needs "highly qualified applicants" so that highly qualified judges and judicial justices will be appointed to do this work.

Provincial Court Judges

We begin by assessing whether the Provincial Court can attract highly qualified applicants in sufficient numbers to maintain a strong court.

The Need for Highly Qualified Applicants

As described by the Judicial Council,

> To move into the role of a provincial court judge requires lawyers with a wide breadth of skills (including effective case management and mediation skills) and the ability to render

> high quality justice in all divisions of the court (family, civil, criminal, and youth). … This is a demanding job that must be carried out in a respectful and impartial manner, dealing with emotionally draining issues, and still getting through an often overwhelming court list for the day.[77]

The criteria for appointment include at least 10 years in the practice of law; superb legal reputation and a professional record review from the Law Society of British Columbia; experience in mediation or alternative dispute resolution; respect in the community; good health; appreciation of and experience with diversity; and a willingness to travel and to sit in all subject areas.[78] Applicants must also demonstrate a number of competencies in the areas of knowledge and technical skills, decision-making, communication and authority, professionalism and temperament, effectiveness, and leadership and management for those in administrative positions.[79]

The PCJA points out that the standard set out in Factor 1 is not "qualified applicants" but "highly qualified applicants" and quotes from several past commissions (some under previous legislation) using words like "outstanding candidates," "exceptional candidates," and "best candidates." It also notes the Judicial Council's requirement that candidates have a superb legal reputation.[80] The Chief Judge expressed the need to ensure that the remuneration is reasonable and sufficient to attract the "most qualified applicants."[81] The Government, however, points out that the statutory standard looks at what is needed to maintain a "strong court" by attracting "highly qualified applicants." The Government submits that applicants need not be the "most qualified" or "superior" to maintain a strong court.[82] Since the Judicial Council has been making appointments every year, the Government submits that there must exist sufficient candidates who meet the Council's standard.[83]

Aside from the fact of appointments being made and the standards set by the Judicial Council, there was no evidence before the Commission about the *quality* of candidates for appointment as judges, and no way to know whether the court is attracting the best possible candidates.[84]

No participant suggested that existing members of the court, including recent appointments, are less than high quality. The Government submitted that because the court attracts excellent candidates, some from the private bar where higher salaries exist, it follows that something more than salaries motivates candidates to apply to become a judge.[85]

---

[77] Submission of Judicial Council, para. 19.

[78] Criteria and Competencies for Appointment, JBD, Vol. 1, Tab 10.

[79] Criteria and Competencies for Appointment, JBD, Vol. 1, Tab 10.

[80] Main Submission of PCJA, paras. 166-168.

[81] Submission of Chief Judge, para. 120.

[82] Reply Submission of Government, para. 111.

[83] TR February 16, 2023, Ms. Wolfe for Government, p. 28, ll. 1-10.

[84] TR February 16, 2023, Ms. Wolfe for Government, p. 30, ll.14-22. Main Submission of PCJA, para. 173: "It is difficult to comment upon the *quality* of the applications" [emphasis in original].

[85] TR February 16, 2023, Ms. Wolfe for Government, p. 34, ll. 21-24 and p. 35, ll. 3-22.

The only competition for those seeking judicial positions in British Columbia comes from the Supreme Court of British Columbia, whose judges are federally appointed. A candidate may apply to either court, and an existing Provincial Court judge or justice may move to the Supreme Court upon a successful application. The Government told us there have been no appointments to the Supreme Court from the Provincial Court since 2019, and only two in the last five years (one in 2017 and one in 2018).[86] As there is no way to know how many potential applicants decided to apply to the Supreme Court instead of the Provincial Court in the first place, this data point does not provide complete information on competition from the Supreme Court.

Diversity of the Court

The Government submitted that a strong court will have a diverse bench that reflects the population of British Columbia in terms of characteristics like "age, gender, ethnicity, residential region and type of practice."[87] The PCJA agreed but focussed its submissions on "legal diversity."

Consistent with 10-year averages, the average age of women applying to the bench in 2021 was 51, and for men was 54. Applicants had an average of 23 years of experience in the practice of law.[88] Numbers of applications from women decreased in 2021, while applications from men increased. However, more women than average were appointed in 2021 and conversely, less men were appointed in 2021. As of March 31, 2022, 52.7% of full-time judges were women, and the proportion of women has increased in recent years.[89]

From 2012 to 2021, the numbers of applications received from candidates originating in different regions and the numbers of appointments in different regions are as follows:[90]

Region	Vancouver	Fraser	Northern	Vancouver Island	Interior
Applications Received	120	75	48	71	59
Appointments Made	7	42	21	11	16

These numbers show that the court is attracting applications from all areas of the province with a higher proportion from the Lower Mainland. It is impossible to know whether the appointments made to a region came from applicants originating in that region or whether applicants in one region were appointed to another. As described below, the Chief Judge told us the Northern Region

[86] Main Submission of Government, para. 97.

[87] Main Submission of Government, para. 80.

[88] Main Submission of Government, para. 88, based on Judicial Council of British Columbia Annual Report 2021, p. 18, JBD, Vol. 1, Tab 2. Note: gender data is based on binary statistics for men and women; it does not yet include numbers of non-binary individuals. Note the 10-year average for years of practice was 22 years.

[89] Main Submission of Government, paras. 89-91.

[90] Judicial Council of British Columbia Annual Report 2021, JBD, Vol. 1, Tab 2, p. 18.

is hard to staff and that judges appointed to the North from other regions often transfer back to their "home" region when a position becomes available.

We have little information on ethnic, cultural, or other diversity of judicial applicants. Since 2014, applicants may provide this information on a voluntary basis, but the numbers of applicants who do so varies from year to year, and there is no information for those who choose not to provide it. In 2021, of the 24 applicants, two identified themselves as indigenous, four as ethnic or visible minority, and four as a diverse group.[91]

The discussion about "legal diversity" stemmed from the large representation of Crown Counsel in the pool of applicants for Provincial Court judgeships. We heard that in 2021, 50% of applicants came from private practice, 37% came from Crown Counsel, and 13% from other areas of law.[92] These percentages are based on the positions held by applicants at the time of their applications, and do not reflect prior experience in other areas. These numbers have been roughly consistent over the last seven years.[93] In contrast, Crown prosecutors comprise only 4.3% of the practising lawyers in British Columbia.[94]

The PCJA characterizes this as an overrepresentation of Crown Counsel,[95] and says the court would benefit from greater legal diversity (i.e., criminal defence counsel in private practice and lawyers in private practice with civil and family law backgrounds). Further, the PCJA says the rate of renumeration is at least one factor in this overrepresentation, as "all Crown counsel will receive at minimum a 15 percent pay increase in appointment [sic]" while "Many lawyers in private practice would incur a loss in salary upon appointment."[96]

The Government says the "total universe of practicing lawyers" is not the "best metric against which to measure the proportion of crown counsel" applying for judicial positions since the "total universe" includes solicitors and many other lawyers who do not have significant litigation or Provincial Court experience. Crown Counsel comprise "a significant portion of the practising lawyers who have both litigation experience and experience in the Provincial Court."[97] Additionally, many Crown Counsel have legal experience prior to joining the Crown, and some

[91] Both "visible minority" and "diverse group" may include individuals who are LGBTQ+, as well as First Nations persons or people of colour.

[92] Main Submission of PCJA, para. 178, fn 138 indicates that "Crown Counsel" includes only prosecutors; the "other areas" includes other lawyers employed by government.

[93] Main Submission of Government, para. 93; Judicial Council of British Columbia Annual Report 2021, JBD, Vol. 1, Tab 2, p. 18. The Judicial Council records the position last held by the applicant and therefore do not reflect any prior experience of a candidate in other areas of law: see Main Submission of Government, para. 94; TR February 16, 2023, Ms. Wolfe for Government, p. 42, ll. 25 to p. 43, ll. 1-9.

[94] Reply Submission of PCJA, Appendix A: Letter from Law Society of British Columbia dated January 25, 2023.

[95] Main Submission of PCJA, para. 181.

[96] TR February 14, 2023, Ms. Latimer for PCJA, p. 154, ll. 6-11; p. 157, l. 23 to p. 158, l. 2.

[97] TR February 16, 2023, Ms. Wolfe for Government, p. 42, ll. 6-19.

judicial appointments that come from the Crown may have broader experience than just being Crown counsel—as demonstrated by some of the recent Provincial Court appointments.[98]

Application and Appointment Statistics

Over the last 11 years, there has been a decline in the number of incoming applications.[99]

Year	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
No. of applicants	35	46	50	27	43	63	27	37	30	24	23

Candidates apply through the Provincial Court's website. The applicants go through extensive scrutiny including a confidential bar report prepared by the Canadian Bar Association, a report from the Law Society of British Columbia, and discreet inquiries to current judges who are familiar with the applicant. Based on this information, the nine-member Judicial Council votes on whom to interview; a candidate needs three votes to be granted an interview. At least five (but usually all nine) Council members conduct the interviews. After an interview, if two or more Council members vote to *not* approve an applicant, the applicant is not placed on the approved list. Otherwise, the applicant is placed on the approved list. Applicants are not notified of the outcome. If placed on the approved list, an applicant remains there for up to three years from the date of their interview. The Attorney General may then appoint judges from the "approved list." An applicant who was not interviewed may reapply three years from the date of their previous application. An applicant who was interviewed but not appointed may reapply 2.5 years from the date of their previous interview.[100]

The figure below from the Judicial Council's 2021 Annual Report shows the application and appointment statistics for 2021 along with the 10-year average. [101]

The Government accepts that the decreasing number of applications is a trend that needs to be monitored, but says the "trend is not cause for alarm."[102] The Government suggests the COVID-19 pandemic may have impacted applications for judicial appointment.[103] It says the court is "still attracting a sufficient number of highly qualified applicants to allow ten appointments per year, as

[98] TR February 16, 2023, Ms. Wolfe for Government, p. 44, ll. 16-25; Appendices for Submission of Government, Tabs 8 and 9.

[99] Information taken from Submission of Chief Judge, para. 121. Note "the number of applications in 2017 was significantly higher due to the influx of paper applications being submitted before the launch of a new online application system": Submission of Chief Judge, fn 8.

[100] See description of the application and appointment process in Judicial Council Submission, paras. 4-9.

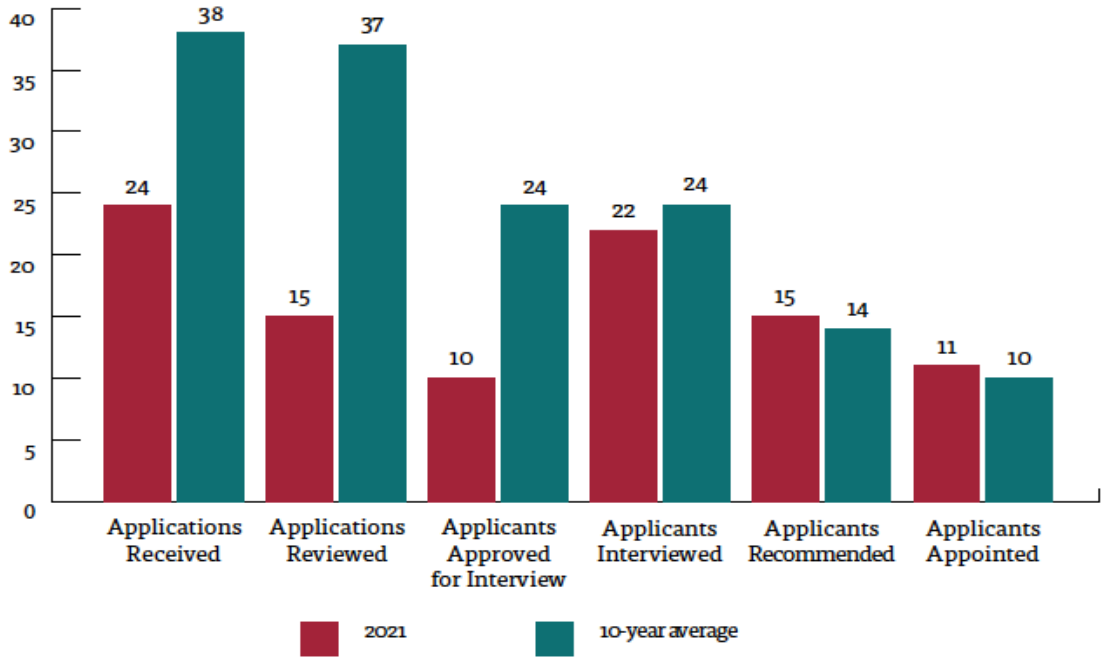
[101] JBD, Vol. 1, Tab 2 p. 15.

[102] Reply Submission of Government, paras. 113-114; Main Submission of Government, para. 101; TR February 16, 2023, Ms. Wolfe for Government, p. 21, l. 19 to p. 22, l. 5.

[103] Reply Submission of Government, para. 114.

the Chief Judge anticipates will continue."[104] Also, the Government points out that the number of applicants recommended for appointment in 2021 (i.e., 15) was higher than in 2020 when only five were recommended, and slightly higher than the 10-year average of 14.[105]

Figure 1: Applications and Outcomes (2021 and 10-Year Average)[1]



As shown in the table below, 2022 has the lowest average number of candidates on the approved list since 1999.[106]

Year	1999 2000 2001	2002 2003	2004 2005 2006	2007 2008	2009 2010	2011	2012	2013	2014	2015	2016
Average No. on approved list	36	39	31	20-25	24	25	23	19	20	28	26

Year	2017	2018	2019	2020	2021	2022
Average No. on approved list	25	23	23	25	20	15

While the court is currently meeting its needs in terms of appointments, the appointment of an average of 10 judges per year speaks to the "high demand the court has for judges."[107] The Chief

[104] Reply Submission of Government, para. 115.

[105] Reply Submission of Government, para. 116.

[106] This table is created from Exhibit 9.

[107] TR February 13, 2023, Chief Judge Gillespie, p. 162, ll. 22-24.

Judge characterized the decline in the number of candidates on the approved list as "quite alarming" and "significant."[108] Some of the 15 candidates currently on the approved list will likely "time out" when they reach three years on the list. Approximately 37% of applicants are approved for appointment. That means "you get about nine candidates a year out of 24 applicants." If the application number remains around 24 per year, this would equate to 36 approved candidates over the next four years (which the Chief Judge rounded up to 40). Over that same period, the court will need approximately 40 new judges.[109] But it is not as simple as matching 40 approved candidates to 40 new positions: "The vast majority of applicants apply for the Lower Mainland but there are a large number of positions in other places around the province in the north, in the northern part of the Island and in certain parts of the interior where it is difficult to attract candidates to that place."[110]

Further, judges who are appointed to serve in, for example, the Northern Region but who come from other regions of the province often transfer back to their home region when positions become available, leaving vacancies in the North. Even judges who come from the North have moved to other locations because the travel demands in the North are so difficult or for other personal reasons. The Chief Judge said she is "very concerned" about the ability to staff the court generally, and specifically in locations outside the Lower Mainland.[111]

While acknowledging that the average number of candidates on the approved list is low, the Government said the number "goes up and down."[112] Also, the lower number in 2022 follows slightly higher than average appointments in 2021 (11 appointments) and 2022 (13 appointments), which may, in part, account for the lower average number on the approved list in 2022.[113]

Conclusions

Our review of the evidence shows a startlingly low level of interest in the Provincial Court, with a low and declining rate of applications for appointment to it. There is serious difficulty in filling judicial vacancies outside the Lower Mainland. While it is not surprising that a significant portion of applicants come from a Crown Counsel background, the court would benefit from greater legal diversity given the nature of the court's work overall. The evidence shows a good gender balance in applicants and appointments to the court, but there is little information about other areas of diversity. The trends described above in terms of applications to the court, and the low numbers of candidates on the current approved list, indicate that there may well be insufficient highly qualified candidates to fill vacancies that are likely to arise before the next judicial compensation commission. While those appointed to the bench are "highly qualified" if measured by their average years of legal experience, which is well over the minimum, this is but one relevant measure for assessing the qualities of a prospective judge. To consistently appoint highly qualified judges

[108] TR February 15, 2023, Chief Judge Gillespie, p. 160, l. 25 to p. 161, l. 6.

[109] TR February 15, 2023, Chief Judge Gillespie, p. 165, ll. 3-20.

[110] TR February 15, 2023, Chief Judge Gillespie, p. 165, l. 24 to p. 166, l. 5.

[111] TR February 15, 2023, Chief Judge Gillespie, p. 165, l. 24 to p. 166, l. 21; and p. 167 ll. 21-24.

[112] TR February 16, 2023, Ms. Wolfe for Government, p. 23, ll. 1-4.

[113] TR February 16, 2023, Ms. Wolfe for Government, p. 23, ll. 6-19.

to this court, the appointing body should be able to draw from a much deeper pool of applicants than has been available in recent years.

Overall, this factor supports an increase in pay sufficient to attract more applicants for Provincial Court appointment from highly qualified lawyers of diverse legal backgrounds.

Judicial Justices

The Judicial Council describes the work of a judicial justice as "demanding and challenging and requires, at its foundation, a legally grounded, professional approach." Judicial justices must apply all the same principles as those applied by a judge: "principles of natural justice, procedural fairness, legislation, rules of criminal evidence, and common law."[114] Indeed, aside from only requiring five years of legal practice instead of 10, the criteria and competencies for appointment as a judicial justice are almost identical to those of a judge.[115]

The JJA notes the words "highly qualified applicants" in section 5(5)(a) are "particularly instructive," given the serious liberty and privacy issues judicial justices deal with, along with their role as the "face of justice" for ordinary citizens.[116]

The appointment process for judicial justices mirrors that for judges.[117] Again, once recommended by the Judicial Council, an applicant stays on the "approved list" for three years. The following table shows the numbers of judicial justice applications received, interviews conducted, applicants recommended, and applicants appointed over the last 6 years:[118]

Year	Applications Received	Interviews Conducted	Applicants Recommended	Applicants Appointed
2017	2	0	0	0
2018	9	2	4[119]	0
2019	15	4	3	3
2020	5	3	2	3
2021	8	6	2	3
2022	4	4	2	1

[114] Submission of Judicial Council, para. 37.

[115] JBD, Vol. 1, Tab 13.

[116] Main Submission of JJA, para. 96.

[117] Submission of the Judicial Council, para. 27.

[118] Main Submission of Government, para. 111; TR February 15, 2023, Chief Judge Gillespie, p. 169, ll. 11-20; Main Submission of JJA, para. 89. In respect of applicants for the position of judicial justice, we have no information on their ages, genders, regional area of origin, ethnic or cultural background, or legal diversity.

[119] Two candidates were recommended without interviews in 2018 as they had previously been judicial officers.

The Government submits the salary increase and legislative amendments following the 2019 JCC "appear to be addressing the previous recruitment and retention problems."[120] It notes the number of applicants recommended since 2018 is higher than the number of appointments, and "If these trends continue, it should be possible to address the upcoming retirements over the next four years."[121] The Government also said that, without knowing what a sufficient complement is for judicial justices, it is difficult to know whether needs are being met.[122] Further, the Government submits its proposed salary recommendation and other proposed recommendations are "collectively sufficient to assist with recruitment and retention needs."[123]

In contrast, the Chief Judge described judicial justice recruitment as keeping "our head barely above water."[124] She said she was not "sitting on big approved lists." She could not tell us the number currently on the approved list because it is so small that revealing it "would be revealing to candidates who is and who is not on that list."[125] The Chief Judge said the current complement of judicial justices is not large enough, given the increased numbers of production orders that judicial justices are dealing with due to the impact of Bill S-4 (described further below), and the increased evening bail shifts. Starting in March 2023, five shifts per week (260 shifts per year) will be added to meet these needs. The Chief Judge said that "at least" a couple more part-time justices are required to do that work.[126] The JJA also submitted that, while no one can currently answer how many judicial justices are needed, there clearly are not enough to meet current requirements.[127]

Twelve of the current judicial justices will reach age 75 (mandatory retirement) between now and 2027. That is 36% of the judicial justice division. Further, the Chief Judge noted that half the judicial justices are older than 66 and "you have to be thinking on some level that some of those people are not going to stay until 75."[128]

The age demographics of the current judicial justices are shown in the figure below.[129]

[120] Main Submission of Government, para. 113.

[121] Reply Submission of Government, para. 94.

[122] TR February 16, 2023, Ms. Wolfe for Government, p. 52, l. 24 to p. 53, l. 13.

[123] Supplemental Submission of Government, March 6, 2023, para. 15.

[124] TR February 15, 2023, Chief Judge Gillespie, p. 169, ll. 9-10.

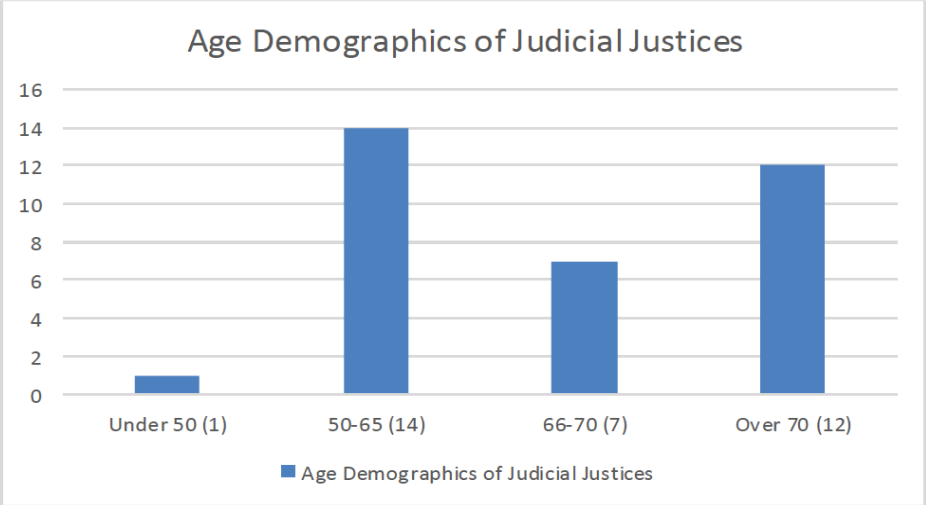
[125] TR February 15, 2023, Chief Judge Gillespie, p. 169, ll. 20-25.

[126] TR February 15, 2023, Chief Judge Gillespie, p. 171, ll. 2-5.

[127] TR February 15, 2023, Mr. Bernstein for JJA, p. 36, l. 23 to p. 37, l. 1.

[128] TR February 15, 2023, Chief Judge Gillespie, p. 169, ll.1-8.

[129] Submission of Chief Judge, p. 38, Figure 10.



When judicial justices are not able to cover shifts at the Justice Centre, the Chief Judge must assign judges to cover that work. Judges are currently paid more than twice as much as judicial justices. Further, they are offered "two for one holiday time" to take a shift at the Justice Centre. This builds up a "leave liability" because "those judges aren't able to sit in court as much because they can only carry over a certain amount of holidays." The Chief Judge compared the situation to robbing Peter to pay Paul.[130] The JJA advised that in 2022, Provincial Court judges filled 42 shifts at the Justice Centre. Twenty-three of these shifts occurred during judicial justices' educational conferences. Of the remaining shifts, all but one were on weekends or holidays.[131] The JJA also advised that judges filled eight judicial justice shifts so far in February and March 2023, and that 10 shifts remained unfilled for April 2023. All these shifts fall on weekends or holidays.[132]

The Chief Judge has made efforts to recruit more judicial justices, speaking to many different bar groups. The Judicial Council made two recent calls for applicants (September 13, 2021, and November 18, 2022). These efforts have not resulted in any noticeable increase in applications.[133]

In response to a question about why recruitment is aimed only at filling part-time judicial justice positions, the Chief Judge explained, "frankly, full-time lawyers will not work for the amount that we pay full-time judicial justices."[134]

Consideration of this factor reveals a looming crisis in attracting and maintaining a strong complement of judicial justices. Given the foreseeable retirements, older age demographics of the current complement, and very low application and approved candidate numbers, it is highly likely

[130] TR February 15, 2023, Chief Judge Gillespie, p. 171, ll. 15-22.

[131] Main Submission of JJA, paras. 93-94.

[132] Reply Submission of JJA, paras. 19-20.

[133] Submission of Chief Judge, paras. 178-179.

[134] TR February 15, 2023, Chief Judge Gillespie, p. 168, ll. 8-10.

that the court will not have a sufficient complement of judicial justices to meet the workload of the judicial justice division unless steps are taken immediately to improve recruitment.

This factor militates in favour of significant compensation increases for judicial justices.

4.2 Factor 2: Changes, if any, to the jurisdiction of judges or judicial justices

Provincial Court Judges

> *As no new changes in jurisdiction significantly impacted judges over the last three years, and we were not advised of predicted changes over the next four years, Factor 2 supports neither an increase nor decrease in the compensation paid to judges.*

The PCJA submitted there have been no significant changes to the jurisdiction of Provincial Court judges since 2016.[135] The impact of changes that occurred prior to the last judicial compensation commission (i.e., the shift of small claims files under $5001 to the Civil Resolution Tribunal, and changes to the number of hybrid offences in the *Criminal Code*) are difficult to assess due to the impact of the COVID-19 pandemic.[136] Similarly, the Government says it is difficult to assess if the new offences related to the COVID-19 pandemic had any effect on the court.[137]

Neither participant argued that a change in jurisdiction was relevant to this Commission's work concerning judges. As the Government pointed out, however, we must still take this statutory factor into account. The fact that there was no change in jurisdiction should be assessed along with the other factors in determining whether this factor supports an increase or supports compensation staying the same."[138]

We conclude that, on its own, this factor supports neither an increase nor decrease in compensation for Provincial Court judges.

Judicial Justices

> *Recent changes to the* Criminal Code *concerning judicial authorizations by telewarrant will significantly increase the collective workload of judicial justices. This factor supports an increase in compensation to judicial justices.*

The JJA submits that Bill S-4's changes to the *Criminal Code* constitute a change in the jurisdiction of judicial justices because these changes allow applications for judicial authorizations that previously had to be made in person (to either a judge or judicial justice) to now be made through

[135] Main Submission of PCJA, para. 184.

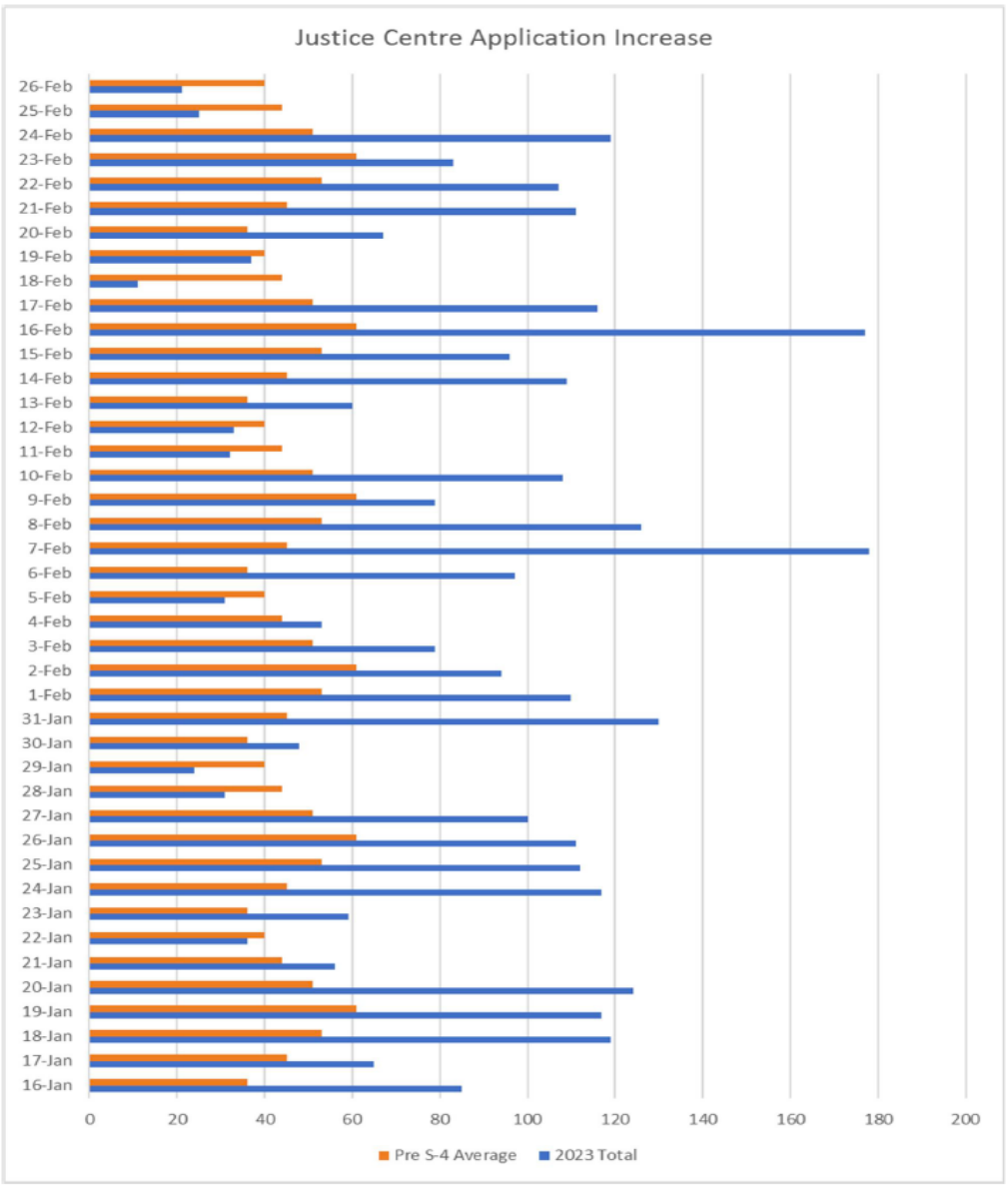
[136] Main Submission of PCJA, para. 184; Main Submission of Government, paras. 116-118.

[137] Main Submission of Government, para. 119.

[138] TR February 15, 2023, Ms. Wolfe for Government, p. 205, ll. 20-24.

telecommunications.[139] Stated differently, judicial justices now have jurisdiction to hear the vast majority of judicial authorization applications throughout the province by way of telecommunication. The changes took effect on January 16, 2023.

Data for the first 42 days since the change took effect show an increased number of applications per day to the Justice Centre (dark blue lines) compared to the average number of applications for the same day of the week (light orange lines, averaged over October, November, and December 2022), as shown in the figure below:[140]



[139] Main Submission of JJA, para. 97.

[140] Figure taken from Supplementary Submission of JJA, para. 7.

The JJA told us that, as of March 6, 2023, the number of unfilled shifts at the Justice Centre "continues to grow" with 27 unfilled shifts from March 29 to May 31, 2023. As well, in response to both Bill S-4 and the anticipated opening of a new virtual bail court commencing March 13, 2023, over 230 new shifts have been created at the Justice Centre.[141] The JJA submits there is no reason to expect that the number of applications received will decrease over time, noting that Bill S-4 was intended to introduce lasting changes to the criminal justice system in order to improve flexibility and efficiency.[142]

The Government submitted that Bill S-4 is not a true change in jurisdiction since many of the authorizations now allowed to be heard by telecommunications could previously be heard by judicial justices in person. It said these shifts in workflow are of a different nature than the changes in jurisdiction that have been considered by previous commissions.[143] The Government says changes in the workload to judicial justices should be monitored over the 2022 cycle, but that it would be premature to recommend any significant adjustments (to compensation) until there is concrete evidence to determine the magnitude of the change.[144] The Government "doesn't deny that there may be an impact," but more time and data are needed to know whether this new process will "continue at the current level or is going to level off a bit."[145] It says its proposal concerning shift premiums may help to address the need to fill new shifts.[146] It recognizes that "there may be a need to increase the overall complement of Judicial Justices in response to Bill S-4" but that it is "still too early to conclude that S-4, by itself, warrants an increase in salaries."[147]

The Chief Judge noted that whether this is a change in jurisdiction depends on how you define "jurisdiction." In any event, "It results in an increase in their workload which is something I think jurisdiction is meant to address."[148]

The figure above shows a clear pattern: the days with the lowest numbers of applications (i.e., January 21, 22, 28 and 29, February 4, 5, 11, 12, 18, 19, 25 and 26) are weekend days; the higher application numbers are on weekdays, only one of which was a holiday (Family Day). While the data only reflect six weeks, they suggest the increased workload is coming on weekdays, and therefore would not be addressed in any way by a weekend shift premium. While we agree the available data about the impact from Bill S-4 are limited, they show a current, growing, significant increase to the workload of judicial justices. This increased workload, combined with the evidence that 230 to 260 new shifts per year will be needed at the Justice Centre, in part to cover this increased workload, is compelling. There is no logical reason to suspect that use of this new

[141] Supplemental Submission of JJA, paras. 10-11. Note the Chief Judge's evidence was that 260 shifts would be added: TR February 15, 2023, Chief Judge Gillespie, p. 171, ll. 2-5.

[142] Supplemental Submission of JJA, para. 8.

[143] TR February 15, 2023, Ms. Wolfe for Government, p. 239, ll. 1-6.

[144] Reply Submission of Government, para. 99.

[145] TR February 15, 2023, Ms. Wolfe for Government, p. 239, l. 22 to p. 240, l. 4.

[146] TR February 15, 2023, Ms. Wolfe for Government, p. 241, ll. 5-10.

[147] Supplemental Submission of Government, March 6, 2023, para. 14.

[148] TR February 15, 2023, Chief Judge Gillespie, p. 173, l. 11 to p. 174, l. 6.

process will drop off; indeed, it seems likely to increase as police seeking authorizations become familiar with the new process. In any case, as Commissioners we are required to look ahead to the next four fiscal years. The evidence shows a real risk that the workload of judicial justices will increase significantly over the next four years in comparison to the last year.

We appreciate the Government's submission that the nature of the change presented by Bill S-4 is different from the sorts of jurisdictional changes addressed by previous commissions. There is no caselaw in this context to help us in determining what "changes to the jurisdiction" of judicial justices means. We agree with the Chief Judge that, in including this factor, the legislature must have intended to capture changes in the workload of judicial justices that flow from changes to the legislation that gives them jurisdiction. This is such a change. This change stems directly from federal legislation that now permits judicial officers—in this case BC judicial justices—to hear matters (virtual applications for authorizations) that they were not permitted to hear previously. It is different from other possible changes in workload that might occur owing to factors unrelated to legislation.

Nevertheless, even if Bill S-4 does not amount to a "change in jurisdiction," it does increase the workload on judicial justices and is another factor that we consider relevant to this Commission's mandate under section 5(5.2) of the *Judicial Compensation Act*.[149] This change in workload is relevant because it increases the need for judicial justices to fill shifts at the Justice Centre or to take on greater workloads during their shifts. Further, it compounds the anticipated problems arising from an insufficient judicial justice complement and the apparent low interest in judicial justice positions, described above.

Whether the changes in workload arising from Bill S-4's amendment of the *Criminal Code* are viewed as a jurisdictional change or as "another relevant factor," these changes militate in favour of increases to judicial justice compensation.

4.3 Factor 3: Compensation provided in respect of similar judicial positions in Canada, having regard to the differences between those jurisdictions and British Columbia

Provincial Court Judges

Examining similar judicial positions in Canada reveals British Columbia's Provincial Court judge salaries are out of step and well below the average of best comparators.

While this factor must be considered along with all the other statutory factors, we agree with the 2016 JCC and the 2019 JCC that the compensation of other judges in Canada is an important consideration in determining the reasonable compensation paid to BC judges.[150] We have looked at all other judges, including federally appointed and provincially appointed judges across Canada.

[149] We advised Government, JJA, PCJA, and Chief Judge that we may consider the effects of Bill S-4 as another relevant factor under s. 5(5.2) and those participants had an opportunity to make submissions on this issue.

[150] 2019 JCC Report, JBD, Vol. 1, Tab 18, p. 20; 2016 JCC Report, JBD, Vol. 1, Tab 21, p. 47.

The Government submits the federally appointed judges are not useful comparators because superior court judges have broader, and inherent, jurisdiction to hear civil, family, and criminal cases, and the superior court judges hear appeals from the Provincial Court and conduct judicial reviews.[151] While the types of cases differ, and the Provincial Court judges are limited to their statutory jurisdiction, the judicial roles are similar in both courts. As noted by the PCJA, "the same qualities of judicial temperament, legal knowledge, and an abiding sense of fairness are required of all judges" and all judges make decisions that will greatly affect people's lives, including the potential loss of freedom.[152]

The BC Supreme Court logically competes with the BC Provincial Court for applicants by drawing from the same pool: BC lawyers with at least 10 years of experience. While some lawyers will apply to one court over the other for reasons other than compensation (e.g., because of differences in the nature of the cases heard), compensation will be an important consideration, as it is in applying for any position. Federally appointed judges currently receive $83,700 more in salary per year than Provincial Court judges in British Columbia, and the compensation value of pension benefits for a federally appointed judge (expressed as a level of percentage of pay over the working lifetime of a typical judge) is 66.4% compared to 43.1% for a Provincial Court judge.[153]

In short, while recognizing differences (including the type of work done in the superior courts of general jurisdiction compared with that done in statutory provincial courts), we also see similarities sufficient to include federally appointed judges as one element in the group of Canadian comparators.

While provincial courts in other provinces are less likely to compete with the BC Provincial Court for applicants, judges in provincial courts across Canada are important comparators because of the similarity in roles and subject matters dealt with by the other provincial courts.

The Government says the method of determining compensation in other jurisdictions is a "difference" that must be considered when comparing the salaries of provincial court judges in other Canadian jurisdictions to BC salaries.[154] Some provincial governments (Ontario, Saskatchewan, and New Brunswick) have chosen to set their judges' salaries at a fixed percentage of superior court judges' salaries. The Government says British Columbia has made a different policy choice that does not contemplate a fixed relationship, and that we must take account of this "difference" and "give effect to the choices made here."[155] In Government's submission, because Ontario, Saskatchewan, and New Brunswick use fixed percentages of superior court salaries to determine their provincial court salaries, these provinces do not make good comparators.[156]

---

[151] Main Submission of Government, paras. 128 and 130.

[152] Main Submission of PCJA, para. 191.

[153] PCJA BD, Tab 3, p. 5.

[154] Main Submission of Government, paras. 132-135.

[155] Main Submission of Government, para. 134-135.

[156] Main Submission of Government, paras. 132, 145, 146

The wording of section 5(5)(c) seems aimed at directing commissions to consider *substantive* differences in either (a) the nature of judicial work, or (b) the economic or social characteristics of the region or "jurisdiction" where the work is done. The language of section 5(5)(c) does not naturally suggest that a commission should delve into the *processes* by which governments in other regions of Canada have chosen to make decisions about judicial compensation. Comparing judicial salaries to other similar positions is intended to provide an objective measure of the reasonableness of salaries that have been implemented by the BC Government. If we eliminate from comparison all the provinces whose governments have not made the same policy choices as the BC Government in respect of the process for setting judicial compensation, we will not have an objective comparative view of what is being paid for similar judicial work across the country. We will have a view that is biased to be as close as possible to the policy choices of the BC Government. Accordingly, we reject the Government's contention that Ontario, Saskatchewan, and New Brunswick are inappropriate comparators.

In short, we agree with the 2019 JCC. In looking at provincial court salaries across the country, it considered both differences in the positions ("markers of similarity: the qualifications for the positions, the core qualities required for them and the nature of the judicial work, including jurisdiction"), and differences among regional jurisdictions ("performance of their respective economies and relative debt levels, populations, [and] budgets").[157]

The participants acknowledge the broad jurisdiction of BC Provincial Court judges.[158] Not all other provincial courts in Canada hear cases from the diverse subject areas represented before BC judges. In Alberta and Ontario, urban areas have specialized criminal, family, and civil divisions while rural areas have non-specialized judges. In Quebec, specialized courts exist in almost all areas of the province and judges are assigned exclusively to those divisions.[159]

With respect to differences in economic indicators, the Government submits that Alberta and Quebec are the notable comparators for British Columbia, saying these are the closest to British Columbia in terms of GDP and population. It says the current salaries received by BC Provincial Court judges are "within a reasonable range" of these comparators.[160] The PCJA submits the best comparators are Alberta, Saskatchewan, and Ontario, as these jurisdictions are, like British Columbia, "in favourable economic positions" as measured by GDP per capita. [161]

While Quebec is close to British Columbia in terms of unemployment rate and provincial GDP, it is 63% larger in population, resulting in a lower GDP per capita. Nevertheless, the PCJA concedes that, comparing the six largest provinces, GDP per capita would be "broadly similar." However, looking only at GDP per capita obscures the relative costs of living in different provinces such as the cost of buying a home. The only other province with comparable home prices to British

[157] 2019 JCC Report, JBD, Vol. 1, Tab 18, pp. 19-20

[158] TR February 16, 2023, Ms. Wolfe for Government, p. 16, ll. 12-14; Main Submission of Government, p. 31; Main Submission of PCJA, para. 79.

[159] TR February 15, 2023, Chief Judge Gillespie, p. 139, l. 1 to p. 140, l. 6.

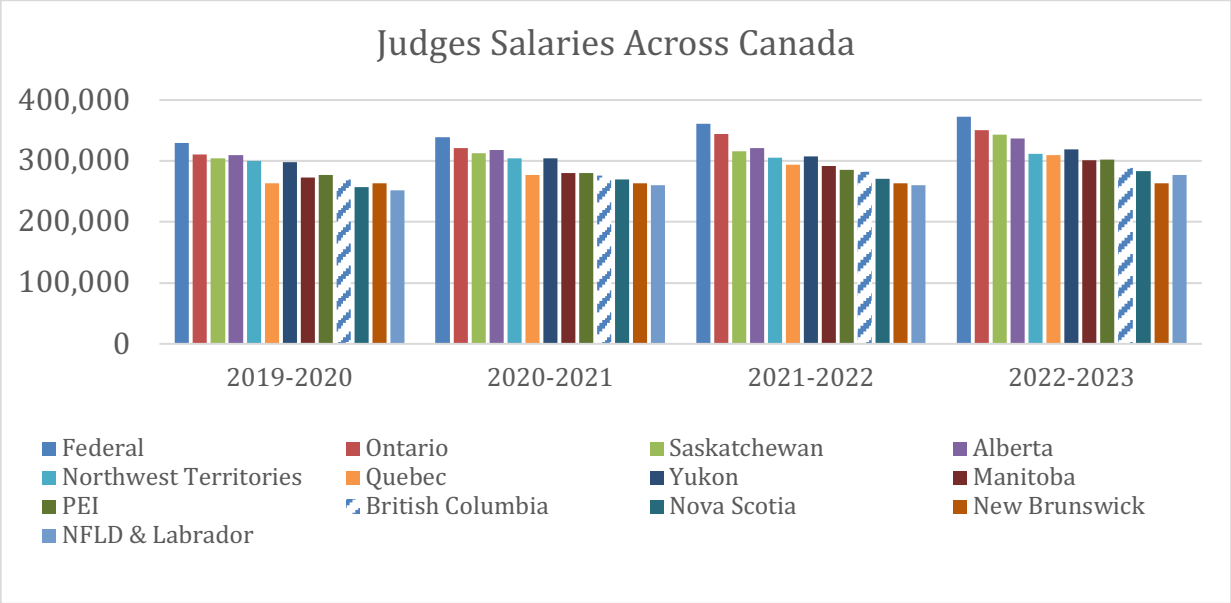
[160] Main Submission of Government, paras. 148-149.

[161] Main Submission of PCJA, para. 208; Reply Submission of PCJA, para. 37; TR February 13, 2023, Mr. McKinnon, p. 77, ll. 9-13.

Columbia is Ontario.[162] Other economic factors, such as debt as a percentage of GDP, make Alberta and Saskatchewan comparable to British Columbia.[163] Saskatchewan has the closest unemployment rate to British Columbia, and is also similarly diverse in its export destinations.[164]

Taking these points into account, the closest comparators to BC Provincial Court judges are provincially appointed judges in Alberta, Saskatchewan, and Ontario. While some urban courts in Alberta and Ontario are more specialized than in British Columbia, the rural judges have comparatively broad jurisdiction—unlike the more specialized judges in Quebec. Alberta, Saskatchewan, and Ontario have similarly healthy economies. Ontario is most similar to British Columbia in terms of housing costs. Alberta and Saskatchewan are similar to British Columbia in terms of debt as a percentage of GDP. Alberta is similar in terms of population size, and Saskatchewan in terms of diverse export destinations.

The figure below shows annualized judicial salaries across Canada for the last four fiscal years.[165]



[162] Reply Submission of PCJA, paras. 38-39.

[163] Exhibit 1, slide: BC – Provincial Comparisons Taxpayer-Supported Debt (% of GDP).

[164] Exhibit 1, slide: Export Destinations; slide: Unemployment Rate by Province and Region.

[165] Data for this figure come from JBD, Vol. 2, Tab 34. For Alberta in 2021/22 and 2022/23 and Yukon 2022/23, the actual compensation is unknown. We assumed that these jurisdictions will be given at least an increase to account—in some way—for CPI. To provide an estimate of the 2021/22 salary for Alberta, the 2020/21 salary was increased by the amount equal to the change in "all items" monthly CPI for Alberta from January 2020 to January 2021: 0.8%. To provide an estimate of the 2022/23 salary for Alberta, the estimated 2021/22 salary was increased by the amount equal to the change in "all items" monthly CPI for Alberta from January 2021 to January 2022: 4.8%. To provide an estimate of the 2022/23 salary for the Yukon, the 2021/22 salary for Yukon was increased by the amount equal to the change in "all items" CPI for Yukon from January 2021 to January 2022: 3.7%. The "all items" monthly CPI numbers for these provinces were generated from Statistics Canada. Table 18-10-0004-02 Consumer Price Index by geography, all-items, monthly, percentage change, not seasonally adjusted, Canada, provinces, Whitehorse, Yellowknife and Iqaluit.

British Columbia's Provincial Court judge salaries currently rank 10th out of all judicial salaries in Canada (9th if only considering provincial/territorial courts). We also note that, while the judicial salaries in most other provinces for the 2023-24 fiscal year are currently unknown, those that are known have increased from the 2022-23 values shown in the figure above.

The table below shows judicial salaries across Canada for the current year (2022-23), along with averages for comparison:[166]

Jurisdiction	Salary for 2022-23
Federal	372,200
Ontario	350,212
Saskatchewan	343,045
Alberta	336,458 (estimate)
Yukon	319,107 (estimate)
Northwest Territories	311,723
Québec	310,000
Prince Edward Island	302,010
Manitoba	301,345
British Columbia	288,500
Nova Scotia	283,075
Newfoundland & Labrador	277,357
New Brunswick	263,920
AVERAGES	
All salaries (excluding BC)	314,204
All provinces/territories (excluding BC)	308,932
Alberta, Saskatchewan, and Ontario	343,238
Alberta, Saskatchewan, Ontario, and Quebec	334,928

For 2022-23, the average salary of all judges (federal and provincial) across Canada, excluding BC judges, is $314,204. British Columbia's judges' salary is over $25,000 below the national average.

If we look only at British Columbia's closest comparators (Alberta, Saskatchewan, and Ontario) and exclude federal judges, the average salary is $343,238. British Columbia's economy is comparably healthy to their economies. With respect to BC's financial position, independent bond rating agencies give British Columbia the highest rating in Canada (see discussion under section

[166] See *ibid.* for calculation of values for Alberta and Yukon.

4.5). Despite that, a BC Provincial Court judge's salary is currently $54,738 below the average of its closest comparators. This objective measure strongly suggests that BC judges' salaries are unreasonably low.

Additionally, considering compensation as a whole (as described below in section 6.2), Mr. Sauvé's undisputed evidence was that the estimated compensation value of the judicial pension arrangement in British Columbia is 43.1% of salary compared to an average compensation value of 54.6% for the other four jurisdictions he considered (federal, Alberta, Ontario, and Saskatchewan)—for a difference of 11.5% of salary.[167]

In our view, British Columbia is not paying salaries to its Provincial Court judges that are within a reasonable range of the province's comparators. This factor militates in favour of a significant increase in compensation.

Judicial Justices

British Columbia's judicial justices are paid below average salaries for work similar to other judicial justices or justices of the peace in Canada, despite British Columbia's strong economy and more favourable fiscal position.

Only Alberta, Saskatchewan, Manitoba, Ontario, and Quebec have judicial justice or justice of the peace positions (collectively "judicial justices") that are comparable or analogous to those in British Columbia.[168]

However, there are some differences. In British Columbia and Alberta, a judicial justice must have a law degree and have practised for five years, but in Ontario no legal training is required to hold the position. In Quebec, 10 year's legal practice is required.[169] The Government also points to some differences in the jurisdiction of judicial justices among the six provinces,[170] but aside from Manitoba (where judicial justices conduct trials and sentencing hearings for summary convictions) and Quebec (where judicial justices rule on contested applications relating to the disposal of seized property), the differences in jurisdiction are relatively minor. All deal with significant liberty and privacy issues, and the Government acknowledged that the jurisdiction of judicial justices across Canada is "largely analogous."[171]

The Government argues that we should consider the difference between the processes for determining compensation for judicial justices. It points to the fact that in Saskatchewan, Ontario, and Manitoba the salaries are set as a percentage of provincial judges' salaries. For the same

[167] Comparative Analysis of Judicial Pension Plans, Prepared by Andre Sauvé, December 2022, PCJA BD, Tab 3, p.5.

[168] Main Submission of Government, para. 154; Main Submission of JJA, para. 101.

[169] Reply Submission of JJA, para. 61

[170] Main Submission of Government, para. 154.

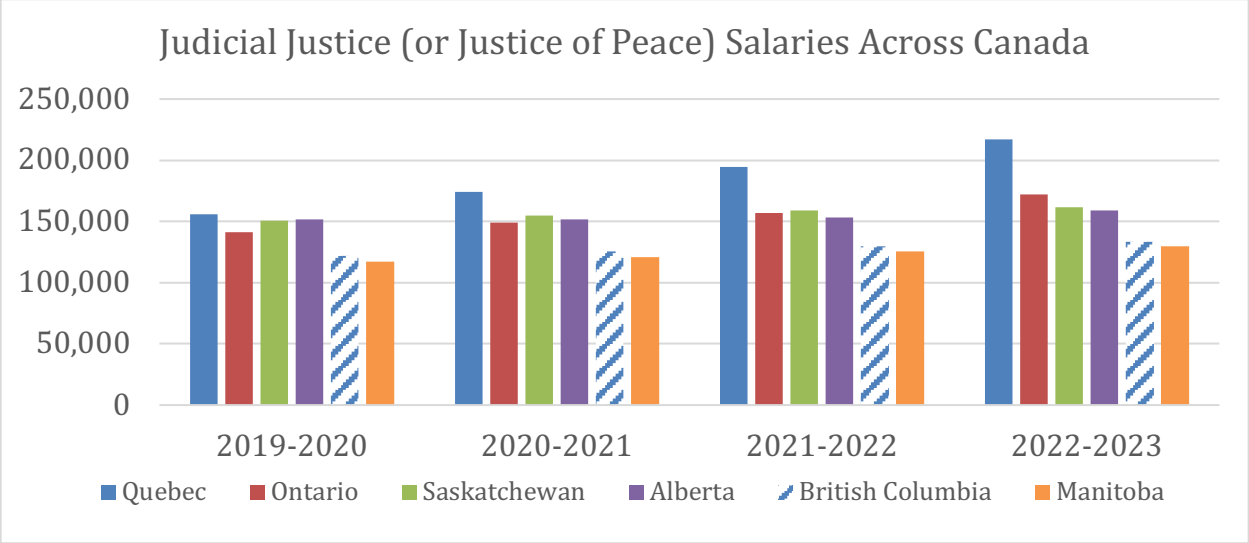
[171] TR February 16, 2023, Ms. Wolfe for Government, p. 13, ll. 1-20; Main Submission of Government, paras. 152 and154.

reasons described above in the section on judges, we do not find differences in the processes for determining compensation to be relevant considerations under this factor.

The Government says Alberta is the most appropriate comparator for judicial justice salaries in terms of "GDP, GDP growth, geographic location and population." It says Quebec is not an appropriate comparator given differences in jurisdiction.[172] The JJA adopted the 2019 JCC's finding that Alberta and Ontario are the best comparators.[173]

We find the roles of judicial justices across Canada to be roughly comparable, acknowledging some differences. As with the analysis above for judges, we find Alberta, Saskatchewan, and Ontario to be the closest to British Columbia with respect to the health of their economies, housing costs or provincial debt burdens. For consistency and given slight variations in the judicial justice roles in Quebec and Manitoba, we have determined that Alberta, Saskatchewan, and Ontario are the best comparators.

The figure below shows the annualized salaries of BC judicial justices and similar positions across Canada for the 2019-20 to 2022-23 fiscal years.[174]



The current salary for BC judicial justices is $34,366 below the average of all the other provinces. Despite British Columbia having a strong economy and an independently-ranked stronger financial

[172] Main Submission of Government, para. 156.

[173] Main Submission of JJA, para. 102. TR February 15, 2022, Mr. Bernstein for JJA, p. 91, ll. 12-23; p. 93, ll. 3-10. p. 121, ll. 7-23.

[174] Data for this figure come from JBD, Vol. 2, Tab 35. For Alberta in 2021/22 and 2022/23, the actual compensation is unknown, but the participants provided us with an unconfirmed number for 2021/22 of $151,813. Assuming at least an increase to account for CPI in the previous year, to provide an estimate of the 2022/23 salary for Alberta, the 2021/22 salary was increased by the amount equal to the change in "all items" CPI for Alberta from January 2021 to January 2022: 4.8%. The "all items" CPI numbers were generated from Statistics Canada. Table 18-10-0004-02 Consumer Price Index by geography, all-items, monthly, percentage change, not seasonally adjusted, Canada, provinces, Whitehorse, Yellowknife and Iqaluit.

position than any other province, BC judicial justice salaries are $30,751 below the average of its closest comparators, Alberta, Saskatchewan, and Ontario.

The current salaries and averages for comparison are found in the following table:[175]

Jurisdiction	Salary for 2022-23
Québec	217,000
Ontario	172,000
Saskatchewan	161,655
Alberta	159,100 (estimate)
British Columbia	133,500
Manitoba	129,578
AVERAGES	
All provinces (excluding BC)	167,866
Alberta, Saskatchewan, and Ontario	164,251
Alberta, Saskatchewan, Ontario, and Quebec	177,438

Within British Columbia, the position of a judicial justice may also be compared with that of a Provincial Court judge. The two positions have some overlapping jurisdiction such that Provincial Court judges fill shifts normally assigned to judicial justices. The qualifications for the positions are nearly identical. As noted by the JJA, "To the public, there is generally no discernible difference between a judicial justice and a Provincial Court judge."[176] However, as described above, the statutory jurisdiction of a Provincial Court judge is much broader than that of a judicial justice. The judicial justice's jurisdiction is further limited by the assignment of specific duties by the Chief Judge.

Currently, the salary of a full-time judicial justice is 46.3% of the annual salary of a judge: $133,500 compared to $288,500. In 1978, when judicial justices did not have to be lawyers, the salary of a judicial justice was 64.7% of a judge's salary.[177] While judicial justices are much more specialized, have narrower jurisdiction, and do not conduct trials (other than in traffic court), it strikes us as remarkable that BC judicial justices are now paid less than half the salary of Provincial Court judges.

As with Provincial Court judges, this factor militates in favour of significant compensation increases for judicial justices.

[175] See *ibid*. for the estimate of Alberta Judicial Justice salary.

[176] Main Submission of JJA, para. 140.

[177] Main Submission of JJA, paras. 142-143.

4.4 Factor 4: Changes in the compensation of others paid by provincial public funds in British Columbia

The Government's current approach to compensation of the public sector is relatively generous compared to recent history. The Government has shown its willingness to address specific problems such as recruitment and retention with increases in compensation.

This factor directs us to look at changes in the compensation of others paid out of the public purse. It is the *change* in compensation that is important—not a dollar-for-dollar comparison of compensation between different groups of public employees or public office-holders.[178] Under this factor, it is important to look at trends, and consider what those trends might say about a reasonable approach to judicial compensation, noting the unique, constitutional role of the judiciary. For example, looking at the changes to the compensation of others paid from the public purse might "support the inference that the Province had exercised moderation in dealing with other public salaries."[179] Conversely, it might support an inference that the government has acted more expansively.

Under this factor we look at what the government has considered "to be a reasonable change in compensation for the rest of the public service."[180] The Government acknowledged that a strict application of its public sector bargaining mandate to changes in compensation by the judiciary would not be appropriate.[181]

The Government rightly conceded that "we are in a different world" compared to the situation before past commissions.[182] The *2022 Shared Recovery Mandate* is the most generous bargaining mandate that the BC Government has put forth in over 12 years.[183] It guarantees, over a three-year period, wage increases to the public sector of 11.5% to 13.75%, depending on whether cost of living adjustments need to be made.[184] The Government said the mandate was designed, in part, to respond to inflation. The PCJA pointed out that under this bargaining mandate, the BC

[178] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2021 BCCA 295, JBA, Vol. 1, Tab 14, para. 59.

[179] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2021 BCCA 295, JBA, Vol. 1, Tab 14, para. 61.

[180] TR February 16, 2023, Ms. Wolfe for Government, p. 61, ll. 2-4.

[181] Main Submission of Government, para. 162, citing *Provincial Court Judges Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022.

[182] TR February 16, 2023, Ms. Wolfe for Government, p. 61, l. 23 to p. 62, l. 2.

[183] For comparison, see the government's public sector bargaining mandates from 2019, 2014, 2012, and 2010 at https://www2.gov.bc.ca/gov/content/employment-business/employers/public-sector-employers/public-sector-bargaining/mandates-and-agreements. The 2010 and 2012 mandates were for zero net increases. The 2014 mandate was for 0, 1, 1.5, 1.5 and 1.5% increases over 5 years. The 2019 mandate was for 2% increases in each of 3 years.

[184] Main Submission of Government, para. 177; 2022 Shared Recovery Mandate, JBD, Vol. 2, Tab 43.

Government is also offering "a flexibility allocation to target additional wage adjustments—over and above the general wage increases—that are needed to address, among other things, specific recruitment and retention challenges."[185]

The PCJA also described instances where small groups of employees receive certain bonuses or stipends.[186] In addition, some employees in the public sector receive step increases as they progress through "levels" of their positions. In contrast, all Provincial Court judges or judicial justices receive the same compensation regardless of years served; there are no salary increases or stipends or bonuses, and no promotion levels for a judge to move through (with the exception of the small number of administrative positions of Chief Judge, Associate Chief Judge, etc. referred to above). The Government submits such step increases are irrelevant to this Commission as members of the judiciary already receive the maximum salary for their position.[187] We accept that point, and in any event, on the evidence before us it is impossible to assess whether there has been a change in the compensation received by employees in the public sector as a result of changes in bonuses or the system of progression through position levels.

One conclusion is clearly supported by the evidence: in exceptional circumstances, the government has shown itself willing to depart from bargaining mandates and to implement greater compensation increases for specific groups. The PCJA says these exceptions demonstrate there are "circumstances in which government may need to offer increases over and above the bargaining mandate" to address problems.[188]

For example, in 2019, when the government's bargaining mandate was 2%, it increased legal aid tariff rates by 35% after the legal aid lawyers working for tariff rates threatened to strike. The context for this raise included that the tariff rates had not been raised in 13 years.[189]

The PCJA and the Government referred to a current example: family physicians, who may receive changes in compensation greater than the *2022 Shared Recovery Mandate*, to ensure that the "take home pay of family doctors will be roughly comparable to equivalent hospital physicians going forward."[190] The context here includes a health care system in crisis and "a recruitment and retention" problem for family doctors.

The Commission requested and the Government provided further details about the increased compensation for physicians. It appears that all physicians will see across the board increases to the rates and fees they may charge of 6-8.25% over three years (2022/23 to 2024/25), depending on whether a Cost of Living Protection Adjustment is triggered.[191] On top of this, approximately

---

[185] Main Submission of PCJA, para. 331.

[186] TR February 14, Ms. Latimer for PCJA, p. 215, ll. 1-19.

[187] Reply Submission of Government, para. 34.

[188] TR February 14, 2023, Ms. Latimer for PCJA, p. 216, ll. 17-20.

[189] Main Submission of PCJA, para. 228; Reply Submission of Government, para. 37.

[190] Main Submission of PCJA, para. 231; Reply Submission of Government, para. 37.

[191] Information Respecting Increases in Compensation for Family Physicians in British Columbia, prepared for 2022 JCC, p. 4. (See Appendix B, item 8.)

$428 million dollars are available to address specific priority areas "such as increasing the Business Cost Premium to offset overhead costs of a physician's practice."[192] There is also a new compensation model for family physicians which is intended to be competitive with compensation for hospitalists (physicians who work in hospitals). The actual compensation varies based on how individual family physicians "respond to various incentives in the model."[193]

From the information provided,[194] it is difficult to know exactly how much of an increase these combined compensation methods provide to an "average" family physician. However, the PCJA referred to documents from the Ministry of Health and statements made by the government to the media, both of which indicate that a full-time family doctor (meeting certain parameters set out in the compensation model) could receive an increase in pay from $250,000 per year to $385,000 per year under the new model. This potentially represents a 54% increase in gross income per year for those physicians meeting all the parameters and responding to the incentives in the model.[195] The Government agreed that the change in the compensation model for family doctors is meant to address recruitment and retention problems. [196]

The evidence before us clearly shows the BC Government currently taking a generous approach to increases in compensation in the public sector when compared to the recent past. The evidence also shows that government is willing to allocate significant funding in order to correct specific problems like the recruitment and retention of family doctors.

Overall, this factor supports an increase in compensation for both judges and judicial justices.

4.5 Factors 5 and 6: The generally accepted current and expected economic conditions in British Columbia; and the current and expected financial position of the government over the four fiscal years that are the subject of the report

The BC economy is sound and solid. The government is currently embarked on a number of spending programs due to its fiscal surplus. British Columbia receives the highest credit ratings of any province. While a short-term economic slowdown is expected this year, the economy is expected to rebound to normal levels. The economic and fiscal position of British Columbia permits significant increases in compensation for Provincial Court judges and judicial justices.

[192] Information Respecting Increases in Compensation for Family Physicians in British Columbia, prepared for 2022 JCC, pp. 3-4. (See Appendix B, item 8.)

[193] Information Respecting Increases in Compensation for Family Physicians in British Columbia, prepared for 2022 JCC, p. 4. (See Appendix B, item 8.)

[194] Information Respecting Increases in Compensation for Family Physicians in British Columbia, prepared for 2022 JCC. (See Appendix B, item 8.)

[195] Supplemental Submission of PCJA, para. 11 and Tabs D, E, and F.

[196] TR March 10, 2023, Ms. Wolfe for Government, p. 98, ll. 11-25.

Although Factors 5 and 6 are discrete factors, the "current and expected economic conditions" obviously affect the "current and expected financial position of the government." Therefore, we have chosen—like the participants did in the oral hearings—to discuss these factors together.

Two witnesses gave evidence to help us understand these factors. We heard from Mr. Ian McKinnon, a consultant with Pacific Issues Partners, who provided us with a report, a supplementary report, and two PowerPoint presentations.[197] His evidence was presented by the PCJA. Ms. Heather Wood, Deputy Minister of Finance for British Columbia, was tendered by the Government. She provided a report, testified before us, and provided us with two PowerPoint presentations.[198] We also had before us considerable information regarding the 2023 Provincial Budget ("Budget 2023").[199]

Both witnesses spoke about the state of the BC economy. Mr. McKinnon told us the following:

- Canada has a considerable advantage over other G7 countries arising from lower debt levels. The IMF expects Canada's economic growth forecast to be slightly above the average for advanced economies. International events are expected to have a positive effect on Canada's economy, such as China's relaxation of COVID restrictions, which is expected to improve supply chain issues, and the conflict in Eastern Europe, which has increased demand for Canadian grain and energy.[200]
- In response to inflation, over the last year the Bank of Canada increased interest rates "rapidly and fairly dramatically." Inflation is now stabilizing and beginning to move down.[201] Since the summer of 2022, the consumer price index (CPI) has been trending down.[202]
- Canadian Real GDP is above where it was pre-COVID-19, by a "significant percent."[203] Similarly, Canadian employment levels have been fully restored to pre-pandemic levels and "have been growing since."[204]
- In British Columbia, "the GDP has grown faster, unemployment has tended to be below the national average and we've got a diversified economy. Diversified economy means that you don't have the terrific ups, the booms … but nor do we have the declines."[205] The BC economy is sound and solid.[206]

---

[197] PCJA BD Tab 1; Exhibit 1; Supplementary Submission of PCJA, Tab B; and Exhibit 14.

[198] Exhibit 2; and Exhibit 17.

[199] Budget Submission of Government, Appendices; and Supplemental Submission of PCJA, Appendices.

[200] TR March 10, 2023, Mr. McKinnon, p. 12, l. 20 to p. 14, l. 8; Exhibit 14, p. 2.

[201] TR March 10, 2023, Mr. McKinnon, p. 15, ll. 4-15.

[202] TR March 10, 2023, Mr. McKinnon, p. 17, ll. 15-18.

[203] TR March 10, 2023, Mr. McKinnon, p. 15, ll. 16-23; Exhibit 14, p. 4.

[204] TR March 10, 2023, Mr. McKinnon, p. 15, l. 24 to p. 16, l. 4; Exhibit 14, p. 5.

[205] TR March 10, 2023, Mr. McKinnon, p. 18, ll. 17-21; Exhibit 14, p. 7.

[206] TR March 10, 2023, Mr. McKinnon, p. 25, ll. 18-22.

Ms. Wood similarly testified to the strength and resilience of the BC economy, but cautioned about an economic slowdown over the next year:

- The BC economy has proven to be resilient in facing the pandemic and geopolitical disruptions.[207]
- Economic growth was "very strong" in 2021 and 2022, slowing towards the end of 2022, and a slower growth in GDP is expected in the 2023-24 fiscal year as higher interest rates start to cool domestic and global demand.[208]
- BC real GDP growth in 2023 is forecast to be 0.4%, which is lower than the previous forecast of 1.5% from the First Quarterly Report.[209] In the near and medium term, the economy is forecast to "expand by 1.5 percent in 2024" and to be in the range of 2.2 to 2.4 percent annually by 2025-2027.[210]
- While economic growth is not strong every year, the "underlying fundamentals of BC's economy are very strong."[211] Overall, British Columbia has a "sound, solid economy."[212]

With respect to the financial position of the BC government, Mr. McKinnon told us the following:

- The government's strong financial position reflects British Columbia's strong economy and the government's "prudence" in budgeting.[213]
- The government has been using the recent budgetary estimates to "spend as much of the surplus as they can."[214] Given time constraints, this spending cannot go through normal processes and is subject to less reporting and evaluation.[215]
- The current budget shows deficits over the next three years, largely due to increased spending.[216]
- British Columbia has significant fiscal capacity due to its relatively low personal tax burden.[217]

---

[207] TR February 14, 2023, Ms. Wood, p. 34, ll. 13-17.

[208] *Ibid.* and see TR March 13, 2023, Ms. Wood, p. 6, l. 15 to p. 8, l. 3.

[209] TR March 13, 2023, Ms. Wood, p. 20, ll. 11-14; Budget Submission of Government, para. 7.

[210] TR March 13, 2023, Ms. Wood, p. 8, ll. 11-21.

[211] TR March 13, 2023, Ms. Wood, p. 20, ll. 8-15.

[212] TR February 14, 2023, Ms. Wood, p. 88, l. 1.

[213] TR March 10, 2023, Mr. McKinnon, p. 19, ll. 4-15; Exhibit 14, p.8 (Quote from Ms. Wood's Letter of February 28, 2023, in *Budget 2023*, p. *v*).

[214] TR March 10, 2023, Mr. McKinnon, p. 20 ll. 17-24.

[215] TR March 10, 2023, Mr. McKinnon, p. 21, ll. 7-15.

[216] TR March 10, 2023, Mr. McKinnon, p. 21, l. 16 to p. 22, l. 2; Exhibit 14, p. 10.

[217] Exhibit 1, slide: Fiscal Capacity.

- It is "highly probable" that no other province in Canada builds the same level of prudence into its budgets as does British Columbia. British Columbia's bigger margins are an "appropriate response" to uncertainty.[218]

- British Columbia has the highest credit ratings (from independent rating agencies) of any province in the country. The strength of the rating influences the interest rate a debt-holder is charged.[219] The rating agencies' "core mission" is similar to that of this Commission in terms of looking at the future of the economy and the fiscal prospects of the government—they look at these factors in determining the prospect that the government's debt will be paid back.[220] As shown in the figure below,[221] these ratings view British Columbia's fiscal performance as better than any other province.[222]

Ratings Agencies Give BC Highest Provincial Rating

	S&P	DBRS	Moody's
B.C.	AA+	AA high	Aaa
Alberta	A	AA low	Aa3
Sask.	AA	AA low	Aa1
Manitoba	A+	A high	Aa2
Ontario	A+	AA low	Aa3
Quebec	AA-	AA low	Aa2
N.B.	A+	A high	Aa2
Nova Scotia	A	A high	Aa2
Nfld.	A	A low	A1

Ms. Wood also told us about increased levels of government spending, the expected deficits, and the prudence in the budget. She also referred to lower expected revenues and increased debt levels:

- The third quarterly report for 2022-23 shows a surplus of $3.6 billion, which is lower than the surplus noted in the second quarterly report because the Province has used $2.1 billion of the formerly reported surplus to fund priorities in this fiscal year, including infrastructure grants to local governments, BC Ferries affordability, rental protections, and an

[218] TR March 10, 2023, Mr. McKinnon, p. 27, ll. 5-12; TR February 13, 2023, Mr. McKinnon, p. 70, ll. 1-7.

[219] TR March 10, 2023, Mr. McKinnon, p. 23, l. 15 to p. 24, l. 11; p. 32, ll. 2-15; Exhibit 14, p. 12.

[220] TR March 10, 2023, Mr. McKinnon, p. 23, l. 21 to p. 24, l. 5.

[221] Exhibit 14, slide: Rating Agencies Give BC Highest Provincial Rating. See, TR March 10, 2023, Mr. McKinnon, p. 24, ll. 12-20, where Mr. McKinnon explains that the S&P (Standard and Poor's) rating was updated in December 2022, leaving BC's ratings exactly where they were in the spring of 2022.

[222] Exhibit 1, slide: B.C.'s Ratings; TR March 10, 2023, Mr. McKinnon, p. 23, ll. 2-8.

affordability tax credit.[223] In relation to the $1 billion dollar grant to municipalities for infrastructure, she said the Province does not maintain control over how the municipalities spend the money, but can indicate the categories of funding that local governments should be using and require public reporting on the use of the funds.[224]

- Any budgetary surplus from 2022-23 that is not spent before the end of the fiscal year will be applied against the province's debt as a matter of law and accounting practice.[225]
- The government projects lower revenue for the next two years owing to tax revenues returning to "more normal levels from the highs of 2022."[226]
- The operating surplus in 2022-23 "brought down the debt level but the forecasted deficits and capital spending forecasted in budget will result in increased debt and somewhat deteriorating debt affordability metrics."[227] While declining deficits are expected in later years of the forecast, provincial debt will "continue to increase as a result of capital spending."[228] However, long term, "BC continues to have relatively affordable levels of debt."[229]
- The budget includes explicit layers of prudence through the economic forecast and forecast allowance and through contingencies (as explained further below). The prudence that is built into the budget makes the Province's fiscal position resilient.[230]
- British Columbia is unique among provinces in that it has "multiple levels of prudence. We have economic prudence; we have contingencies allocation; we have forecast allowance. So BC is unique in that regard, and the credit rating agencies have acknowledged that."[231]

Both witnesses spoke in detail about the prudence measures built into the BC Government's forecasting. Mr. McKinnon compared the monetary sum of the prudence measures incorporated into Budget 2023 for the next three years against the estimated deficits for the same years. Doing so results in a positive balance in the range of $1.5 to $2 billion per year.[232] Mr. McKinnon said one cannot look at multibillion dollar deficits without realizing that amounts are built into the budget to "respond to demand in needs or shortfalls on the income side."[233]

---

[223] TR March 13, 2023, Ms. Wood, p. 9, l. 22 to p. 10, l. 9.

[224] TR March 13, 2023, Ms. Wood, p. 23, ll. 15-20.

[225] TR February 14, 2023, Ms. Wood, p. 72, l. 20 to p. 73, l. 7.

[226] TR March 13, 2023, Ms. Wood, p.10, l. 24 to p. 11, l. 3; Exhibit 17, p. 5 (Budget 2023 Fiscal Plan).

[227] TR March 13, 2023, Ms. Wood, p. 12, ll. 10-15.

[228] Exhibit 17, p. 8.

[229] TR March 13, 2023, Ms. Wood, p. 13, ll. 4-7.

[230] TR March 13, 2023, Ms. Wood, p. 28, ll. 3-15.

[231] TR March 13, 2023, Ms. Wood, p. 31, ll. 3-8.

[232] TR March 10, 2023, Mr. McKinnon, p. 22, ll. 3-24; Exhibit 14, p. 11.

[233] TR March 10, 2023, Mr. McKinnon, p. 23, ll. 9-14.

Ms. Wood told us the government's "prudence measures" in Budget 2023 fall into various categories: general contingencies, a forecast allowance, priority spending initiatives and caseload pressures, and specific contingencies.[234] The bulk of the prudence measures ($5.5 billion of $6.2 in 2023-24) are general or specific contingencies, which are allocated expenses. She said it was not possible to "offset" the contingency measures against the forecast deficit as Mr. McKinnon had done.[235] They "reflect actual expenses that are anticipated"—they are for "specific items such as the wage mandate costs, pandemic related spending and climate related disasters."[236] The "priority spending initiatives and caseload pressures" is a prudence measure built into the fiscal budget for 2025-26, acknowledging that, in later years of the fiscal plan, there will be a need to fund core government programs.[237] It is only the "forecast allowance" that could "perhaps late in the fiscal year" be removed to get an assessment of the "bottom line" of the budget.[238]

We accept that, as Ms. Wood stated, it is unusual to compare the monetary sum of the prudence measures incorporated into Budget 2023 for the next three years against the estimated deficits for the same years, and we are not placing any weight on that comparison. Instead, we rely on the evidence from both Mr. McKinnon and Ms. Wood that the government's prudence measures serve British Columbia well in times of uncertainty.

In submissions, the PCJA pointed out that the economy and the government's financial position are so strong that the government has been able to make the largest infrastructure investment in the province's history, spending very large sums "outside the normal budgeting processes and the analysis that is usually entailed in those financial decisions." It says such actions are not those of "a government that sees significant fiscal risks in the next few years."[239] Further, the PCJA argued that a recent agreement with the federal government on healthcare spending is another positive change to the government's fiscal position and "another reason to have confidence" in the government's fiscal position.[240] Ms. Wood testified that these agreements are not reflected in the forecasts in Budget 2023.[241] However, part of that funding will not help to offset costs until after 2025/26, and the other part of it will be for new costs and will not offset existing costs.[242]

---

[234] Budget Submission of Government, Appendices (Budget 2023, p. 30).

[235] TR March 13, 2023, Ms. Wood, p. 15, ll. 14-19.

[236] TR March 13, 2023, Ms. Wood, p. 12, ll. 16-24; p. 17, ll. 20-25.

[237] TR March 13, 2023, Ms. Wood, p. 16, ll. 8-17.

[238] TR March 13, 2023, Ms. Wood, p.18, ll. 1-9.

[239] Supplemental Submission of PCJA, para. 5; TR March 10, 2023, Ms. Latimer for PCJA, p. 41, l. 22 to p. 42, l. 6.

[240] TR March 10, 2023, Ms. Latimer for PCJA, p. 42, l. 15 to p. 43, l. 5.

[241] TR March 13, 2023, Ms. Wood, p. 24, ll. 12-16.

[242] TR March 13, 2023, Ms. Wood, p. 32, ll. 2-13.

The JJA adopted the PCJA's submissions, noting that a positive outlook for British Columbia is consistent with increases to judicial compensation.[243]

The Government's submissions emphasized that the BC economy has slowed over 2022, and that forecasts call for further slowing or a recession in 2023.[244] In the longer term, "British Columbia is expected to experience steady employment growth, solid investment activity, and higher international migration" resulting in "a higher real GDP growth range between 2025 and 2027."[245] Risks to the economy include persistent high inflation, uncertainty over the impact of higher interest rates on borrowing and the housing market, lingering supply chain disruptions, a weaker than expected global economy, the impacts of geopolitical conflicts on trade, and aging demographics leading to tighter labour markets.[246]

On its financial position, the Government noted increased spending measures aimed at British Columbians struggling with cost of living pressures, and debt metrics calling for fiscal prudence.[247] The Government noted that the budget's prudence measures account for a number of risks.[248]

We have considered all this evidence. Despite some disagreements, for example in the characterization of future risks to the economy (and consequently, the financial outlook of the government), by and large Mr. McKinnon's and Ms. Wood's evidence painted a consistent picture. The disagreements are not material to our conclusions about this factor.

We conclude that British Columbia's economy is sound, solid, and resilient. Independent bond rating agencies have confidence in the province, giving it the highest ratings of any province in the country. The government builds layers of prudence into its budgets—more than other provinces—and this prudence makes for a resilient fiscal position. British Columbia is well-positioned financially to weather risks over the next few years. The rapid and record level spending of 2022-23's budget surplus demonstrates the Government's confidence in its own financial position. The short-term outlook is for an economic slowdown or recession in 2023-24, but then a recovery to normal levels of growth in 2024-25 and beyond.

In our view, the strength and resilience in the economy and the financial position of government are each compatible with significant increases in judicial compensation. However, the forecasted economic slowdown for 2023-24 indicates the need for some moderation in the next fiscal year.

---

[243] Main Submission of JJA, para. 130; Reply Submission of JJA, para. 68; Supplemental Submission of JJA, para. 28; TR March 10, 2023, Mr. Bernstein for JJA, p. 54, ll. 4-6.

[244] Budget Submission of Government, paras. 6-12. TR March 10, Ms. Wolfe for Government, p. 64, l. 15 to p. 65, l. 21.

[245] Budget Submission of Government, para. 14.

[246] Budget Submission of Government, para. 15.

[247] Budget Submission of Government, paras. 22-23.

[248] Budget Submission of Government, paras. 25-26.

5 Recommendations on Salaries

Both the PCJA and the JJA submitted that a significant "correction" to judicial salaries is needed to bring the compensation of judges and judicial justices up to the level of "reasonable compensation."[249] That correction, they say, should not just account for inflation but address the fall in ordinal rank in comparison to other judicial officers across Canada.[250] The Government recommended modest increases to current salaries, incorporating "a level of catch-up" with inflation and then increases to address anticipated inflation over the 2022 cycle.[251]

We heard different views about whether it is necessary for us to have a notional "starting point" from which to recommend increases (or decreases) to the salaries of judicial officers. The "starting point" would have to be notional (for judges) because, at the time of making our Final Report, the Legislative Assembly's implemented salary for 2022-23 has been quashed and remitted back to the Legislative Assembly for reconsideration.[252] Thus, though the current judicial salary is $288,500, the "final" salary—for at least the judges—for 2022-23 remains unknown. [253]

The Government argued that the legislature is responsible for approving public expenditures and, given it has approved the current salaries of judges, those current salaries have "to be the starting point of this commission's work."[254] Further, it says the statutory factors that we are required to account for all involve changes in conditions in some form or another, so all need a starting point.[255] More specifically, the Government submitted that to understand the magnitude of an increase that is being requested you need a starting point, especially when taking into account the changes in the compensation of others.[256]

---

[249] TR February 15, 2023, Mr. Bernstein for JJA, p. 36, ll. 8-16.

[250][250] TR February 16, 2023, Ms. Latimer for PCJA, p. 101, ll. 3-10, p. 124 l. 17 to p. 125, l. 3; Mr. Bernstein for JJA p. 114, ll. 7-20. Also, see JBD, Vol. 2, Tab 34 which provides provincial court salary details for all the provinces and territories. These data show British Columbia's fall in salary "rank" since 2010.

[251] Main Submission of Government, para. 9.

[252] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2023 BCSC 520.

[253] The PCJA cautioned us to avoid the situation where, as happened in 2013, the commission recommends a percentage increase on what is currently paid to judges, only to have the starting point changed by a subsequent court decision: TR February 14, 2023, Ms. Latimer for PCJA, p. 139, ll. 11-23; *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2017 BCCA 63 at paras. 4, 6, 8, and 9. See also the discussion of starting point in the 2016 JCC Report, JBD, Vol. 1, Tab 21, p. 59.

[254] TR February 15, 2023, Ms. Wolfe for Government, p. 202, l. 21 to p. 203, l. 6.

[255] TR February 15, 2023, Ms. Wolfe for Government, p. 207, ll. 7-13.

[256] TR February 15, 2023, Ms. Wolfe for Government, p. 208, l. 18 to p. 209, l. 6; February 16, 2023, Ms. Wolfe for Government, p. 56, ll. 16-19.

The PCJA asked us to focus on a dollar amount rather than a percentage increase based on a notional starting point, as this will focus us on the appropriate question—the reasonable renumeration that should be paid to judges.[257] It said the starting point is not particularly important with respect to changes to the compensation paid to others because we do not need to find that judges should receive identical increases to others paid by public funds.[258] It urged us to focus on what changes in the compensation of others tell us about government's approach to compensation generally, and to consider that evidence along with all the other statutory factors.[259]

In considering some of the statutory factors, it is obviously relevant and useful to look at what judges and judicial justices are currently being paid. However, we are not expressing our recommendations in terms of a percentage increase. Our focus is on what is reasonable compensation for the next four years—not only on what is a reasonable increase in compensation.

5.1 Provincial Court Judges

Our recommendation for Provincial Court judges' salaries for the next four fiscal years appears in the table below along with the salaries proposed by the PCJA and the Government. Although the PCJA proposed a salary for 2023-24 and then requested an increase by the amount of CPI for each of the subsequent three years, we have expressed the subsequent years of its proposal in dollar terms for ease of comparison.

Provincial Court Judges	**Current Salary**	**2023 - 2024**	**2024 - 2025**	**2025 - 2026**	**2026 -2027**
Government Submission	$288,500	$311,000	$323,000	$332,000	$338,000
PCJA Submission	$288,500	$350,860	$364,547 ($350,860 + est. 3.9% CPI increase)[260]	$373,296 ($364,547 + est. 2.4% CPI increase)	$381,509 ($373,296 + est. 2.2% CPI increase)
RECOMMENDATION:		*$343,000*	*$360,000*	*$360,000 + a percentage increase equivalent to the annual average percentage change in BC CPI for 2024*[261]	*2025-26 salary + a percentage increase equivalent to the annual average percentage change in BC CPI for 2025*

[257] TR February 14, 2023, Ms. Latimer for PCJA, p. 138, ll.15-24.

[258] TR February 15, 2023, Ms. Latimer for PCJA, p. 6, ll. 3-11.

[259] TR February 15, 2023, Ms. Latimer for PCJA, p. 6, ll. 13-22; p. 7, ll. 4-17.

[260] These estimates for CPI are taken from Reply Submission of Government, para. 109.

[261] For clarity, "BC CPI" refers to CPI for the whole province of British Columbia (not CPI that may be experienced in a particular region of the province), and it refers to "all items" CPI (not CPI calculated on a subset

It must be remembered that "reasonable compensation" speaks to total compensation. For judges, pensions comprise a significant part of their total compensation. No participant proposed any changes to the overall value of pensions. Where increases in compensation are needed, we have determined that those increases should, at this time, come in the form of increased salary.

In arriving at our salary recommendations, we have considered what each statutory factor tells us about the reasonable compensation for judges:

- Factor 1 supports a salary increase sufficient to attract greater numbers of highly qualified applicants from diverse legal backgrounds to apply to become Provincial Court judges. There is currently low interest in this court, shown by declining applications, coupled with a serious difficulty in filling judicial vacancies outside the Lower Mainland. The court could benefit from more diversity in applicants' previous legal practice. The appointing body needs a deeper pool of applicants from which to draw.
- Factor 2 supports neither an increase nor decrease in the compensation paid to judges.
- Factor 3 reveals BC Provincial Court judges' salaries are out of step and well below the average of best comparators, which are objective indicators of reasonable judicial salaries. The ranking of current provincial/territorial court judges' salaries across Canada shows British Columbia in 9th of 12 places. Provinces with comparable economies or costs of living (particularly housing) occupy the top three spots. Ontario, Saskatchewan, and Alberta are each close to $50,000 above the current level of BC judges' salaries. This gap, which grows larger if pension values are considered (see section 6.2 below), militates in favour of a significant increase in judges' salaries.
- Factor 4 supports an increase in compensation for judges. The government has taken a relatively generous approach to compensation of the public sector and has shown a willingness to increase wages when needed to address recruitment and retention problems for others paid from the public purse.
- Factor 5 supports an increase in judges' salaries. The BC economy is solid and resilient. While there is a forecasted economic slowdown that indicates the need for a degree of moderation in the next fiscal year, the overall and longer-term outlooks for the BC economy are both positive and strong.
- Factor 6 supports an increase in judges' salaries. The financial position of government is strong, and arguably the best in Canada. British Columbia is well-positioned through its budgetary prudence to remain financially strong over the next four years.

Considered together, these factors overwhelmingly indicate the need for an increase in compensation. While Factor 2 is neutral, the alignment of all other factors shows that the time is ripe to correct the significantly below average pay earned by BC Provincial Court judges compared

---

of particular goods and/or services). BC CPI calculations should be made on the basis of the previous calendar year (e.g., for the 2025-2026 salary, use the annual average percent change from January 1, 2024 to December 31, 2024). BC Stats is to be relied on as the source for reporting BC CPI, using Stat Can data. BC CPI percentage changes should be calculated to one decimal place. If the annual average percentage change in the BC CPI over the previous calendar year is less than 0%, it should be treated as a 0% change and the judges' salary will remain the same rather than being reduced.

to all other judges in Canada, and especially to their closest comparators. Given the healthy economy of British Columbia, and the strong financial position of the government, BC judges should receive compensation that puts them closer to the top group of courts on the table found on page 40 of this report and within the range of Alberta, Saskatchewan, and Ontario judges.

A significant correction in salary should help to address the Provincial Court's challenge in recruiting judges. For one thing, it would reduce the current gap in pay between Provincial Court and Supreme Court judges. A pay correction also aligns with the government's current approach to sharing the success of British Columbia's strong financial position with others paid from public funds. Government's actions in the past six months, and its approach in Budget 2023, show that it is able, while remaining commendably prudent, to give robust support to valuable public activities—such as the work of family physicians. We recognize that access to justice is not universally seen as equivalent to access to health care. However, a justice system that may struggle over the next four years with a declining court complement deserves support. The Government is clearly in a position to provide such support at this time.

We agree with the PCJA that a significant correction is required to judges salaries. However, we have determined that a lesser amount in the first year than what the PCJA has proposed would still meet the requirement for reasonable compensation so long as it is followed by a further corrective increase in the second year.

We also heard the Government's submission that its proposed salaries "take into account the need to remain economically and fiscally prudent, given the anticipated initial decline and weakening of the economic and financial position that is reflected in budget 2023," (with a forecast of a return to average growth, with some deficits and increased debt over the subsequent three years.)[262] While we disagree that the amounts proposed by the Government are reasonable when taking into account all the factors discussed above, we accept that an economic slowdown is expected for 2023-24 before a return to normal economic levels. In recognition of this, we have split the correction in judges' salaries over the first two years of our mandate: 2023-24 and 2024-25. We recommend the judges receive increases in salary over and above rates of inflation for those two years. After the full correction is implemented, for the last two years of our mandate, we recommend inflationary increases equal to BC's Consumer Price Index.[263] By tying the later increases to CPI, we intend to keep judicial salaries stable against the cost of living.

Our salary recommendation will still likely put BC judges behind its closest comparators in 2023-24, but will likely place BC judges above the national average.

5.2 Judicial Justices

Our recommendation for judicial justices' salaries for the next four fiscal years appears in the table below along with the salaries proposed by the JJA and Government.

[262] TR March 10, 2023, Ms. Wolfe for Government, p. 71 ll. 10-22.

[263] See footnote 261, *supra*, for remarks about the calculation of BC CPI.

Judicial Justices	Current Salary	2023 – 2024	2024 – 2025	2025 - 2026	2026-2027
Government Submission	$133,500	$143,915	$149,527	$153,564	$156,636
JJA Submission	$133,500	$175,000	$180,000	$185,000	$190,000
RECOMMENDATION:		*$172,000*	*$177,000*	*$182,000*	*$187,000*

We note that most judicial justices work part-time and they will be paid pursuant to a per diem formula, based on the full-time salary.

We recognize that benefits factor into the total compensation of judicial justices, and accordingly we have recommended (below) an increase to the amount paid to part-time judicial justices in lieu of benefits, as well as an increase in the amount paid for "overhead" to part-time judicial justices. Further, in making our salary recommendation, we have considered that shift premiums factor into the total compensation of part-time judicial justices. Still, salary (or the per diem equivalent) remains the largest component of judicial justice compensation.

In arriving at our salary recommendations, we have considered what each statutory factor tells us about the reasonable compensation for judicial justices:

- Factor 1 reveals a looming crisis in attracting and maintaining a strong complement of judicial justices. It is very likely the court will not have a sufficient complement of judicial justices to meet the workloads of the Judicial Justice Division over the next four years unless steps are taken immediately to improve recruitment. This factor strongly militates in favour of significant salary increases for judicial justices.
- Whether the changes in workload arising from Bill S-4's amendment of the *Criminal Code* are viewed as a jurisdictional change (Factor 2) or as "another relevant factor" under section 5(5.2), these changes militate in favour of increases to judicial justice compensation. The evidence clearly shows an impact to judicial justice workload and a current problem in finding judicial justices to do this work—a problem that is likely to worsen over time.
- Factor 3 shows BC judicial justice salaries are well below the average of those in other provinces, and over $30,000 below BC's closest comparators, Alberta, Saskatchewan, and Ontario. This factor supports significant salary increases.
- Factor 4 supports an increase in compensation for judicial justices. The government has taken a relatively generous approach to compensation of the public sector and has shown a willingness to increase wages when needed to address recruitment and retention problems for others paid from the public purse.
- Factor 5 supports an increase in compensation for judicial justices. The economy is solid and resilient. While there is a forecasted economic slowdown that indicates some moderation in salaries for the next fiscal year, the overall and longer-term outlook for the BC economy is one of strength.

- Factor 6 supports an increase in judicial justices' salaries. The financial position of government is strong and arguably the best in Canada. British Columbia is well-positioned financially through its budgetary prudence to remain in a strong position over the next four years.

Considered together, these factors overwhelmingly support the need for increased compensation for judicial justices. The staffing impact of federal Bill S-4—whether considered under Factor 2 or as another relevant factor under section 5(5.2) of the Act—combined with the crisis in recruiting new judicial justices and the impending retirements over the next four years suggest that a significant bump in judicial justice salary must occur immediately.

The current salary is not reasonable when compared with that of other judicial justices in Canada; it is currently $30,000 below the average of the closest comparators. In light of British Columbia's healthy economy and its strong financial position, BC judicial justices should be paid at least the average of their Alberta, Saskatchewan, and Ontario counterparts. And, in our view, given the historic underpayment of these judicial officers and the crisis in recruitment that has ensued, a salary slightly above the average of those comparators is warranted. Our recommendation will put judicial justices' salary at approximately 49% of our salary recommendation for a Provincial Court judge, which is an improvement over the current 46%, but still nowhere near the historical highs. A pay correction to address the unreasonably low pay of BC judicial justices also aligns with the government's current approach to sharing the success of British Columbia's strong financial position with others paid from public funds.

While we agree with the JJA that a significant correction to judicial justice salaries is required, we recommend a slightly lesser amount than what the JJA proposed as sufficient to meet the goal of reasonable compensation. We heard the Government's submission that its proposed salaries take into account the need to remain economically and fiscally prudent, given the anticipated short-term decline and weakening of the economic and financial position that is reflected in Budget 2023. Still, we find the amounts proposed by the Government to be unreasonable given our assessment of all the factors discussed above.

Rather that dividing the corrective increase over two years, as we have recommended for judges, we conclude that the bulk of the salary correction needs to come in the first year of our mandate. The judicial justice division could soon be on life support if recruitment efforts continue to fail, and we think that a delay is too risky. We recommend the judicial justices receive a significant increase as of April 1, 2023. Recognizing that both the JJA and the Government told us they prefer the certainty of defined dollar amounts over increases linked to increases in CPI, we have recommended a fixed increase of $5,000 in each of the following years of our mandate.

Our salary recommendation will likely put BC judicial justices near the national average, and somewhere in the range of judicial justices in Alberta, Saskatchewan, and Ontario.

6 Recommendations on Other Aspects of Judicial Compensation

6.1 Salary Differentials for Administrative Positions

RECOMMENDATION: Administrative judges should continue to receive the following percentages of a puisne judge's salary: Chief Judge 112%; Associate Chief Judges 108%; and Regional Administrative Judges 106%. Administrative Judicial Justices should receive 106% of judicial justice compensation.

We agree with the main participants that the current salary differentials for administrative positions within the court should remain as follows: the Chief Judge (112% of puisne judge), Associate Chief Judges (108% of puisne judge), Regional Administrative Judges (106% of puisne judge), and Administrative Judicial Justices (106% of judicial justice compensation). The higher compensation reflects the added responsibilities and workload that accompany these roles. Agreement among the participants indicates that the current salary differentials are reasonable and do not need to be changed.

6.2 Pensions for Provincial Court Judges

Accrual Rate

RECOMMENDATION: The 3% accrual rate for judge's pensions should be maintained.

Both the PCJA and the Government agree that the current accrual rate for judges' pensions should be maintained at 3%.

The only information before us about judicial pensions came from André Sauvé, Consulting Actuary, who prepared a report for the PCJA. His report compared the pension arrangements of the federal courts and provincial courts in British Columbia, Alberta, Saskatchewan, and Ontario. Aside from age-related accrual rate adjustments in Saskatchewan, both Alberta's and Saskatchewan's pension plans have 3% accrual rates. The Ontario and federal pensions have no fixed annual accrual rates; pension amounts in Ontario and for federally appointed judges use different formulas.[264] Overall, Mr. Sauvé concluded that:

[264] Comparative Analysis of Judicial Pension Plans, Prepared by Andre Sauvé, December 2022, PCJA BD, Tab 3, p.2.

> The compensation value of the judicial pension arrangement in British Columbia is estimated to be 43.1% of salary compared to an average compensation value of 54.6% for the other four jurisdictions for a difference of 11.5% of salary.[265]

This evidence shows the pension of BC's Provincial Court judges to be less valuable than the pensions of other courts. Still, the PCJA and the government have not made any arguments about changes to the judge's pension arrangement. Instead, the PCJA uses this difference in pension value between jurisdictions to argue that their salary proposal is "modest" when considered in the context of the "combined value of both the salary and pension paid to judges in BC and the comparator jurisdictions."[266]

Given the agreement of the PCJA and the Government to maintain the current 3% accrual rate, as well as the fact that it is the same rate as in Alberta and Saskatchewan, we recommend maintaining the 3% accrual rate for judges' pensions.

Non-judicial Pensions

RECOMMENDATION: The Judicial Compensation Act *should be amended to align the non-judicial pensionable service provisions with the Public Service Pension Plan rule changes made in 2018 and 2022, as detailed in Appendix F, in respect of the following:*

i. the benefit accrual rates for service between April 1, 2018-March 31, 2022, and after April 1, 2022;

ii. the past service benefit enhancement and the bridge benefit for the period of April 1, 2006-March 31, 2018 and after April 1, 2018; and

iii. the early retirement factor for non-judicial service earned on or after April 1, 2018.

Some Provincial Court judges earned pensionable service in the Public Sector Pension Plan ("PSPP") as public servants prior to appointment to the bench. However, once an individual is appointed to the bench, both the judicial and the "non-judicial" portions of their pension are governed by Part 3 of the *Judicial Compensation Act*. Historically, many aspects of the non-judicial pension benefit provisions under the Act were aligned with the PSPP rules; however, amendments to the PSPP rules in April 2018 and April 2022 have brought them out of alignment. The result is "a divergence between non-judicial pension benefits earned while working as a regular member of the PSPP … and what would ultimately be received by a judge in respect of the non-judicial component of their pension upon retirement from the bench."[267]

---

[265] *Ibid.*, p.5.

[266] Main Submission of PCJA, para. 287

[267] Joint Submission on Non-Judicial Pensions, para. 4.

To correct this divergence, the Government and the PCJA, with the support of the Chief Judge, jointly proposed that we make the following recommendation:

> That the *Act* be amended to align the non-judicial pensionable service provisions with the Public Service Pension Plan rule changes made in 2018 and 2022, as detailed in the attachment to the joint proposal, in respect of the following:
>
> i. the benefit accrual rates for service between April 1, 2018-March 31, 2022, and after April 1, 2022;
>
> ii. the past service benefit enhancement and the bridge benefit for the period of April 1, 2006-March 31, 2018 and after April 1, 2018; and
>
> iii. the early retirement factor for non-judicial service earned on or after April 1, 2018.

The attachment to the joint proposal is found in Appendix F to this report. The participants advise us that the proposed recommendation would be cost neutral for both the PSPP and for the judges to which the change would apply.[268]

Given that all affected participants support this proposed recommendation, and that it is cost neutral to them, we agree to make this recommendation.

6.3 Benefits

Enhancements to the Flexible Benefits for Judges and Full-time Judicial Justices

> *RECOMMENDATION:* Effective January 1, 2024, Provincial Court judges should receive the enhancements to the flexible benefits program that were offered to excluded public sector employees on January 1, 2023. Future enhancements to the flexible benefits plan for excluded employees and appointees should be automatically implemented for the Provincial Court judges, with the judiciary having recourse to seek changes through future judicial compensation commissions.

The Government notes that modest enhancements were made to the flexible benefits plan for public sector excluded employees on January 1, 2023. The Government suggests that these benefits could be made available for judges and full-time judicial justices. The Government also proposes that "future enhancements to the flexible benefits plan for excluded employees and appointees be automatically implemented for the judiciary." This would not preclude the judiciary from seeking other changes to the flexible benefits plan through future commission processes, but it would ensure that there is no lag time for the judiciary to access benefit enhancements to which other excluded employees become entitled.[269] Examples of the enhancements are an increase in the

[268] Joint Submission on Non-Judicial Pensions, para. 7.

[269] Reply Submission of Government, paras. 59-60; JBD, Vol 2, Tab 46, p. 4 and Appendix "A".

annual maximum for counselling services from $500 to $750, and an increase in the employee basic life insurance from $80,000 to $100,000.[270]

The PCJA supports these changes.[271]

The JJA "does not wish for there to be any changes to its flexible benefits" and does not agree with the changes proposed by government.[272] The JJA opposes the changes based on its understanding that the changes include an annual cap on physiotherapy treatments, which are currently unlimited. The JJA says unlimited physiotherapy treatments are "a valuable benefit given the rigors of the job including the many hours spent at a desk, using a computer and looking at a screen."[273]

Despite the possible cap on physiotherapy treatments, overall, these changes or "enhancements" seem reasonable and are in line with the benefits provided to public sector excluded employees. However, we also note that there are only five full-time judicial justices who are affected by changes to the flexible benefits plans, some of whom may retire during this commission cycle, and that the JJA opposes these changes.

We recommend that, effective January 1, 2024, Provincial Court judges receive the enhancements to the flexible benefits program that were offered to excluded public sector employees on January 1, 2023, and that future enhancements to the flexible benefits plan for excluded employees and appointees be automatically implemented for Provincial Court Judges. We make no recommendation in respect of full-time judicial justices.

Part-time Judicial Justices Per Diem in Lieu of Benefits

RECOMMENDATION: The amount in lieu of benefits added to the per diem pay for part-time judicial justices should be increased from 20% to 22%.

Part-time judicial justices do not receive any benefits as part of their compensation. They currently receive an additional 20% in lieu of benefits, calculated on the amount of a full-time judicial justice salary divided by 207 days. For example, based on the current full-time judicial salary, the amount in lieu of benefits added to the part-time per diem rate would be as follows: ($133,500/207) x 20% = 128.98. The JJA initially sought to increase the percentage amount to 25.4% as this is the government "charge-back" rate for budgeting the cost of benefits for full-time employees, including full-time judicial justices.[274]

The Government proposed an increase in the percentage amount in lieu of benefits to 22%, on the basis that the 25.4% chargeback rate includes a component for administration of the benefits

[270] JBD, Vol. 2, Tab 46, Appendix "A".

[271] TR February 16, 2023, Ms. Latimer for PCJA, p. 97, ll. 15-20.

[272] TR February 16, 2023, Mr. Bernstein for JJA, p. 109, ll. 10-17.

[273] Supplemental Submission of JJA, paras. 14-15. Note that the Submission uses the words "physical therapy", but the flexible benefits plan provides for "physiotherapy": JBD, Vol. 2, Tab 39, p. 1, Column for Option 3.

[274] Main Submission of JJA, paras. 150- 155.

regime. The Government provided a breakdown of the value of benefits paid for by government that actually go to a full-time judicial justice (expressed in terms of a percentage of full-time salary) as follows: pension contributions 15.9%; ETA/MSP 1.95%; health and dental benefits 3.08%; LTD 1.10%. These total 21.93%, which the Government rounded up to 22%.[275] After considering this information, the JJA agreed that an increase in the percentage amount in lieu of benefits to 22% would be appropriate.[276]

We agree with the participants and recommend that the percentage amount added in lieu of benefits to the per diem for part-time judicial justices be increased to 22%. This increase is needed to keep the compensation of part-time judicial justices in line with that of their full-time colleagues.

Chief Judge's Request for Increased Base Budget Funding to the Court to Cover Long-term Disability Plan Costs

The 2022 JCC makes no recommendation concerning funding to the court for long-term disability plan costs for judges and full-time judicial justices.

The Chief Judge sought a recommendation from us that government's base budget funding to the Court be increased by $1,000,000 per fiscal year to cover the cost for long-term disability benefits for judges and full-time judicial justices, with the court having access to contingency funds should the cost exceed $1,000,000.[277]

In response, the Government says it has chosen to fund some of these expenditures associated with the plan through contingencies rather than an increase in base budget funding. Instead of accessing the available contingency funds, since 2020-21, the Office of the Chief Judge has been able to absorb the costs of the long-term disability plan that exceed the base budget amount. There has been no shortfall, and the Office of the Chief Judge has "not demonstrated any need to access the available contingencies earmarked for long-term disability expenditures for the last three fiscal years."[278] In these circumstances the Government requests the commission refrain from making any recommendation.[279]

We agree with the Government that there is no need for any recommendation on this issue. Funds appear to be available to the Office of the Chief Judge if necessary to make up any shortfall resulting from the costs of the long-term disability program.

[275] TR February 15, 2023, Ms. Wolfe for Government, p. 220, ll. 1-23; Exhibit 12.

[276] Supplemental Submission of JJA, para. 12.

[277] Submission of Chief Judge, paras. 3 and 183.

[278] Reply Submission of Government, para. 137.

[279] Reply Submission of Government, paras. 132-138.

6.4 Shift Premiums for Judicial Justices

RECOMMENDATON: As set out in Appendix G, new holidays should be added to the list of the holidays attracting a $245 shift premium, the shift premium for Christmas Day should be increased by $75, a weekend shift premium of $75 should be implemented and a court closure day shift premium of $75 should be implemented.

Judicial justices currently receive a $245 shift premium for taking shifts on certain holidays. The JJA asked that additional holidays be added to the list that attract the $245 shift premium.[280] The JJA also asked for the Christmas Day shift premium to be increased by $75, noting that judges have had to fill Christmas Day shifts for the last four years.[281] The JJA also sought to establish a weekend premium of $75, noting that weekend shifts are often difficult to fill.[282] As well, the JJA asked for a "court closure" premium of $75 for shifts that fall on a court closure day (such as where a court closure occurs on a weekday to make up for a holiday that falls on a weekend).[283]

The Government supports adding additional holidays to the list that attracts the $245 shift premium, and the increased premium for Christmas Day.[284] The Government also supports implementing a weekend shift premium to address the evidence of staffing challenges at the Justice Centre. However, the Government proposes that a $25 premium would be "proportionate to weekend shift premiums paid elsewhere in the public sector."[285] Similarly, for court closure days, the Government supports a $25 premium.[286]

The JJA proposes specific language to describe the shift premiums, to avoid uncertainty over whether a shift attracts a premium and what that premium should be. The Government agrees with all the language proposed, except for the amount of the weekend and court closure premiums, which it submits should be $25.[287] The proposed language is set out in Appendix G.

We agree with both the JJA and the Government that adding the days proposed to the list of holidays attracting a $245 premium, and increasing the premium for Christmas Day, will enhance the court's capacity to staff shifts on these holidays. We also agree with the language proposed to describe the shift premiums.

With respect to weekends and court closure days, the evidence shows Provincial Court judges staffing shifts at the Justice Centre, particularly on weekends. (While we do not have specific information before us concerning court closure days, it is logical to treat them similarly to weekend

[280] Main Submission of JJA, para. 167.

[281] Main Submission of JJA, para. 168-169.

[282] Main Submission of JJA, paras. 173, 93.

[283] Supplementary Submission of JJA, para. 18.

[284] Reply Submission of Government, para. 71; Exhibit 13.

[285] Reply Submission of Government, para. 72.

[286] Exhibit 13.

[287] Supplemental Submission of JJA, paras. 19-21; Exhibit 13.

days as they usually result in a "long weekend.") It is not clear to us whether either a $25 or a $75 shift premium will be sufficient to address the staffing problem; neither may be enough on their own. More judicial justices are required in the staffing pool, which our salary recommendation above is intended to address. Still, in the shorter term, given the much greater cost of having a Provincial Court judge fill a vacant weekend shift, adding a $75 premium to encourage the current judicial justices to pick up these shifts seems reasonable, and that is what we recommend.

6.5 Overhead Amount for Judicial Justices

RECOMMENDATION: The overhead amount added to the per diem pay for part-time judicial justices should be increased from $75 to $100.

Since 2007, part-time judicial justices receive $75 per shift to account for overhead costs. This amount has not been increased in over 15 years. The JJA sought an increase of this amount to $100 per shift, arguing that it is required to keep up with inflation, and to attract highly qualified applicants to the judicial justice position.[288] The Government supports this increase as "logical" given the increase in overhead costs that judicial justices would have incurred since 2007.[289]

We agree it is time to increase the overhead amount for part-time judicial justices to $100 per shift in order to maintain the purchasing power intended when the overhead amount was implemented in 2007. We so recommend.

6.6 Professional Development Allowance

RECOMMENDATION: For the next four fiscal years, the professional development allowance for judges should remain at $4,500 per year, and the professional development allowance for judicial justices should remain at $3,250 per year.

The PCJA requests no changes to the judges' professional development allowance ("PDA") and the Government agrees that no change is necessary. As there is no evidence before us that an increase (or decrease) is required, we recommend this amount remain the same ($4500 per year) for the next four fiscal years.

The JJA seeks an increase in judicial justices' PDA from $3,250 to $4,500 to be at parity with the judges. It also seeks to increase the portion of a judicial justice's PDA that can be used for "Expenses Reasonably Incurred in the Execution of the Office of a Judicial Justice and Approved Other Expenses" from the current $1,500 to $2,500. The JJA says judicial education is important and that the cost of attending conferences that are popular with judicial justices exceeds the current budget.[290]

---

[288] Main Submission of JJA, paras. 157-160.

[289] Reply Submission of Government, para. 65.

[290] TR February 15, 2023, Mr. Bernstein for JJA, p. 124, ll. 3-15, l. 18 to p. 126, l. 17.

The Government does not support either of these proposed changes. It says no evidence demonstrates that recent increases in the PDA budget for judicial justices (implemented April 1, 2020) are ineffective.[291] The Government understands that PDA spending since 2020 has likely been impacted by the pandemic and is therefore not a good measure of need. However, judicial justices' PDA spending for the 2019-20 fiscal year—which occurred mostly prior to the pandemic—was less than one third of the total PDA budget available.[292] As well, during the 2019-20 fiscal year, the per justice PDA was lower at only $2,500. While four justices exceeded that limit, as can be seen by the global numbers, overall, judicial justices only spent half the annual allotment in that year.[293]

On this evidence, we decline to recommend an adjustment to the PDA of judicial justices at this time.

6.7 Travel Allowance

RECOMMENDATION: The current travel allowance or per diems for judges and judicial justices should be maintained.

Neither the PCJA or the JJA seek changes to the current travel reimbursement and the Government asks that the current travel per diems be maintained.[294] Judges and judicial justices both fall within government's "group 4" expense category, meaning they receive the same travel per diems as Members of the Legislative Assembly, which is the highest level.[295] As there is no evidence before us showing a need to increase (or decrease) current travel allowances, we agree with the parties that current travel per diems, whereby judges and judicial justices receive the same travel per diems as Members of the Legislative Assembly, should be maintained.

[291] Reply Submission of Government, para. 80.

[292] Judicial justices spent only $39,722 of the available $124,330, comprised of the 2019-20 allowance of $78,958 and $45,372 carried over from the previous year: Exhibit 10.

[293] Exhibit 10.

[294] The JJA stated that "To the extent that changes are made, the JJABC seeks the same policy as Provincial Court Judges" though it did not ask for any changes be made: Main Submission of JJA, para. 23(c).

[295] TR February 15, 2023, Ms. Wolfe for Government, p. 193, ll. 1-9.

7 Recommendations on Interest and Costs

7.1 Interest on any Retroactive Salary Adjustments

RECOMMENDATON: For retroactive salary increases, the Government should pay judges or judicial justices pre-judgment interest from April 1, 2023 to the date on which the increase is established and post-judgment interest thereafter until payment is made.

In respect of any retroactive salary increases that occur after April 1, 2023, both the PCJA and the JJA seek pre-judgment interest for judges and judicial justices from April 1, 2023 to the date on which the increase is established, and then post-judgment interest thereafter until the payments are made. The Government does not oppose these interest requests. In our view, interest on retroactive payments will ensure that judges and judicial justices receive the full benefit of any salary adjustments that are delayed. The use of the pre-judgment and post-judgement rates is appropriate for this purpose.

7.2 Costs of Participation in Commission Proceedings

RECOMMENDATION: The Government should, by enacting a regulation pursuant to section 7.1(3) of the Judicial Compensation Act*, reimburse 100% of the reasonable costs and disbursements, including expert costs, of the PCJA and JJA for their participation in the 2022 commission process.**

Both the PCJA and JJA ask us to recommend that the Government pay 100% of their reasonable legal fees and disbursements, including—for the PCJA—100% of the cost of its expert evidence.[296] The JJA asks, in the alternative, for a recommendation for "a significant increase to the ceiling of reimbursed costs" by way of a regulation or amendment to the Act.[297] The Government's position is that the Commission should leave costs to be dealt with under section 7.1 of the Act.

In the late afternoon of March 30, 2023, the day before we delivered our Preliminary Report, we were advised that the Lieutenant Governor in Council had increased the maximum amounts for participation costs for the Provincial Court Judges' Association and the Judicial Justices' Association. Order in Council No. 194[298] sets higher amounts for the purposes of section 7.1(2) of

[296] Main Submission of PCJA, para. 355; Main Submission of JJA, para. 23(d).

[297] Main Submission of JJA, para. 23(d).

[298] B.C. Reg. 83/2023, approved and ordered on March 30, 2023.

the *Judicial Compensation Act*. Pursuant to that revision, the legislation effectively provides as follows:

> **7.1** (1) Subject to subsection (2), the government may pay out of the consolidated revenue fund the reasonable costs, incurred by the Provincial Court Judges' Association of British Columbia and the Judicial Justices Association of British Columbia, of participating in the commission.
>
> (2) The maximum amount that may be paid under subsection (1), which maximum amount applies separately to the Provincial Court Judges' Association of British Columbia and the Judicial Justices Association of British Columbia, is as follows:
>
> (a) the first $40 000in costs; [299]
>
> (b) 85% of the costs over $40 000 but under $150 000.[300]
>
> (3) Despite subsections (1) and (2), the Lieutenant Governor in Council may, by regulation, set higher amounts for the purposes of subsection (2).

The JJA tells us its anticipated total legal costs for this process will be approximately $80,000 (including taxes), which is an increase of about $20,000 over the 2019 JCC. It attributes most of the increase to a substantial increase in pre-hearing discussions and preparations.[301] We note the small number of members in the JJA, meaning that it likely has very limited resources.[302] If the JJA were responsible for one third of its legal costs over $30,000, that could impose a $500 to $1000 burden on each individual member—up to 0.7% of a current full-time judicial justice salary.

The PCJA tells us its costs will be approximately $90,000 for legal fees, and disbursements including expert reports, but not including junior counsel's attendance at the hearings. In 2019, the total costs were about $85,000.[303] The PCJA attributes the increase in fees this year to higher expert fees.[304] While the PCJA has a larger pool of potential members with higher salaries than the JJA, it argues it is "manifestly unfair that the judiciary should be burdened by personally funding its participation in the process." In contrast, it says the Government "uses any number of civil servants paid from the public purse and who are presumably capable of utilizing Government resources as they see fit in order to advance the Government's position."[305]

The Government submits the costs formula under the Act has not been found unconstitutional and remains good law.[306] We make no comment here on the constitutionality of those provisions. We speak instead to their effect on the 2022 Commission process.

---

[299] Previously, $30,000.

[300] Previously, two-thirds of the costs over $30,000 but under $150,000.

[301] Supplementary Submission of JJA, para. 29.

[302] Main Submission of JJA, para. 188.

[303] Supplemental Submission of PCJA, para. 23.

[304] Supplemental Submission of PCJA, para. 23.

[305] Main Submission of PCJA, para. 385.

[306] Costs Submission of Government, para. 7.

The Government says the Commission should not make any recommendations on costs, arguing that costs do not fall within the broad jurisdiction of the Commission because costs are not "remuneration, allowances and benefits" of judges and judicial justices and do not "implicate" remuneration, allowances or benefits.[307] The Government refers to a decision of Chief Justice Hinkson, in a judicial review of the Government's response to the 2016 JCC. He upheld the validity of the Government's rejection of the 2016 JCC's decision on costs, and his decision was not appealed.[308] The Government says, consistent with that decision, it may be open to a commission to make a recommendation on costs only "where it is necessary to ensure the approach to costs is 'fair, equitable and reasonable'."[309] The Government says, "A recommendation to alter a legislated norm cannot be justified on the basis of matters the Legislature must have understood at the time the norm was established. Instead, a Commission's recommendation to alter such a norm can only be justified on the basis of exceptional circumstances or a significant evolution in the Commission process."[310] It submits the disparity of resources between the government and the judicial officers, the importance of judicial officer participation in the process, and the potential impact of inflation were all known to the Legislature and therefore do not justify departure from the statutory norm.[311]

The PCJA submits that the legislation sets out no requirement for "exceptional circumstances" before a commission may make recommendations respecting costs.[312] It says section 5(1) of the Act gives a commission broad jurisdiction to report on "all matters respecting the remuneration, allowances and benefits of judges." The PCJA says that the costs of participation in the hearings falls within this broad jurisdiction.[313] Further, it says, "There is no principled difference between recommendations made in the face of the statutory provisions concerning costs and a myriad of other issues that the commissions must consider and which may also require legislative change."[314] Indeed, in these proceedings, the Government and the PCJA have jointly asked us to recommend an amendment to the Act concerning non-judicial pensions. Further, as the PCJA points out, it is difficult to imagine a bar to the commission recommending that government, by regulation, set higher amounts than those set out in the Act, as such regulations are expressly contemplated in section 7.1(3) of the Act.[315]

We agree with the PCJA that we have jurisdiction to make a recommendation on costs.

First, while reimbursement for the cost of participating in a commission may not be "remuneration, allowances and benefits of judges and judicial justices" *per se*, it is "*a matter respecting* remuneration, allowances and benefits." Participation in the commission process is the only way

---

[307] TR March 10, 2023, Ms. Wolfe for Government, p. 88, ll. 17-20.

[308] Costs Submission of Government, para. 9; *Provincial Court Judges' Association v. British Columbia (Attorney General)*, 2020 BCSC 1264.

[309] Costs Submission of Government, para. 18.

[310] Costs Submission of Government, para. 19.

[311] Costs Submission of Government, para. 12.

[312] Supplemental Submission of PCJA, para. 14.

[313] Main Submission of PCJA, paras. 356-357.

[314] Supplemental Submission of PCJA, para. 15.

[315] Supplemental Submission of PCJA, para. 18.

for judicial officers to seek changes to their compensation. Accordingly, the costs of that participation are very much a matter respecting remuneration.

Second, nothing in Chief Justice Hinkson's decision prohibits us from making recommendations concerning costs; his ruling speaks to the rationality of the government's rejection of the 2016 JJC's recommendation on costs, not to the ability of a commission to make such a recommendation. While Chief Justice Hinkson noted departures from the "legislative norm" were for the legislative branch of government to consider, not the judiciary upon judicial review, he did not suggest that commissions cannot make recommendations that depart from the legislative norm.[316] He noted that the statutory formula may be overridden by the government through regulation. In our view, that is most likely to happen following a recommendation from a judicial compensation commission.

Third, there is no legislated requirement for exceptional circumstances to exist before a commission may make a recommendation on the costs of participation in the commission process. The legislature may establish a statutory formula for costs (as it has in BC since 2015), the government may agree to pay the participatory costs of the judiciary (as it did historically in BC), or the commission may determine costs. The Supreme Court of Canada has said that, irrespective of the approach to the payment of costs, "it should be fair, equitable and reasonable."[317] If the statutory costs formula set out in section 7.1 of the Act results in an approach to the payment of costs that is not fair, equitable and reasonable, that is a "matter respecting remuneration" upon which this Commission may make recommendations. And, in assessing what is fair, equitable and reasonable, this Commission is not limited to the consideration of matters that could not have been known to the legislature at the time it enacted section 7.1. If it were so limited, the legislature could, knowingly, enact an unfair, inequitable, and unreasonable approach to costs without any recourse by the judicial officers who must engage through the commission process on matters respecting their remuneration.

The question for us is whether the application of the section 7.1 formula for costs in the circumstances of the 2022 JCC constitutes an approach to costs that is fair, equitable and reasonable.

As described in the introduction to this report, this Commission exists in fulfilment of a constitutional imperative. Judges and judicial justices alike *must* participate in this process to seek any changes to their compensation. They *may not* negotiate with the other branches of government over their compensation.[318] In our hearings, counsel for the JJA told us, "the current allowance for legal fees is insufficient to cover the costs of the association's participation" such that "judicial justices carry some of the costs themselves."[319] He said that the "concern about legal fees "really inhibits participation in this constitutionally mandated process,"[320] and that his clients must think about how much it is going to cost them personally to participate, and consequently, how much

[316] *Provincial Court Judges' Association v. British Columbia (Attorney General)*, 2020 BCSC 1264, at para. 99.

[317] *R. v. Campbell*, [1999] 2 SCR 956, para. 5.

[318] *PEI Reference*, paras. 186 to 191.

[319] TR February 15, 2023, Mr. Bernstein for JJA, p. 128, ll. 9-13.

[320] TR February 15, 2023, Mr. Bernstein for JJA, p. 129, ll. 14-21.

time he can spend in preparing for the hearing.[321] This indicates to us a significant problem with the current costs formula. It creates a deterrent to the level of participation by judges and judicial justices that is reasonably necessary for this Commission to complete its mandate.

We agree with the PCJA that the approach to costs is not equitable. While the Government has resources for this process paid by the taxpayer, the judiciary must pay any amount over the statutory limits out of their own pockets. Further, the statutory formula does not treat different members of the judiciary equitably in that the financial burden on individual judicial justices to participate in the commission process is much greater than the burden on individual judges.

The costs approach is not fair. Section 7.1 does not account for inflation. Thus, with each passing commission cycle, it compensates the JJA and the PCJA less for their participation. We heard from the JJA that, based on inflation alone, the (former) $30,000 amount, for full reimbursement, would need to be increased to $36,000 to cover the same amount of participation costs.[322]

Most importantly, the costs approach is not reasonable. Section 7.1(1) of the Act speaks to government paying the "reasonable costs" of the PCJA's and the JJA's participation in the commission. But the maximum amounts set in subsection (2) are unreasonably low when considered against the amount of work involved in the commission process and the information required by the Commission to complete its mandate.

As noted by the PCJA, the Act does not prescribe a process for the commission.[323] The commission is not a commission of inquiry with resources to retain counsel or other staff to produce evidence; that work is left to the participants. We were told that the amount of work has increased over the last three commissions since section 7.1 came into force, particularly in relation to document production and preparation for the commission hearings.[324] The commission process entails—as described by the PCJA—"multiple days of hearings, expert evidence, experts being recalled and so on and a sufficiently complex process that the government sees fit that it needs to have two counsel presents [sic]."[325] We note that the PCJA also had two counsel present at the hearings, and the JJA had a second counsel appear at one of the virtual hearings. The point is: significant work was required of *all* the main participants.

To be clear, the commission needs the work of the PCJA, the JJA, and the Government to enable it to do its job. All three of these participants need to be adequately funded. The commission also needs expert evidence, tested through well-informed cross-examination where necessary. The costs of leading, and responding to, expert evidence need to be adequately funded.

We have considered whether the March 30, 2023 change to the formula affects our recommendation on costs or the rationale for it.

---

[321] TR February 15, 2023, Mr. Bernstein for JJA, p. 130 l. 17 to p. 131, l. 6.

[322] Main Submission of JJA, para. 185.

[323] *Judicial Compensation Act*, s. 5(6); TR March 10, 2023, Ms. Latimer for PCJA, p. 47, ll. 14-21.

[324] TR March 10, 2023, Mr. Bernstein for JJA, p. 53, l. 10 to p. 54, l. 3; Ms. Latimer for PCJA, p. 47, l. 21 to p. 48, l.3.

[325] TR March 10, 2023, Ms. Latimer for PCJA, p. 47, l. 24 to p. 48, l. 3.

While the higher amount of $40,000 in section 7.1(2)(a) does remedy the negative inflationary impact that we note in our discussion (above) concerning the former $30,000 amount for full reimbursement, nothing in the revised amounts in OIC No. 194 detracts from our core reasons for recommending that the Government should reimburse 100% of the reasonable costs and disbursements, including expert costs, of the PCJA and the JJA for participation in the 2022 commission process.

We have also considered whether the April 3, 2023 judgment by The Honourable Justice Sharma on judicial review of the legislative response to the 2019 JCC[326] requires us to revisit our analysis of the costs issue. We have concluded that it does not; the approach taken by the Court there is consistent with the one we have taken here in our Report.

In summary, the current statutory formula for costs does not lead to a fair, equitable or reasonable result in the context of the 2022 JCC. The result places financial burdens on individual judicial officers. The statutory formula also does not provide for inflationary increases that have occurred since the legislation was passed. Importantly, the current limits on reimbursement deter reasonably full participation in this constitutionally-mandated process.

Consequently, we recommend that Government enact a regulation pursuant to section 7.1(3) to reimburse 100% of the reasonable costs and disbursements of the PCJA and JJA for their participation in the 2022 Commission. If there is controversy about the reasonableness of the costs and disbursements claimed, the participants can come back to us through written submissions or at a hearing.

[326] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2023 BCSC 520.

8 Confidence in the Commission Process

We heard from participants about their levels of confidence in this process. We have also reflected on the judicial compensation process and its history in British Columbia. We hope these comments prove useful to future commissions and to the government in considering our recommendations.

The Recent History of Judicial Compensation Processes

As we noted in our salary recommendations above, salary comprises the largest component of judicial compensation. It has also proven to be the most contentious. The Government provided useful tables summarizing the salary recommendations, responses of the government, ensuing litigation, and outcomes of the last four commissions as shown below:[327]

Year	JCC recommendations (Provincial Court Judges)	Government (Govt) Initial Response	Further Developments
2010	• 2011/12: 0% • 2012/13: 0% • 2013/14: cumulative CPI over prior 3 years	• Rejected salary (and pension) • Substituted 0% salary increase (consistent with net-zero public sector mandate)	• Response challenged • BCSC set aside initial response; remitted back • Second response substituted 1.5% increase for 2013/14 • Second response set aside by BCCA and Govt ordered to accept 2010 JCC recommendations, resulting in 2013/14 salary of $242,464
2013	• 2014/15: $241,500 • 2015/16: $245,122 • 2016/17: $250,024 As 2010 litigation still outstanding, JCC used	• Rejected salary (and pension) • Substituted: 2014/15: $236,950 2015/15: $240,504 2016/17: $244,112	• Response challenged • BCSC set aside initial response; remitted back

[327] These tables are recreated from Main Submission of Government, paras. 66 and 72. We corrected typographic errors to the dates in the middle column of the 2016 rows. See also "Judicial Compensation Commissions 2010 to 2019 – Summary of Submissions and Results," JBD, Vol. 1, Tab 17.

Year	JCC recommendations (Provincial Court Judges)	Government (Govt) Initial Response	Further Developments
	Govt's second response as starting point ($234,605)		• Govt appealed; Judges cross-appealed • BCCA dismissed appeal; ordered Govt to reconsider response without attributing fault to any party or the legislature (as outcome of 2010 litigation changed the starting point) • Second response not challenged; set at: 2014/15: $244,889 2015/16: $248,562 2016/17: $252,290
2016	• 2017/18: $273,000 • 2018/19: $277,095 • 2019/20: $281,251 • 100% of reasonable costs	• Rejected salary (and costs) • Substituted: 2017/18: $262,000 2018/19: $266,000 2019/20: $270,000	• Response challenged • BCSC set aside initial response on salaries but upheld rejection of costs; remitted back • Govt appealed on salaries • BCCA allowed appeal, upholding Govt's initial response
2019	• 2020/21: $287,000 • 2021/22: $297,000 • 2021/23: $307,000 • Regulation be enacted to permit 100% of reasonable costs	• Rejected salary (and costs) • Substituted: 2020/21: $276,000 2021/22: $282,250 2022/23: $288,500	• Response challenged • Litigation ongoing – petition argued September 2022 and decision reserved

Year	JCC recommendations (Judicial Justices)	Government (Govt) Initial Response	Further Developments
2010	• 2011/12: 0% • 2012/13: 0% • 2013/14: 8% ($107,487)	• Rejected salary and per diem • Substituted 0% salary increase (consistent with	• Response to 2010 and 2013 challenged • Govt later agreed to place motion

Year	JCC recommendations (Judicial Justices)	Government (Govt) Initial Response	Further Developments
	• Change to per diem formula (FT salary/219 days + 24.5% in lieu of benefits +$80 overhead)	net-zero public sector mandate)	before legislature to increase salary by 4.9% from previous fiscal • Legislature adopted motion in July 2016, resulting in 2013/14 salary of $104,402 • Court case discontinued
2013	• 2014/15: $104,501 • 2015/16: $106,591 • 2016/17: $108,723 • Change to per diem formula (change number of days to 207 to account for chambers days allowed to FT JJs)	• Rejected salary; accepted per diem change • Substituted: 2014/15: $101,018 2015/16: $103,038 2016/17: $105,099	• Resulting motion of legislature in July 2016; salaries set at: 2014/15: $105,968 2015/16: $108,087 2015/17: $110,249
2016	• 2017/18: $125,000 • 2018/19: $126,875 • 2019/20: $128,778 • 100% of reasonable costs	• Rejected salary (and costs) • Substituted: 2017/18: $118,000 2018/19: $120,000 2019/20: $122,000	• Salaries implemented per Govt response • Costs paid per statutory formula
2019	• 2020/21: $138,000 • 2021/22: $142,000 • 2022/23: $146,000 • Regulation be enacted to permit 100% of reasonable costs	• Rejected salary (and costs) • Substituted: 2020/21: $125,750 2021/22: $129,500 2022/23: $133,500	• Salaries implemented per Govt response • Costs paid per statutory formula

These tables show the repeated history of commissions making salary recommendations, governments rejecting those recommendations, and the PCJA petitioning the court for judicial review, followed by one or more of the parties appealing the judgment to the Court of Appeal, occasionally resulting in an amended response and further litigation.

Disillusionment with the Commission Process

The PCJA set out the ideal view of judicial compensation commissions in its submissions, stating that their very existence attracts qualified applicants to the court because a commission provides candidates with the "legitimate expectation that compensation will be regularly, meaningfully, and effectively reviewed, and adjusted in good faith." This expectation, the PCJA says, reduces the "risk that only those lawyers whose current level of compensation is less than that of a judge will

be attracted [to applying for the position]."[328] Further, the existence of a commission and the prospect of increases in compensation that at least keep pace with inflation may explain why judges remain as judges after appointment.[329]

In the oral submissions, we heard a disheartened view of the actual commission process over time. Counsel for the JJA described its members' strong feelings of disillusion.[330] This is perhaps unsurprising, given the history set out above. Repeatedly, judges and judicial justices have participated in time-consuming processes in good faith before independent commissions. The commissions' resulting recommendations for salary increases are then rejected by the government. For the last four commission cycles, the government's rejection of the salary recommendations has led to the judges seeking judicial review of those decisions. The Court of Appeal commented in 2021 that while the commission process in British Columbia "has avoided the unseemly involvement of judges of the British Columbia Provincial Court in the negotiation of their remuneration, it has done so at the cost of constant litigation."[331] (It appears that judicial justices have not been involved in the same amount of litigation simply because they cannot afford it.[332])

This repeated pattern risks compromising the commission process itself. Participation in commissions can seem pointless and ineffective to those whose livelihoods are at stake. This problem is compounded where the costs of participation are not covered.

It must be recalled that judicial compensation commissions are constitutionally required to be independent, objective, and "most importantly, the commission must also be effective."[333] The commission's report "must have a meaningful effect on the determination of judicial salaries."[334] This does not mean the commission's report is binding on government; the government retains power to depart from the commission's recommendations as long as it justifies its decision to do so with "rational reasons."[335] However, the commission's recommendations must be given weight.[336] The pattern of almost routine rejection of the salary recommendations of independent and objective commissioners seriously undermines the effectiveness of the commission process.

We also note that this pattern creates uncertainty around judicial compensation that could well affect the ability of the Provincial Court to recruit new judges and judicial justices. The legislature has specified that commissioners must consider the need to attract highly qualified applicants in

[328] Main Submission of PCJA, paras. 155 and 157.

[329] Main Submission of PCJA, para. 158.

[330] TR February 13, 2023, Mr. Bernstein for JJA, p. 20, ll. 10-23.

[331] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2021 BCCA 295, JBA, Vol. 1, Tab 14, para. 7.

[332] As counsel for the JJA noted in his opening remarks at the Commission hearing: "The judicial justices are not involved in litigation, …That isn't to say that they necessarily agree with previous outcomes, but there's resource issues involved in litigation." See: TR February 13, 2023, Mr. Bernstein for JJA, p. 22 ll. 2-7.

[333] *PEI Reference*, para. 174.

[334] *PEI Reference*, para. 175.

[335] *Bodner*, paras. 20-22; *PEI Reference*, paras. 182-184.

[336] *Bodner*, para. 23.

order to maintain a strong court. To say the least, perpetual litigation and uncertainty about salary—the largest component of compensation—is not a feature that would attract highly qualified candidates to apply for appointment to this court; it is much more likely to be a deterrent.

The pattern could also lead to a decline in morale due to the repeated cycle of commission recommendation, government rejection, judicial review, appeal, and eventual resolution of a salary, possibly years after it has been earned. So far as we are aware, no other group of people paid from the public purse is subject to this constant cycle of uncertainty over their salaries.

The Government argued that the disillusion spoken of in the submissions of the PCJA and JJA—concerning whether the work of this Commission would meaningfully affect the outcome—stems from the incorrect view that the legislature is intended to simply accept the recommendations of the commission in order for them to have meaningful effect.[337]

While the Government is correct that commissions' recommendations are not binding, they do need to be given "meaningful effect." Any *single* rejection of a salary recommendation does not necessarily undermine the constitutional process for judicial compensation. However, the repeated pattern of government receiving, rejecting, and substituting lower numbers for the salaries recommended by multiple independent commissions at the very least raises doubt about the effectiveness of the process in the minds of participants (and the commissioners who undertake this work).

When Chief Justice Lamer wrote in the *PEI Reference* that government must be prepared to justify—if necessary in a court of law—"one or more" recommendations it chooses not to accept, he likely did not envision what has ensued in British Columbia over the last 13 years. Independent commissioners have worked hard to review the evidence and to make impartial recommendations for salaries that reflect reasonable compensation in consideration of the statutory factors. They have arrived at recommendations after submissions from the Government, from the judges and judicial justices, and from external organizations such as the Canadian Bar Association and the Law Society, and after giving serious consideration to all of those submissions. There has been no suggestion that previous commissions were anything but impartial. If this process is working properly, rejection should be the exception, not the norm. The government should have confidence in the process that it set up. It should have confidence in the commissioners who are appointed through that process.

We hope that our recommendations will receive careful consideration, followed by implementation, and that this 2022 Judicial Compensation Commission will mark a change in the unfortunate pattern that has been established over the previous decade. Such an outcome would begin to restore confidence in the commission process.

[337] TR March 10, 2023, Ms. Wolfe for Government, p. 94, ll. 2-7.

9 Conclusions

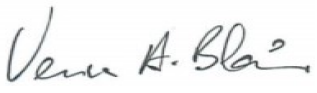
Despite the concerns about the process identified in the preceding section, we remain hopeful that the work we have done to develop recommendations for the reasonable compensation of British Columbia's Provincial Court judges and judicial justices for the next four fiscal years will be useful and that this Commission's work will prove to be not only independent and impartial, but also effective.

The work of the 2022 JCC was shared by many people. We thank counsel for the Government, PCJA, and JJA, and the participants themselves, for the thoughtful work that went into compiling information and providing useful submissions. We could not have done our job without you. We also thank the witnesses who took time to appear at our hearings—two of them more than once. Your testimony helped us understand some of the factors we needed to consider in making our recommendations. We thank government officials and counsel for making all the arrangements for our hearings at UBC Robson Square, and for handling the administration of the hearings. We recognize the contributions of the Chief Judge's staff and the judicial justices who organized court tours for us in conjunction with our counsel. We thank the Chief Judge and the other judges and judicial justices who took the time to speak with us during our court visits. We also appreciate the written submissions of the Law Society and the Canadian Bar Association – BC Branch.

The Commission particularly thanks Commission Counsel, Kathy Grant, for her invaluable assistance, advice, and support. As not only Commission Counsel, but also as the Commission's only administrative support, Ms. Grant played many roles, all effectively and with aplomb.

Lynn Smith, OC, KC, Commission Chair

Eric Gottardi, KC



Vern Blair, FCPA, FCA, FCBV, FRICS

Robert Lapper, KC

Lisa Castle

Appendix A: List of Submissions

1. Submission of the Provincial Court Judges Association of British Columbia to the 2022 Judicial Compensation Commission, January 12, 2023, Counsel: Alison M. Latimer, KC ["**Main Submission of PCJA**"]

2. Submission of the Judicial Justices Association of British Columbia, 2022 Judicial Compensation Commission, January 12, 2023, Counsel: Danny Bernstein ["**Main Submission of JJA**"]

3. Submission of the Government of British Columbia to the 2022 Judicial Compensation Commission, January 12, 2023, Counsel: Karrie Wolfe and Steven Davis ["**Main Submission of Government**"]

4. Submission of the Canadian Bar Association, BC Branch to the 2022 Judicial Compensation Committee [sic], January 23, 2023

5. Submission of the Law Society of British Columbia, 2022 Judicial Compensation Commission, January 24, 2023

6. Submission of the Chief Judge of the Provincial Court of British Columbia to the 2022 Judicial Compensation Commission, January 25, 2023 ["**Submission of Chief Judge**"]

7. Submission of the Judicial Council of British Columbia to the 2022 Judicial Compensation Commission, January 25, 2023 ["**Submission of Judicial Council**"]

8. Reply Submission of the Provincial Court Judges Association of British Columbia to the 2022 Judicial Compensation Commission, February 3, 2023, Counsel: Alison M. Latimer, KC ["**Reply Submission of PCJA**"]

9. Reply Submission of the Judicial Justices Association of British Columbia, Compensation Commission 2022, February 3, 2023, Counsel: Danny Bernstein ["**Reply Submission of JJA**"]

10. Reply Submission of the Government of British Columbia to the 2022 Judicial Compensation Commission, February 3, 2023, Counsel: Karrie Wolfe and Steven Davis ["**Reply Submission of Government**"]

11. Joint Proposed Recommendation to the 2022 Judicial Compensation Commission respecting Non-Judicial Pensions for Provincial Court Judges, March 3, 2023 ["**Joint Submission on Non-Judicial Pensions**"]

12. The Government of British Columbia's Submissions to the 2022 Judicial Compensation Commission respecting participation costs, March 4, 2023 ["**Cost Submission of Government**"]

13. Supplemental Submission of the Government of British Columbia to the 2022 Judicial Compensation Commission regarding matters specific to the Judicial Justices Association, March 6, 2023 ["**Supplemental Submission of Government, March 6, 2023**"]

14. Supplemental Submission of the Government of British Columbia to the 2022 Judicial Compensation Commission on Budget 2023, March 7, 2023 ["**Budget Submission of Government**"]

15. Supplemental Submission of the Provincial Court Judges Association of British Columbia to the 2022 Judicial Compensation Commission, March 7, 2023 ["**Supplemental Submission of PCJA**"]

16. Supplemental Submission of the Judicial Justices Association of British Columbia, Compensation Commission 2022, March 7, 2023 ["**Supplemental Submission of JJA**"]

Appendix B: Documents and Authorities

1. Joint Book of Documents of the Parties, Volumes 1 and 2, with revised Tab 34 (revised March 9, 2023) ["**JBD**"]

2. Book of Documents of the Provincial Court Judges Association of British Columbia ["**PCJA BD**"]

3. Book of Documents of the Judicial Justices Association of British Columbia

4. Appendices for the Submission of the Government of British Columbia ["**Appendices for Submission of Government**"]

5. Appendices to the Reply Submission of the Government of British Columbia (in same volume as the Government's Reply Submissions)

6. Supplemental Book of Documents of the Judicial Justices Association of British Columbia

7. Joint Book of Authorities of the Parties, Volumes 1 and 2 ["**JBA**"]

8. Package of seven documents prepared or compiled by the Government concerning recent pay increases to family physicians.

9. Executive Council of Nova Scotia, OIC 2023-71, March 7, 2023, adopting recommendations of the Nova Scotia Provincial Judges' Salaries and Benefits Tribunal for period of April 1, 2023 to March 31, 2026.

10. Transcripts of Oral Hearings for February 13, 2023, February 14, 2023, February 15, 2023, February 16, 2023, March 10, 2023, and March 13, 2023 ["**TR**"]

Appendix C: Witnesses

Monday, February 13, 2023

Mr. Ian McKinnon, Pacific Issues Partners

Mr. André Sauvé, actuary in private practice

Tuesday, February 14, 2023

Ms. Heather Wood, Deputy Minister of Finance for British Columbia

Friday, March 10, 2023

Mr. Ian McKinnon, Pacific Issues Partners

Monday March 13, 2023

Ms. Heather Wood, Deputy Minister of Finance for British Columbia

Appendix D: Hearing Exhibits

Exhibit	Description
1	The Current Financial Position of the Government: A report for Submission to the Judicial Compensation Commission Prepared by Ian McKinnon – Presentation Material
2	Point in Time Report on the Current and Expected Economic Conditions in British Columbia and the Current and Expected Financial Position of Government as of December 2022, prepared by Heather Wood; and Presentation to the Judicial Compensation Commission, February 14, 2023
3	Times Colonist Article, February 6, 2023 "B.C. throne speech forecasts slowdown but says it's not time to cut back on spending"
4	British Columbia News Release, office of the premier, dated February 12, 2023 "B.C. building stronger communities with $1-billion Growing Communities Fund"
5	Vancouver Sun, February 13, 2023 "Vaughn Palmer: Why B.C.'s premier is in a rush to spend, spend, spend"
6	British Columbia Construction Association, BC Construction Industry Statistics (Fall-2022)
7	The Cambridge Lectures 2023 Registration Form, and the 2023 NCLP Registration Form
8	BC Prosecution Service Annual Report 2021/22
9	Memo to Judicial Compensation Commission from Chief Judge Melissa Gillespie, February 14, 2023 Re: Judicial Applicant Information
10	2019-20 table of expenditures of Judicial Justice Professional Development Expenses
11	Replacement for p. 3 of Government Reply Submissions (Blue Coloured Table)
12	Email from Mr. Davis, February 16, 2023 concerning "22% for pay in lieu of benefits - part-time Judicial Justices"
13	Email from Ms. Wolfe, March 7, 2023 concerning "2022 JCC – Government's position re: JJABC modified shift premium proposal"

14	Ian McKinnon Presentation, "The Current Financial Position of the Government Post-Budget Update" March 2023
15	Vancouver Sun, News Article, March 6, 2023, "Surrey might reduce property tax hike, but only if RCMP remains, mayor says"
16	Vancouver Sun, News Article, February 23, 2023, "2021 B.C. floods recovery: Federal government provides $557 million to help address devastation"
17	Heather Wood, Presentation to the Judicial Compensation Commission re: Budget and Fiscal Plan 2023/24 – 2025/26, March 10, 2023

Appendix E: Court Tours and Site Visits

1. November 21, 2022[338]
    a. Robson Courthouse, 800 Hornby St, Vancouver, BC
        - ACJ Wishart spoke about virtual family management conferences and settlement conferences
        - Commissioners and participant representatives watched traffic court, and civil law hearings
    b. Vancouver Criminal Court, 222 Main St, Vancouver, BC
        - Commissioners and participant representatives watched disposition court
    c. Downtown Community Court, 211 Gore Ave, Vancouver, BC
        - Commissioners and participant representatives watched the Downtown Community Court
        - Judge Doherty provided an overview of the Court
    d. Surrey Courthouse, 14340 – 57 Ave, Surrey, BC
        - ACJ Wishart provided an overview of virtual bail
        - Commissioners and participant representatives watched virtual bail, in-person bail and other criminal matters
2. February 10, 2023
    a. Indigenous Court, Inn at the Quay, 900 Quayside Dr, New Westminster, BC
        - Judge Brown provided an overview of the court, prior to sitting
        - Commissioners and participant representatives watched the court, including client updates and sentencing
3. February 11, 2023
    a. Justice Centre
        - Chief Judge Gillespie, Judicial Justice Brown, and Judicial Justice Blackstone provided an overview of work at the Justice Centre
        - Commissioners and participant representatives watched bail hearings
        - Commissioners and participant representatives viewed how a judicial justice deals with an electronic search warrant application

[338] Commissioner Castle was unable to attend on this day due to illness. Commissioner Gottardi was only able to attend at Surrey Courthouse.

Appendix F: Attachment to Joint Proposed Recommendation Re: Non-judicial Pensions

ECKLER

MEMO

TO	Paul Craven, ADM, Justice Service Branch, Ministry of Attorney General Melissa Gillespie, Chief Judge, Provincial Court of British Columbia
FROM	Catherine Robertson, Eckler Ltd.
CC:	Chris Skillings, Director, Reporting & Analysis, Provincial Treasury Stuart Morgan, Executive Director, Public Service Pension Board of Trustees
DATE	February 24, 2023
RE	**2022 Judicial Compensation Commission ("JCC") proposal to recommend amendments to the *Judicial Compensation Act* to incorporate non-judicial pension benefit plan design changes**

Further to the letter of February 15, 2023 from the Public Service Pension Board, this memo sets out the requested analysis on potential cost implications from the proposal to recommend amendments to the Judicial Compensation Act ("JCA") to incorporate non-judicial pension benefit plan design changes.

Background

The background document provided to us is attached to this memo for reference. In summary, the Public Service Pension Plan (the "PSPP") has been amended twice recently. Firstly, effective April 1, 2018, the benefits for general PSPP members were amended to introduce a flat accrual rate of 1.85%, eliminate the bridge benefit and the rule of 85, provide an early retirement reduction of 6.2% per annum below age 60, as well as providing a retroactive benefit improvement to increase the below YMPE accrual rate from 1.35% to 1.65%, with a corresponding reduction in the bridge benefit, for service accrued from April 1, 2006 to March 31, 2018. We refer to these amendments in this memo as the "2018 PSPP amendments". Secondly, effective April 1, 2022, the benefits for general PSPP members were amended to increase the flat accrual rate to 1.95% for future service, "the 2022 PSPP amendments".

In the absence of a change to the JCA, currently when any PSPP plan member is appointed as a judge, any non-judicial service under the PSPP reverts back to the PSPP benefits prior to the 2018 and 2022 PSPP amendments. This memo considers the cost implications, if any, of the proposed amendments to apply the 2018 and 2022 PSPP amendments to non-judicial service for judges (the "JCC non-judicial proposed amendments"). No changes are being proposed, or have been considered, for judicial service.

The request is for us to consider any cost implications from the JCC non-judicial proposed amendments both for PSPP and for Judges.

ECKLER

PSPP Cost Implications

We have reviewed the impact of the JCC non-judicial proposed amendments on the PSPP, and conclude there is no cost impact to PSPP.

As noted in our valuation reports for PSPP, we ignore the enhanced benefits which are provided to certain member e.g. judges in the valuation, and report separately to the Board on the additional contributions required for such members. As a result, when costing both the 2018 PSPP amendments and the 2022 PSPP amendments, we assumed the amendments would apply to all members, including judges. This means we have already reflected the cost of providing the 2018 and 2022 PSPP amendments to non-judicial service for judges within the 2018 and 2022 PSPP amendments. Generally, where these amendments resulted in a cost to the PSPP, these costs were met out of surplus. The surplus arose on all PSPP members, so has been allocated appropriately. The appropriate contributions have also been made for the benefits provided.

Judges Cost Implications

We have reviewed the impact of the JCC non-judicial proposed amendments on the contributions currently being paid by judges, and conclude there is no cost increase to judges.

We establish the contributions due from judges based on a separate valuation. Judges are a relatively small group of members, who are on average older than the general PSPP active population, and with more generous benefit provisions. Due to the size of the group, and the potential spread of ages at which judges are appointed, it is not appropriate to use the entry age normal cost method that is used for the regular plan. Accordingly, we use the projected unit credit method, which estimates the cost of benefits accruing following the valuation and therefore accurately allows for the age profile of the judges and the increasing cost of accrual over time.

Although there are no changes being proposed to the current benefits for judicial service, the JCC non-judicial proposed amendments may slightly reduce the current judges contributions. The reason for this is that where the JCC non-judicial proposed amendments have an impact on the accrued pension, they will, in aggregate across all judges, increase the total accrued pension. As a result, where a judge is projected to meet the current maximum accrual of 70% of the member's highest average salary, then they may meet this limit sooner allowing for the JCC non-judicial proposed amendments. On reaching this maximum, the valuation assumes that contributions cease, resulting in a lower required contribution. The data we have includes the total non-judicial service, so we have had to approximate how that service is split between April 1, 2006 to March 31, 2018 and from April 1, 2018 (to March 31, 2020, the date of the last valuation). The estimated contribution reduction is marginal. Given that the magnitude of the reduction is not material, the approximations involved in the estimate, and the upcoming valuation as of March 31, 2023 (which may lead to contribution changes dues to experience or data changes), we would recommend that the current contributions are maintained until the 2023 valuation is completed.

With respect to any increase in accrued benefits that may apply to individual judges as a result of the JCC non-judicial proposed amendments, as noted above, these increases were already costed in the 2018 and 2022 PSPP amendments, with any increased cost largely being met from surplus. Hence, the judges should not be charged again for any benefit improvements to accrued service as a result of the JCC non-judicial proposed amendments. In addition, the appropriate contributions have been paid to the PSPP for any post March 31, 2018 non-judicial service accrued by any current judge.

We would be pleased to discuss this further.

2022 Judicial Compensation Commission ("JCC") proposal to recommend amendments to the *Judicial Compensation Act* to incorporate non-judicial pension benefit plan design changes

Background

The *Judicial Compensation Act* ("JCA") includes provisions for judges' pension benefits for both judicial service and non-judicial service (if any). At retirement, judges will receive a blended lifetime pension benefit if they earned any pensionable service as a regular member under the Public Service Pension Plan ("PSPP") prior to being appointed to the provincial court (for example, working as a government lawyer).

Historically, the JCA's non-judicial pension benefits provisions have been harmonious with the PSPP rules in many respects. This harmony ensured the pension benefit earned and paid for while serving as a regular member is maintained despite the change in employment status. However, plan design changes made by the PSPP in recent years have not been incorporated into the JCA, resulting in a divergence in the benefits for impacted judges in relation to non-judicial service.

The changes proposed for recommendation to the 2022 JCC intend to incorporate the plan design changes to ensure impacted judges receive benefits in harmony with the current PSPP plan design (i.e., the benefit that was earned prior to judicial appointment). If ultimately implemented through subsequent JCA amendments, it is expected the changes will result in improved lifetime benefits for virtually all existing active and retired impacted judges.

Proposed Amendments to be Recommended

The proposal is to pursue incorporating plan design changes into the JCA for those elements where the JCA and PSPP have been historically harmonious (an overview of pension benefits is provided in Appendix A). These elements include the benefit accrual rates, the bridge benefit, and the early retirement factor. If implemented, the proposed changes would apply to non-judicial service only; there would be no changes to the judicial benefit. Specifically, the proposed changes are as follows:

1. Moving from 1.35%/2% integrated benefit accrual rates to the following flat benefit accrual rates:
    a. 1.85% for service from April 1, 2018 – March 31, 2022
    b. 1.95% for service after April 1, 2022
2. Past service benefit enhancement ("benefit enhancement") to the lifetime portion of the pension of 1.35% up to 1.65% for service on earnings up to Yearly Maximum Pensionable Earnings ("YMPE") for the period of April 1, 2006 – March 31, 2018
3. Corresponding elimination / reduction to the bridge benefit payable until the earlier of age 65 and death:
    a. Elimination of bridge benefit for service after April 1, 2018; and
    b. Reduction of bridge benefit from 0.65% to 0.35% on earnings up to the YMPE for service between April 1, 2006 and March 31, 2018 (offset by the benefit enhancement to the lifetime portion above)

4. Increasing the Early Retirement Factor (ERF) from 5% to 6.2% for the non-judicial benefit portion of service earned on or after April 1, 2018, for judges that do not qualify for an unreduced pension.

Individual judges' pensionable service will likely cross over the timeframes shown above.

There are other pension elements that have not been historically harmonious between the two regimes and would therefore not be changed by this proposal if ultimately implemented. They include:

1. Shorter three year Highest Average Salary (HAS) calculation for both judicial and non-judicial service, compared to five years for regular members;
2. More favourable "Rule of 55/5" (no reduction in pension if retire at age 55 with at least 5 years of service) for all service (both judicial and non-judicial). Depending on the service period, regular members must meet the rule of 85 (for service pre-plan design), have 35 years of service or reach age 60 with at least 2 years of service to qualify for an unreduced pension; and
3. Enhanced 'normal form' of pension that includes a joint life 60 per cent normal form option with no reduction for married members. Regular members are only provided a single life with a 10-year guarantee normal form, regardless of their spousal status.

In each case, the features above result in a more favourable pension benefit for judges compared to benefits earned by regular members of the plan. The continuation of these more favourable features is an important factor in support of the 'net benefit' outcomes for impacted judges under the proposal for recommendation.

Determination of Impacted Judges

The plan design changes were applied to all regular members that still had an entitlement in the plan at the time of implementation, regardless of status: all active, inactive/deferred and retired members were impacted to the extent pensionable service was earned during the periods noted above. However, because the non-judicial component of judges' pensions is prescribed by the JCA, the plan design changes did not apply to judges.

The proposal will apply the changes in a consistent manner for judges with non-judicial service earned during the effective dates if those judges still have an entitlement in the plan[1]. This is true regardless of status under the plan: e.g. active, inactive/deferred, or retired. This application is the most equitable approach to implementing plan design changes, including because it ensures the past service benefit enhancement is awarded consistently to all members.

Pension Corporation has confirmed there are a total of 54 impacted judges with non-judicial service earned in the timeframe that would be affected by the plan design changes, if

[1] Any member who remains in the pension plan, whether actively employed, retired, or deferred but with benefits left in the plan, holds an entitlement.

implemented: 47 active judges and 7 retired judges[2].There are no inactive/deferred members impacted. An assessment of the population of impacted judges is provided in Appendix B.

Effective dates

The proposal for recommendation would, if implemented, apply the new provisions retroactively to the effective dates of the plan design changes. This retroactivity ensures impacted judges receive the benefits of plan design changes consistent with what would have applied to their previous earned time if they had not been appointed, creating equity with continuing regular members of the plan.

Importantly, the past service benefit enhancement was provided to members with an entitlement under the plan on or after October 1, 2019. All members, whether active, inactive/deferred, or retired that were in the plan on or after this date received the benefit enhancement for time served during the April 1, 2006 to March 31, 2018 period. The proposal for recommendation would, if implemented, retroactively award the benefit to eligible judges (including retired judges) with an entitlement as of the October 1, 2019 date.

For judges that are not eligible for an unreduced pension (i.e. members who receive a reduced pension), the higher ERF would apply to the non-judicial pension component at the time of retirement for non-judicial service earned after April 1, 2018 (being the start date of the new flat accrual structure). However, Pension Corporation advises there have been no reduced pensions put into pay over the last 15 years. As a result, this change has no impact on the existing retired judge population and is not anticipated to impact active judges as a population in the future.

The October 1, 2019 effective date for the benefit enhancement would also be relevant in the following specific circumstances.

Commuted values

The October 1, 2019 effective date was relevant for calculating a commuted value in the event a member elects to leave the plan or a lump sum payout is required due to a member's death[3]. A member/beneficiary who took their commuted value prior to this date did not receive the benefit enhancement.

Pension corporation has confirmed there have been no commuted values calculated for impacted judges since October 1, 2019, and therefore there is no impact for existing judges (and no recalculations required). Assuming the parties agree to propose, and the JCC recommends, these changes, it is proposed that, rather than using the October 1, 2019 date for purposes of determining a member's entitlement for commuted values, the date the JCC recommendations in this regard are either accepted by the Lieutenant Governor in Council or approved by the

[2] In addition to the 54 impacted judges, there are also 5 impacted masters: 2 active master and 3 retired masters. While masters' pensions are tied to those of provincial court judges under the *Supreme Court Act*, the 2022 JCC will not deal with masters directly, so the remainder of this document omits reference to the 5 impacted masters.

legislative assembly be used instead. This approach would avoid the complexity of having to recalculate the amount if a commuted value payment is made to a judge between today and the effective date of the JCA amendments. If a judge is paid a commuted value after the date of the JCA amendments, the benefit enhancement would be included.

Adjustments to the normal form

For members who are currently receiving a pension and chose a pension option with a greater value than the normal form pension, the proposal will ensure that member's pension prior to age 65 does not decrease. This means that for members currently receiving a pension who chose a single life pension guaranteed for 15 years or a 100% joint survivor pension, there would be a slight reduction in their lifetime pension increase in order to maintain the same pension prior to age 65[4]. This is the same principle that was applied for regular members at the time plan design was implemented.

Pension Corporation has confirmed there are two existing retired judges who would be impacted by this issue if the changes are ultimately implemented. These members would see no impact to their pre-65 payments and would still receive an increase to lifetime benefits after age 65, albeit on a slightly reduced basis for the reason noted above.

Refund of overcontributions

The JCA permits a lifetime pension benefit up to a maximum 70% of HAS. When an active judge's benefit accrual reaches 70%[5], contributions cease. If proposed plan design changes result in a judge exceeding the 70% maximum, or reaching the maximum more quickly, the judge will have made an over-contribution retrospectively. Under the proposal, overcontributions would have to be calculated and returned to any judge in this situation who has an entitlement on or after October 1, 2019.

Pension Corporation has confirmed there are three judges (two active, one retired) that have reached the 70% maximum and would require a refund of overcontributions if the changes are implemented. There are no inactive/deferred judges impacted.

Cost implications to the Plan

The plan design changes were developed and implemented within a 'cost neutral', or 'fully funded' framework; the benefit of new flat accrual rates was funded by foregoing the bridge benefit and increased early retirement factor on future service. As well, the estimated cost related to the past service benefit enhancement was funded from a portion of the plan's surplus identified in the 2017 actuarial valuation. In combination, both changes were fully funded and did not result in a change to contribution rates.

---

[4] An optional form factor is applied to the lifetime pension when a greater pension form is provided than the normal form. This factor is not applied to the temporary bridge benefit, therefore this can result in a small reduction in the net payment before age 65.

[5] For example, for a judge that works 100% in a judicial capacity (I.e. has no non-judicial service), the 70% max is reached after 23.33 years (70% / 3% accrual per year).

It is expected that the proposal, if implemented, will have no incremental cost to the plan: as members of the pension plan, costs associated with the benefits accrued were considered at the time the actuarial work was performed. This is expected to be true even with anticipated retroactive benefit enhancements and/or overcontributions that result in lump sum payments to impacted judges. The proposal here simply ensures the benefits are awarded to judges with non-judicial service during the relevant timeframes as the plan design changes originally contemplated.

Pension Corporation's internal actuary has reviewed the proposal and agrees with this conclusion. The plan's actuary will be engaged to confirm this understanding. The ability to move forward with the proposal for recommendation to the 2022 JCC is contingent on the actuary's confirmation of no cost outcome. If a cost is identified, funding sources and/or modifications will need to be identified.

Next steps

- Confirm a clear understanding with all parties of the proposal, respond to any additional questions, and agreement to proceed
- Liaise with Pension Corporation for additional information and/or modelling, if needed
- Confirm the 'no cost' implications with plan actuary
- Confirm JCC submission approach

Appendix A – Overview of Defined Benefit Pension Benefit

Judicial pensions are a **defined benefit** (DB) pension arrangement. The amount of the lifetime pension benefit is calculated based on a benefit accrual rate, years of service under the plan, and the salary earned by the member.

While judges are members of the Public Service Pension Plan (PSPP), their enhanced pension rules for judicial service are contained in the *Judicial Compensation Act* (JCA). The JCA also contains the pension rules for non-judicial service.

Glossary of Key Terms

Benefit Accrual Rate: The multiplier used in the pension formula, along with a member's pensionable service and earnings, to calculate the member's lifetime pension.

Bridge Benefit: A temporary monthly amount paid in addition to the lifetime pension. It is payable from the member's retirement date until the member turns 65 or dies, whichever comes first. For regular members, the bridge benefit applies only to service up to March 31, 2018.

Commuted Value: A lump-sum value based on the amount of money the pension plan would need to put aside today, at current interest rates, to pay for a member's future pension at retirement.

Highest Average Salary (HAS): The average of a member's three highest years of pensionable salary for judges (compared to a five year average for regular members). To calculate this average, the plan uses the best three years of full-time-equivalent earnings from the member's entire time with the plan. When a member retires, their pension is based on a formula that uses the member's highest average salary.

Normal Form of pension: Is the single life or joint life amount of a pension set by the Board or as specified in the *Judicial Compensation Act*, before any actuarial factors are applied to calculate the various pension option amounts.

Year's maximum pensionable earnings (YMPE): A salary limit set by the federal government each year for the purposes of determining the maximum annual contributions workers make to the Canada Pension Plan. It is also used as part of the pension formula to calculate contributions and pension benefits for certain periods.

<u>Existing JCA terms</u>

Accrual Rates
Non-judicial service:

- Lifetime: 1.35% up to the YMPE, 2.0% over the YMPE
- Bridge Benefit: 0.65% up to lesser of HAS or YMPE

Judicial service:

- Lifetime: flat 3.0%
- Bridge Benefit: No bridge benefit

Highest Average Salary (HAS)

- 3-year HAS applied to both non-judicial and judicial service

Early retirement reduction rates

- 5.0% per year from age 60, for non-judicial and judicial service, subject to unreduced rule below
- Judges qualify for an unreduced pension at age 55 if they have at least 5 years of contributory service (55/5 rule)

Sample Calculation (under existing JCA pension benefits):

- Assume the following:
  - 10 years of non-judicial service and 10 years as a judge
  - HAS of $290,000
  - YMPE $64,900
  - Retirement age: 65 (no bridge benefit or early reduction applied)
- Non judicial service:
  - 1.35% x 10 years x $64,900 = $ 8,762 plus
  - 2.0% x 10 years x $225,100 = $45,020
- Judicial service:
  - 3.0% x 10 years x $290,000 = $87,000
- **Total Annual Pension = $140,782**

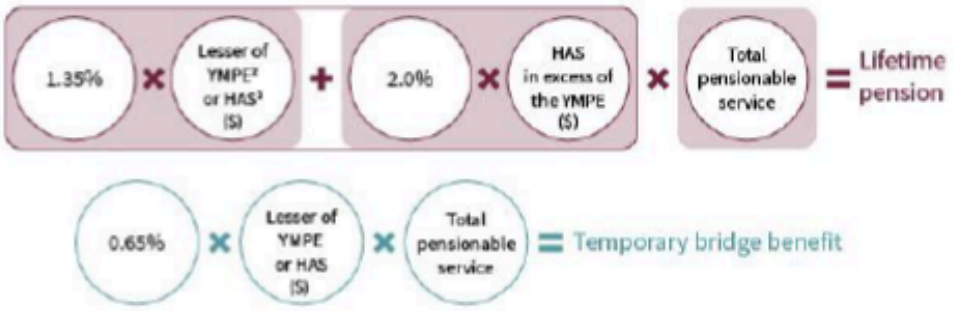
<u>Plan Design Changes for Regular Members</u>

- Past service benefit enhancement (increased the below YMPE accrual rate from 1.35% to 1.65%, corresponding decrease in bridge benefit from 0.65% to 0.35%) for service earned between April 1, 2006 and March 31, 2018, effective October 1, 2019)

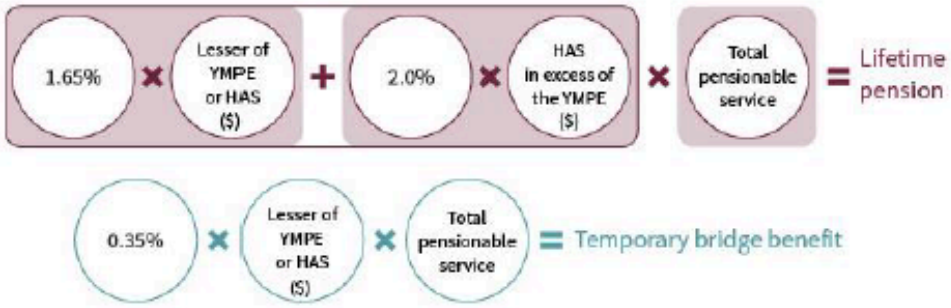
- Flat 1.85% accrual rate, effective April 1, 2018

- Flat 1.95% accrual rate, effective April 1, 2022

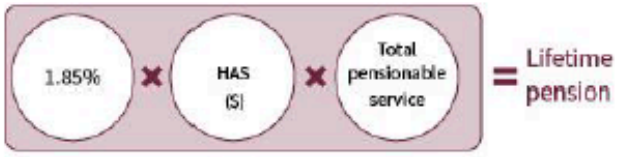
For pensionable service earned before April 1, 2006:



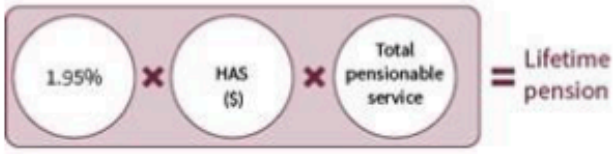
For pensionable service earned between April 1, 2006 and March 31, 2018, inclusive:



For pensionable service earned on and after April 1, 2018, to March 31, 2022, inclusive:



For pensionable service earned on or after April 1, 2022:



Appendix B – Assessment of implications for Impacted Judges

Pension Corporation have confirmed there are a total of 54 active and retired judges impacted by the proposal. Of the 54 total, 47 are active judges and 7 are retired judges. There are no inactive/deferred members impacted.

The following table provides an overview of the identified population by group based on timeframe of non-judicial service. Individual judges' experience will vary depending on the duration and timespan of the time earned, retirement age, HAS, and YMPE - final outcomes for active members cannot be known in advance of a specific retirement date being identified.

Scenario	Plan design changes applied	Comments on impacts
Of the 47 active judges:		
30 judges have April 1, 2006 to March 31, 2018 service only	past service benefit enhancement with offsetting bridge benefit reduction to age 65	No change to net pensions paid up to age 65, increased lifetime pensions paid beyond. All judges are better off
2 judges have April 1, 2018 March 31, 2022 service only	change from 2%/1.35% accrual rate to flat 1.85% for duration of non-judicial service	Impact depends on HAS and YMPE at time of retirement. Using current YMPE and a HAS of $288.500, **members will see marginal reduction in lifetime pension** [note members identified have only 2.22 and 0.6 years of non-judicial service.]
14 judges have both April 1, 2006 to March 31, 2018 and April 1, 2018 to March 31, 2022 service	Both: i) change from 2%/1.35% accrual rate to flat 1.85% for duration of non-judicial service, and ii) past service benefit enhancement with offsetting bridge benefit reduction to age 65	Impact will depend on duration of time between the two periods, age of retirement, and HAS and YMPE at time of retirement. The past service benefit enhancement will offset time at 1.85% to some degree. The net impact will vary on a case by case basis. Average judge experience supports a net benefit outcome in most cases. The amount of the lost/reduced bridge benefit will be paid back over a period of time depending on the factors noted above.

1 judge has service through all three periods; April 1, 2006 to March 31, 2018 and April 1, 2018 to March 31, 2022 service as well as post-April 1, 2022 service	All: i) change from 2%/1.35% accrual rate to flat 1.85% for duration of non-judicial service, ii) 1.95% on time after 2022 iii) past service benefit enhancement with offsetting bridge benefit reduction to age 65	Impact will depend on duration of time between the two periods, age at retirement, and HAS and YMPE at time of retirement. For one judge identified, Pension Corporation has confirmed time spanning pre-2018 and post-2022 is expected to offset period at 1.85% resulting in net benefit after age 65. The amount of the lost/reduced bridge benefit will be paid back over a period of time depending on the factors noted above.
Of the 7 retired judges:		
7 retired judges have time earned only in the 2006 – 2018 period	past service benefit enhancement with offsetting bridge benefit reduction to age 65	No change to net pensions paid up to age 65, increased lifetime pensions paid beyond. Judges will receive a lump sum benefit enhancement for pensions paid after October 1, 2019 All judges are better off

Other factors assessed:

- 3 judges (two active, 1 retired) have hit the 70% maximum accrual such that contributions ceased. These individuals would receive an overcontribution refund to the extent changes accelerated reaching 70%.

- There have been no commuted value asset transfers out of the plan (due to leaving or lump sum payout due to member death) on or after the effective date – there are no situations where the issue of a commuted value recalculation is currently needed.

- There is one terminated judge who has post-April 1, 2006 non-judicial service, but that individual was paid out in 2013, prior to the October 1, 2019 effective date and is therefore not affected.

- There are two retired members who retired prior to age 65 and elected a Joint Survivor 100% form for lifetime pension. These two individuals will be subject to the mechanism discussed above to ensure net payments prior to age 65 are not impacted and will receive a slightly lower increase to the lifetime pension.

- An assessment of marriage breakdown is still required: if there are any instances, the limited member's benefit will be treated the same way as the member's benefit.

Appendix G: Changes to Shift Premiums for Judicial Justices

(a) Definitions:

(i) "Shift" means an 8-hour scheduled Shift.

(ii) "Weekend" includes any Shift where any portion of the Shift falls on a Saturday or Sunday, but does not include Holidays.

(iii) "Court closure day" means any Shift where any portion of the shift falls on a Monday or Tuesday that is not a holiday, on which day courts are generally closed for provincial court judges in BC (for example, when July 1 falls on a Saturday or Sunday and courts are generally closed on the following Monday).

(iv) "Holidays" include:

(A) New Year's Day, Family Day, Good Friday, Easter Monday, Victoria Day, Canada Day, British Columbia Day, Labour Day, National Day for Truth and Reconciliation, Thanksgiving Day, Remembrance Day, Christmas Day, Boxing Day; or

(B) Any Shift where any portion of the Shift falls on a Holiday.

(b) Weekend Shift premium: $75

(c) Holiday Shift premium: Remain at $245 but with an additional $75 for any Christmas Day Shift

(d) Court closure day premium: $75

(e) A judicial justice may only claim the Holiday premium once for the same Holiday. For example, if a night judicial justice works June 30th from 11pm to 7am, as well as July 1st from 11pm to 7am, that judicial justice may only claim the Holiday premium for one of these shifts. As another example, if one judicial justice works June 30th from 11pm to 7am and a different judicial justice works July 1st from 11pm to 7am, each judicial justice will receive the Holiday premium.

(f) Any Shift worked by a judicial justice will attract the highest applicable premium for that Shift, and only that premium.

2022 Judicial Compensation Commission Final Report
in Respect of Provincial Court Judges and Judicial Justices
November 28, 2023

The Judicial Compensation Commission is an independent, constitutionally required body mandated by the *Judicial Compensation Act* (the Act) to report on and make recommendations respecting remuneration, allowances, and benefits of Provincial Court judges and judicial justices. The recommendations of the 2022 Judicial Compensation Commission (the 2022 Commission) cover the period from April 1, 2023 to March 31, 2027.

The 2022 Judicial Compensation Commission

In accordance with section 2 of the Act, as modified for the 2022 Commission by Bill 30-2021, the members of the 2022 Commission were appointed on or before September 1, 2022. The 2022 Commission members were the Honourable Lynn Smith, OC, KC (Chairperson); Vern Blair, FCPA, FCA, FCBV, FRICS; Eric Gottardi, KC; Lisa Castle; and Robert Lapper, KC.

Legislative Assembly Outcome

As the Legislative Assembly did not reject the recommendations of the 2022 Commission within the statutory time limits set out in section 6(2) of the Act, pursuant to section 6(3) of the Act, Provincial Court judges and judicial justices are entitled to receive the remuneration, allowances and benefits recommended by the 2022 Commission for the period from April 1, 2023 to March 31, 2027.

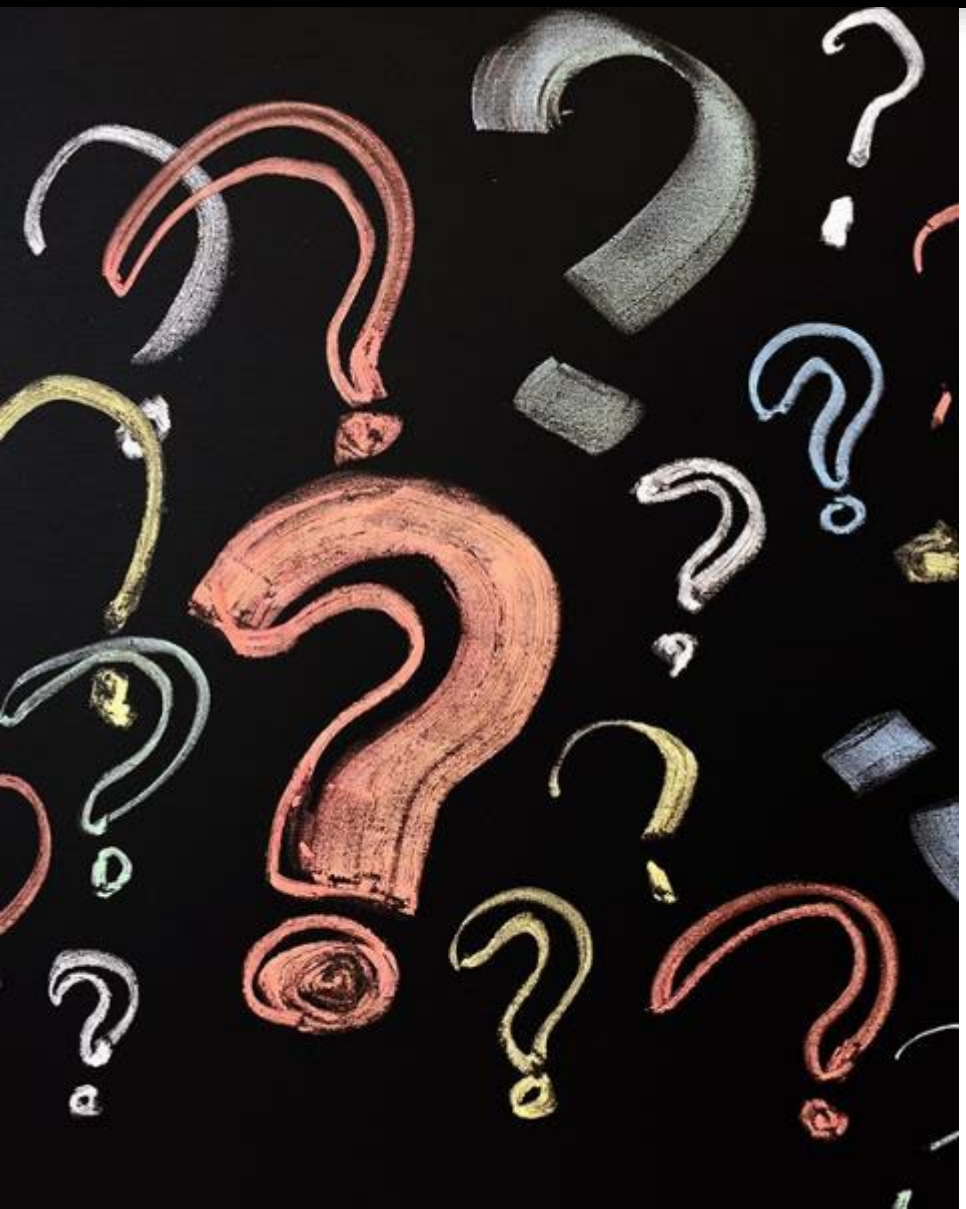
2023 CSCJA Member Research Report

THE PORTAGE GROUP

Canadian Superior Courts Judges Association

November 2023

Table of Contents



Introduction

- Study Background & Methodology
- Important Study Context

Study Background & Methodology

- The Canadian Superior Court Judges Association's (CSCJA) Judicial Independence Committee commissioned the Portage Group Inc. to carry out research in support of a review of Government support of Superior Courts on judicial independence, effectiveness and impartiality.
- To support this process, the CSCJA's Independence of the Judiciary Committee determined that there was a need to undertake a comprehensive survey. The essence of this survey is to capture firsthand experiences from members regarding the impact of resource provision in critical areas. The key objectives of the survey are:

1. **Understand Resource and Support Availability:** Obtain insights into members' experiences with the availability and adequacy of resources and support in:
   - Facilities, Infrastructure, and Technology.
   - Human Resources, and;
   - Security
2. **Capture Experiences of Traveling Judges**: Understand the experiences of judges who travel or serve in courts other than their primary work location in terms of resources, technology, human resources, and security.
3. **Identify Impacts on Judicial Independence:** Assess how resourcing constraints might impact the timely administration of justice, perceptions of the judicial system, and the personal well-being of the judges.
4. **Influence Advocacy Efforts:** Provide CSCJA leaders with empirical data and insights to guide their advocacy initiatives for improved support and resources.

- Invitations to participate in the survey were sent to 1,035 Superior Court Justices (including Chief Justices) across Canada in September 2023. Four-hundred and thirty-three (433) responses had been received by the cut-off date for an overall response rate of 42%.
- The responses gathered from this survey are more than just data points; they represent the voices and concerns of members that will be instrumental in the CSCJA's advocacy efforts. By offering a clearer understanding of the current state of affairs and highlighting areas that require attention, the findings of this survey will guide future initiatives and policy directions. The following report summarizes the findings from this research.

Important Study Context

- When reviewing the findings of this study, the results should be viewed and interpreted as opinions and perceptions of Canadian Superior Court Justices.
- The study did not include a formal review or evaluation of the actual facilities and/or resources available to Canadian Superior Court Justices and should not be interpreted as such.

Description of the Sample

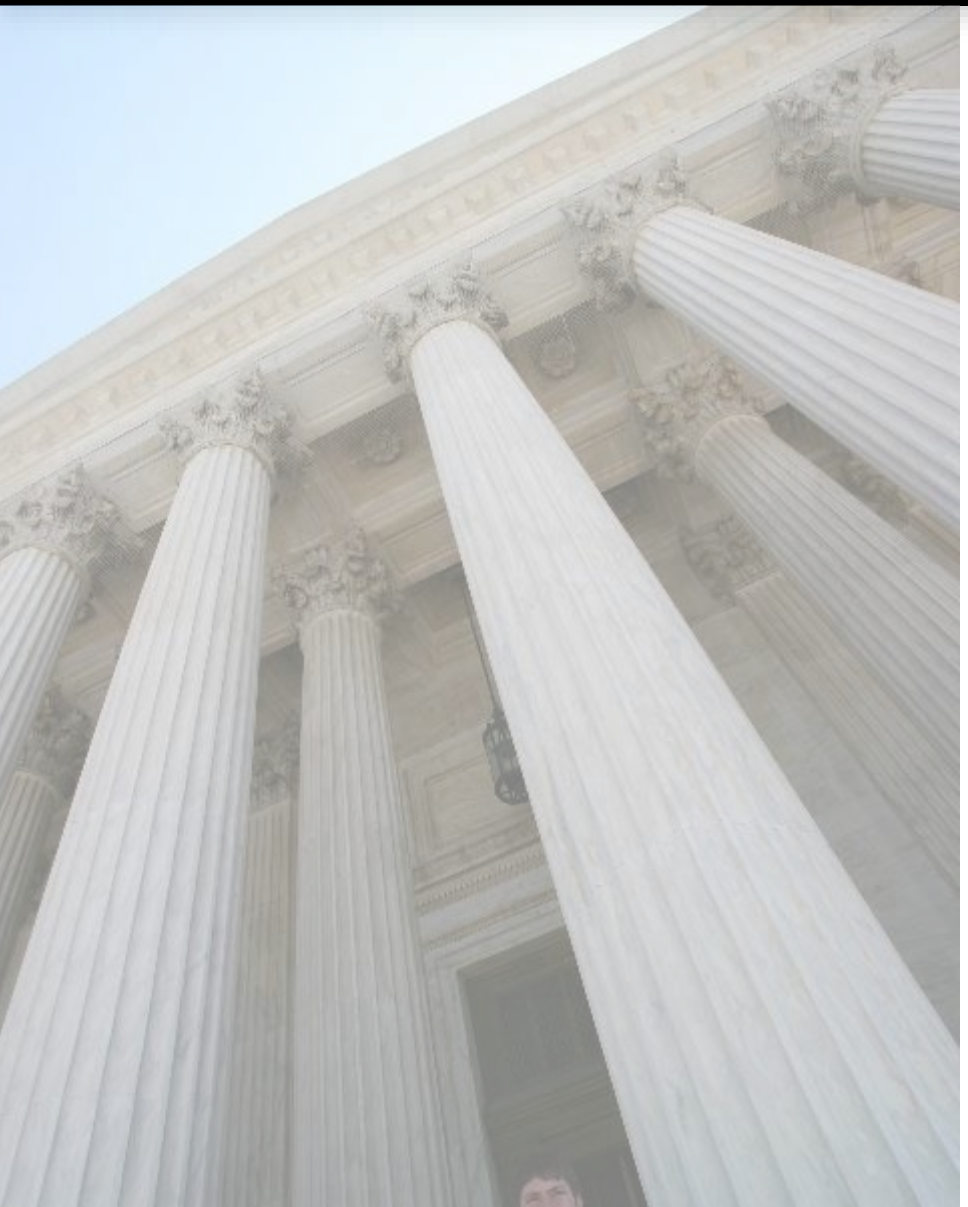
- Participant Characteristics

Participant Characteristics

- The following tables present a summary of the demographic characteristics of the respondents to help provide context to the results in the report.

	ALL RESPONDENTS
PROVINCE WORKED IN (N=432)	
Ontario	32%
Quebec	22%
British Columbia	12%
Alberta	8%
Newfoundland & Labrador	6%
Nova Scotia	6%
Manitoba	5%
Saskatchewan	4%
New Brunswick	3%
Northwest Territories	1%
Prince Edward Island	1%
Yukon	0.2%
Nunavut	0%
FUNDING SOURCE (N=399)	
Provincially funded	73%
Federally funded	27%
GENDER (N=408)	
Male	51%
Female	49%

	ALL RESPONDENTS
AGE (N=416)	
Under 40	0.2%
40 to 49	4%
50 to 59	43%
60 to 64	22%
65 to 69	18%
70 or older	13%
YEARS OF EXPERIENCE AS CANADIAN SUPERIOR COURT JUSTICE (N=418)	
Less than 1 year	3%
1-2 years	9%
3-5 years	24%
6-10 years	27%
11-20 years	26%
More than 20 years	11%



Facilities and Infrastructure

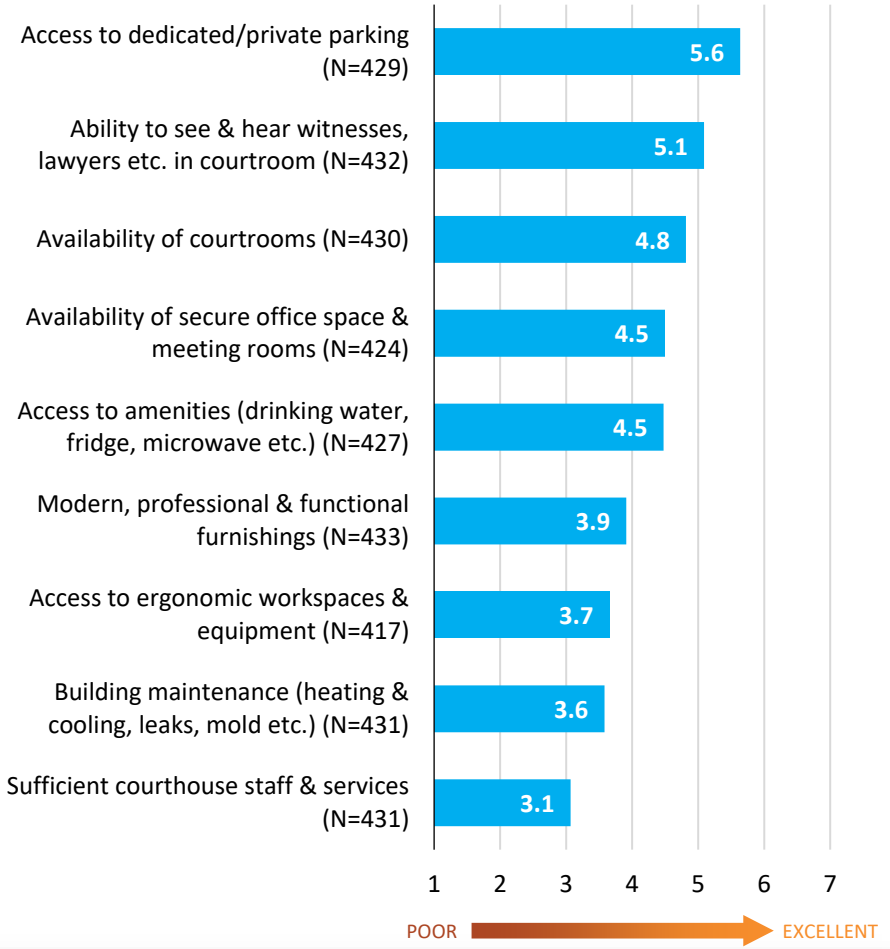
- Evaluation of Workplace Facilities
- Shared Judicial Workspaces
- Impact of Facility Resources on Judicial Duties

Evaluation of Workplace Facilities

- Participating justices were asked about the quality of their workplace facilities. Respondents were given nine facilities attributes and were asked to award a rating on a scale from 1 (poor) to 7 (excellent).
- Top rated attributes include access to dedicated/private parking at 5.6, ability to see and hear participants like witnesses and lawyers in the courtroom at 5.1, and the availability of courtrooms with a rating of 4.8.
- On the other hand, buildings and furniture are poorly rated and may be areas that require more immediate attention in the eyes of Justices. More specifically, failing grades were awarded to modern, professional, and functional furnishings (3.9), access to ergonomic workspaces and equipment (3.7) and building maintenance (3.6).
- A significant concern was the adequacy of courthouse staff and services, which received the lowest rating of 3.1

> My Courthouse, located in the provincial capital, is a disgrace. It is aged, dirty, minimally maintained, and far below current standards. The working conditions are deplorable. What an embarrassment.

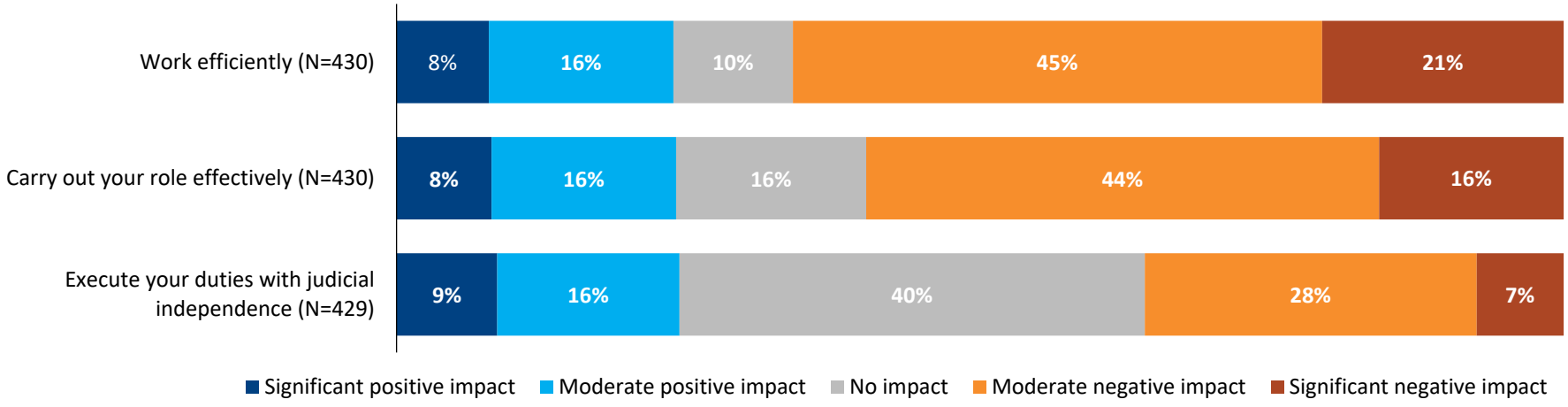
Rating of Workspace Amenities and Features

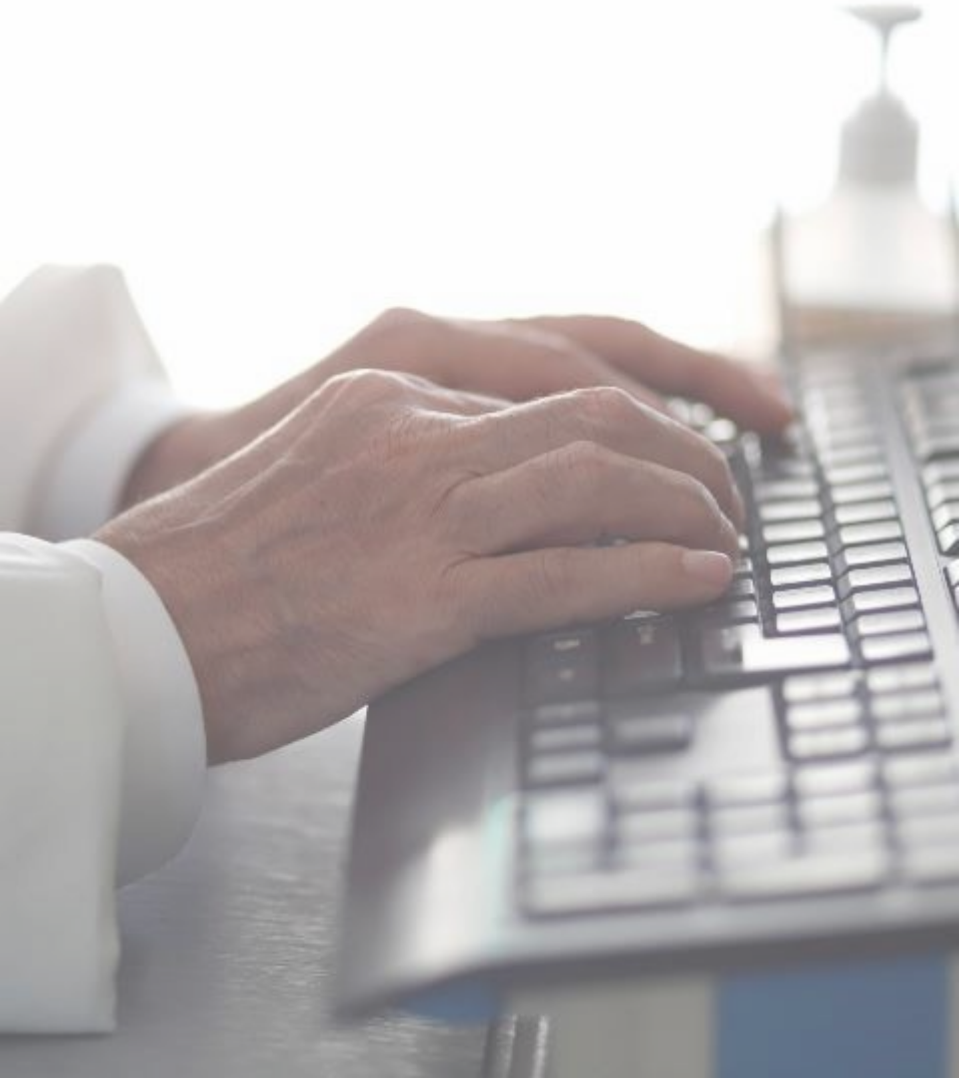


Impact of Facility Resources on Judicial Duties

- Participating justices were asked the extent to which the availability of facility resources impact their ability to carry out their judicial duties efficiently, effectively, and with judicial independence.
- The results indicate that a significant portion face challenges when it comes to carrying out their role. Specifically, 66% and 60% believe there's at least a moderate negative impact on their efficiency and effectiveness, respectively, in role execution. Within this, one in five (21%) indicated the impact is significantly negative on efficiency while 16% indicated the same about the impact on effectiveness.
- When it comes to judicial independence, a notable 40% indicate that facility resources have no bearing on their duties. However, while lower, the 35% that expressed that the facility resources have at least a moderate negative impact on executing duties with judicial independence is still significant.

Impact of Facilities on Efficiency, Role Execution, and Independence





Technology

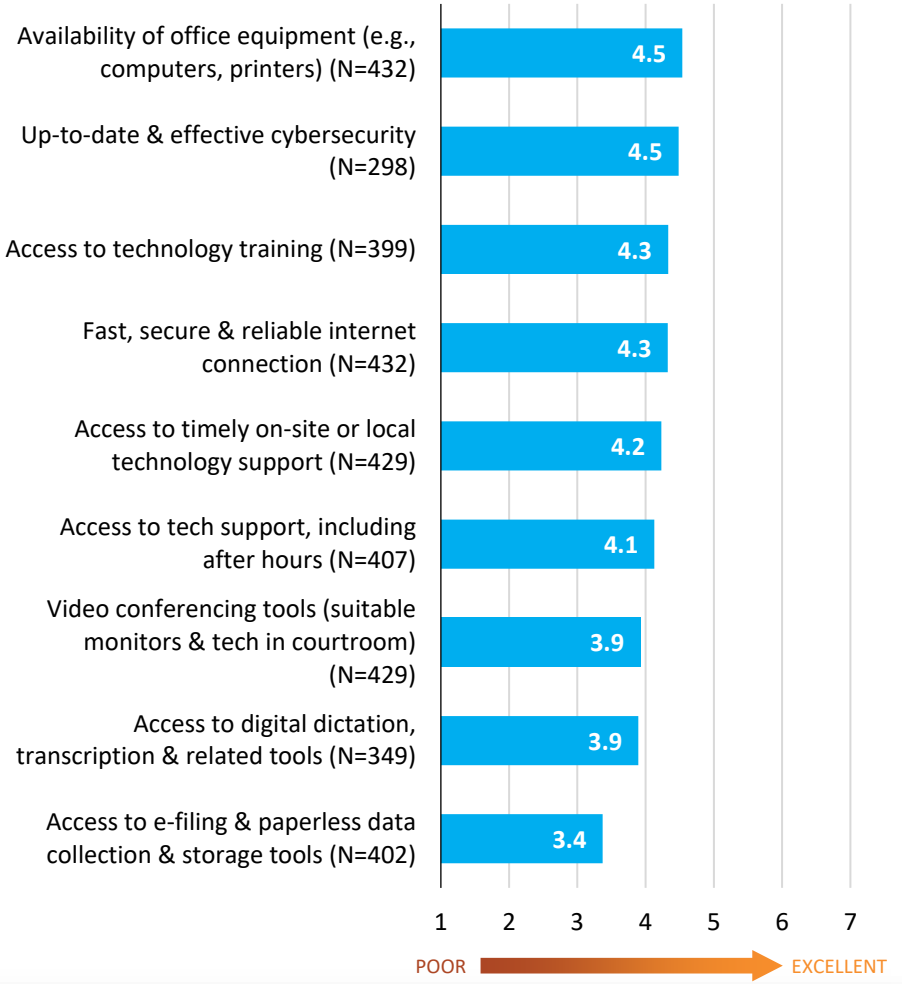
- Evaluation of Technology Infrastructure
- Impact of Technological Resources on Judicial Duties

Evaluation of Technology Infrastructure

- Participating justices were asked about the quality of the technology-related infrastructure at their workplace. Respondents were given a list of nine attributes and were asked to award a rating on a scale from 1 (poor) to 7 (excellent).
- While six of nine technology related attributes were awarded a passing grade, there were no technology attributes that rated particularly high. The highest rated aspects were up-to-date and effective cybersecurity and availability of standard office equipment (computers/laptops, printers, etc.), both scoring 4.5 out of 7.
- At the other end of the spectrum, three attributes received a failing grade. The most deficient area in the eyes of respondents is availability and access to e-filing and other paperless data collection and storage applications, which was rated at only 3.4. Other subpar attributes include video conferencing equipment and platforms and availability, and access to digital dictation, transcription and other similar tools and applications. They were both rated at 3.9.
- While the technology-related infrastructure received varied ratings, it's important to note that overall, the scores hovered around the mid-range, suggesting a mediocre level of satisfaction among participants. This indicates that while certain areas are being addressed adequately, there is significant room for improvement across the board to ensure optimal workplace efficiency and satisfaction.

Our access to technology is FAR behind what the lawyers who appear before us enjoy. The technology gap is increasing.

Ratings of Key Technological Amenities and Features

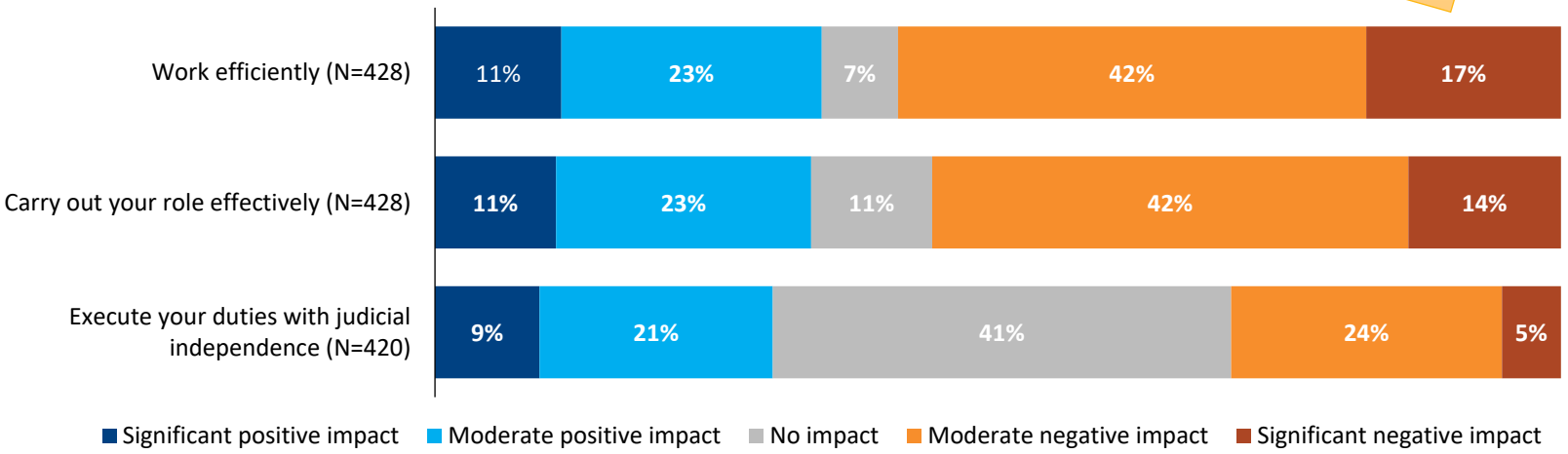


Impact of Technological Resources on Judicial Duties

- Participating justices were asked to indicate the extent to which the availability of technology resources and support impacts their ability to work efficiently, carry out their role effectively, and execute their duties with judicial independence.
- The results are similar to those for facilities presented earlier.
- A discernible trend emerges indicating challenges faced by the Justices due to technological resource constraints. Specifically, when examining efficiency and role effectiveness, a combined 59% and 56% respectively believe there's at least a moderate negative impact due to technology resource limitations. The portion indicating that the impact is significant sits at 17% and 14%, respectively.
- When it comes to judicial independence, a significant 41% indicate that technological resources have no bearing on their duties. However, it is again significant that 29% indicated that the availability of technology has at least a moderate negative influence on their ability to execute duties with judicial independence.

In Ontario we have been forced to use Caselines in place of court services staff. It has added 2 hours to each workday, causes no end of delays due to lack of materials, is not secure and has completely eroded our independence in the way we work.

Impact of Technology on Efficiency, Role Execution, and Independence



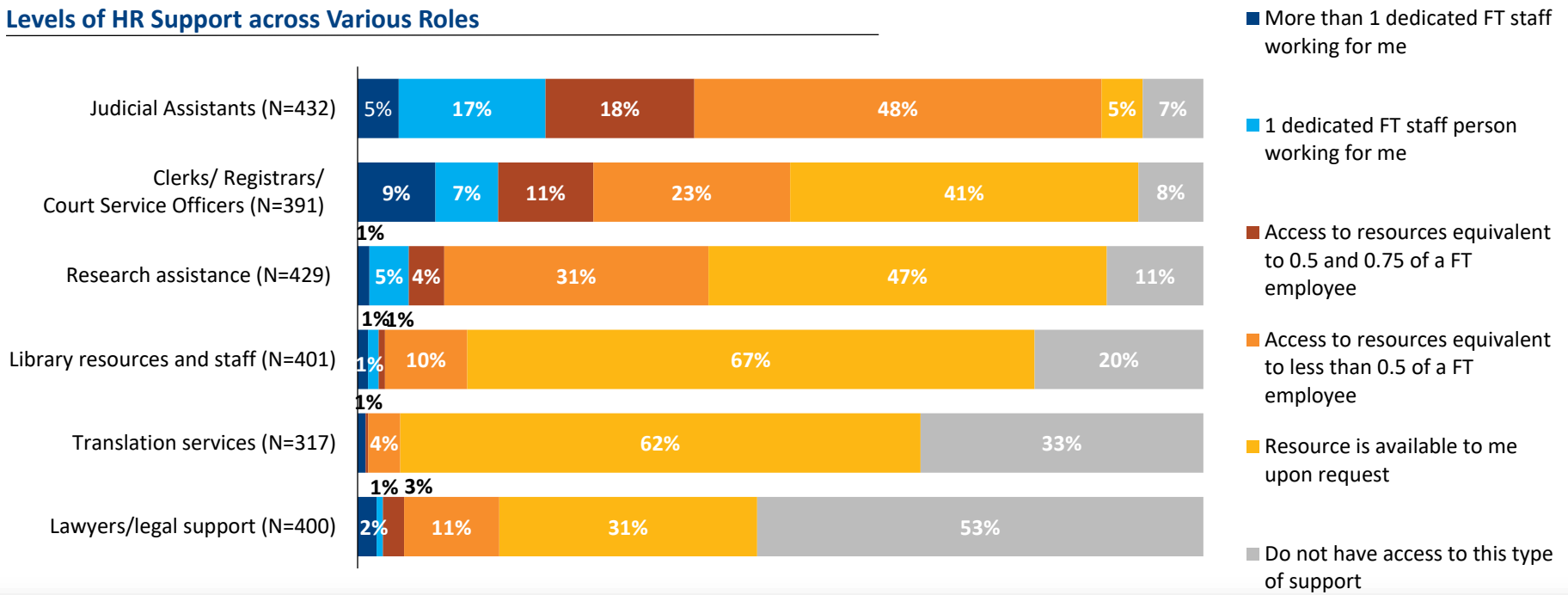
Human Resources

- Availability of HR Support in Judicial Roles
- Adequate Access to HR Support
- Impact of HR Support on Judicial Duties

Availability of HR Support in Judicial Roles

- With the exception of lawyers/legal support, the majority of Justices report having each type of HR resource available to them, whether on their staff or upon request. For lawyers/legal support, only 47% have them available with only 17% indicating they are on staff.
- At the other end of the spectrum, over nine in ten (93%) report having access to judicial assistants with 88% indicating they are on staff. Clerks/registrars/court service officers are the next most common with 92% having access, but only 51% indicated they are on staff. This is followed by research assistants at 88% for access and 41% on staff.
- For the remaining two levels, only a handful have library resources and personnel (13%) or translation services (5%) on staff, while 67% and 62% have access on demand.

Levels of HR Support across Various Roles

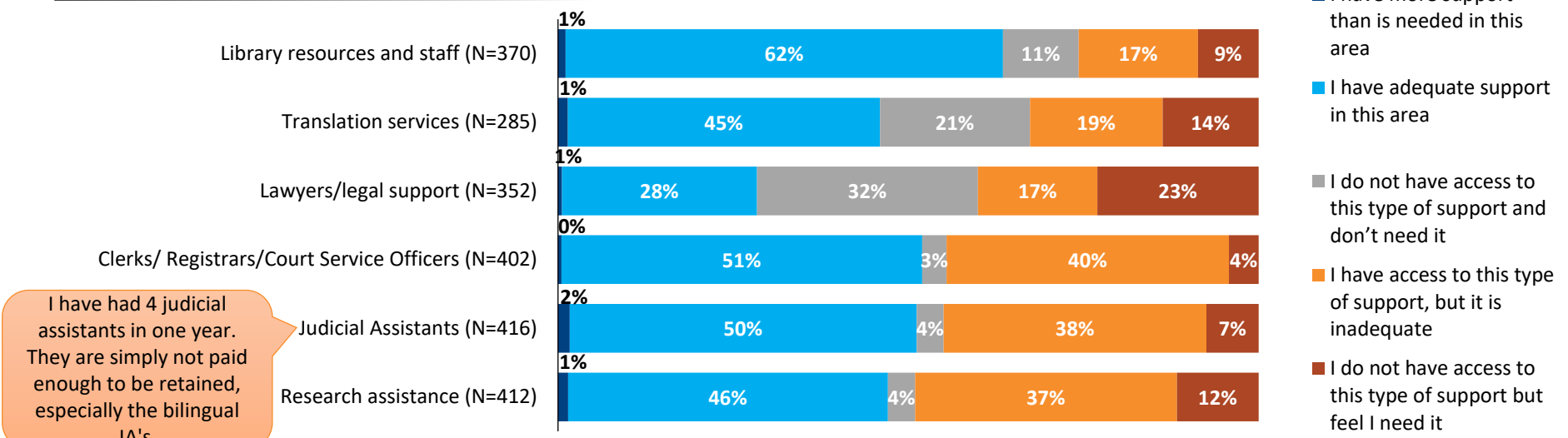


Adequate Access to HR Support

- When asked about the adequacy of HR support, only 1% to 2% indicated that they had more than they need in each area.
- At least half of respondents confirm receiving adequate support (including those with more than enough) in the areas of library resources (63%), clerks/registrars/court service officers (52%), and judicial assistants (52%). However, for the latter two, while half feel resources are adequate, just under half (45% for both) indicated that resources are inadequate or not offered but needed.
- For research assistant support, less than half, at 47%, believe they have what they need while 49% find it lacking or need it but don't have it but need it.
- When it comes to translation services, 46% feel their needs are met or exceeded. However, there's a marked split: 19% find their support inadequate, and 14% don't have it but need it. However, 21% see no need for this support.
- As for lawyers/legal support, only 29% feel sufficiently supported, while a notable 23% would like it but lack access and 17% feel their resources are inadequate. However, the most significant proportion, at 32%, don't see a need for it at all.
- Overall, while many justices acknowledge a baseline of support, there are areas where support could be improved particularly when it comes to judicial administrative staff as well as both judicial and research assistants.

We are in desperate need of additional court support staff. Existing staff are overwhelmed by the current workload. Mistakes happen as a result. Court files are not updated in a timely way, resulting in incomplete files coming before the court.

Level of Access to HR Support



I have had 4 judicial assistants in one year. They are simply not paid enough to be retained, especially the bilingual JA's.

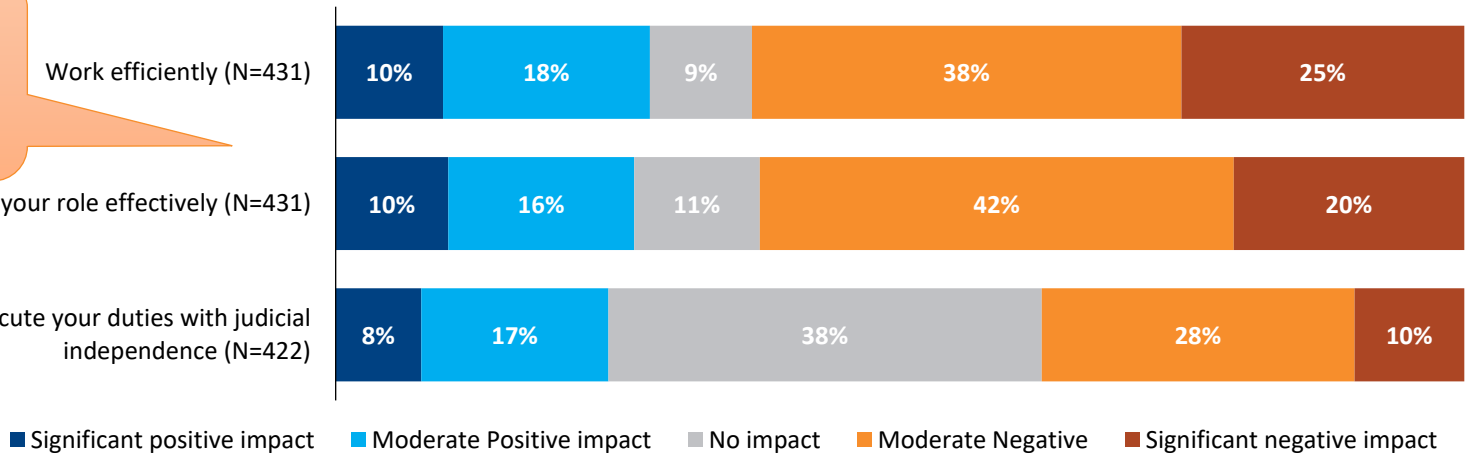
Impact of HR Support on Judicial Duties

- Participating justices were asked to indicate the extent to which the availability of HR support impacts their ability to work efficiently, carry out their role effectively, and execute their duties with judicial independence.
- Results are again similar to those for other resources presented earlier
- When asked about the influence of human resource support on their professional duties, 63% of the justices believe it has a negative impact on working efficiently, and 62% believe the same about carrying out their role effectively. For working efficiency, one quarter (25%) indicated the impact is significant while 20% indicated a significant impact on effectiveness.
- Concerning judicial independence, 38% indicated there is no impact. However, results again show a significant 10% indicating there is a significant negative impact.

> The most critical issue for me is use of a law clerk and secretarial assistant. I share a law clerk with 9 other judges and a secretary with 3 other judges. I could be substantially more efficient with a dedicated law clerk or a shared clerk with one other judge.

Impact of HR Support on Efficiency, Role Execution, and Independence

> The scarce judicial resources are wasted by having judges do their own clerical work; efficiency is dragged down by lack of clerical and administrative support.

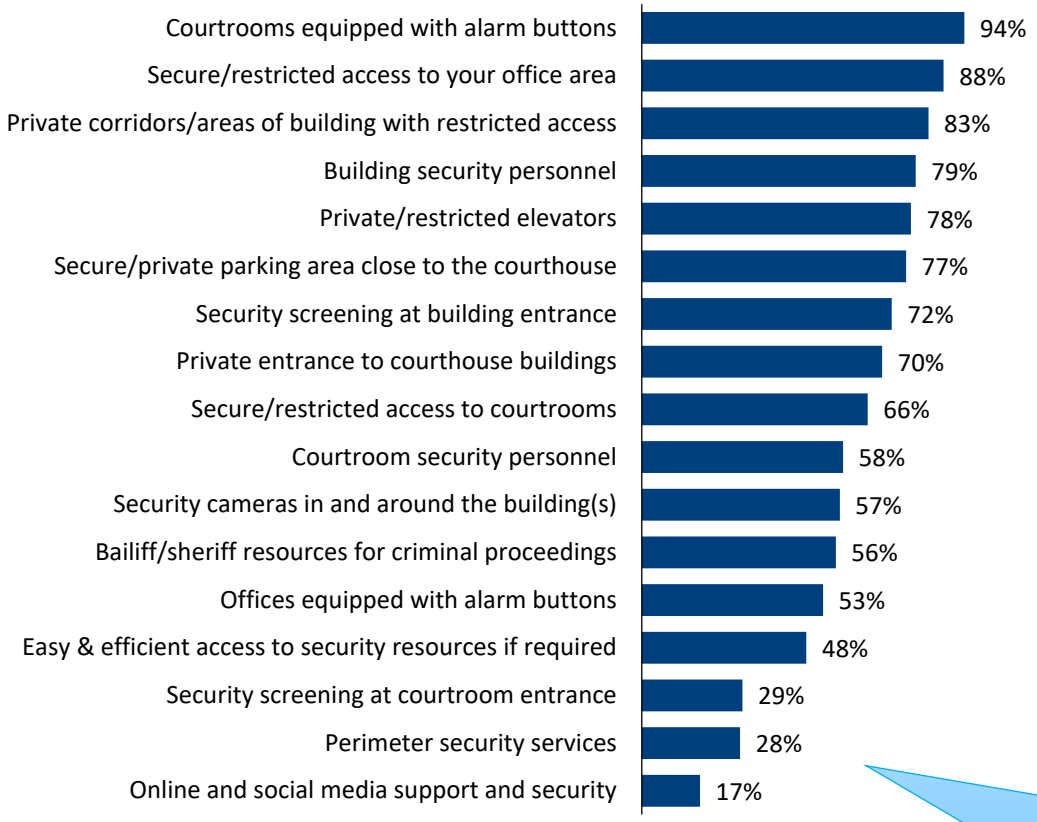


Security

- Security Measures in Place for Judges
- Perceived Adequacy of Security Measures and Supports
- Perceived Need for Absent Security Measures
- Impact of Security Support and Safety Measures on Judicial Duties

Security Measures in Place for Judges

Availability of Specific Security Measures and Supports



Base n = 432
Percentages do not sum to 100% due to multiple responses

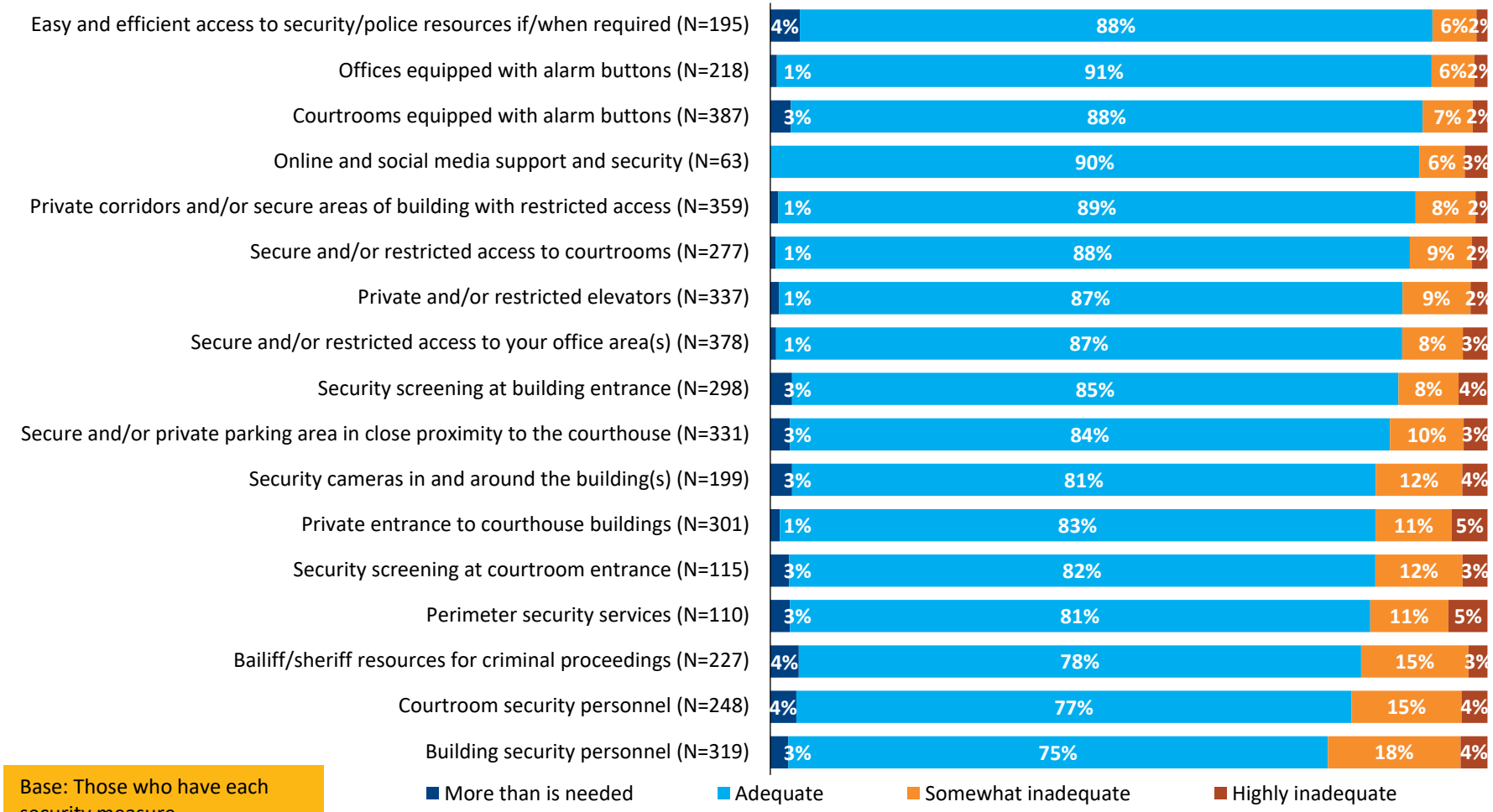
- Justices were asked to indicate which security measures/supports (from a list of 17) were available to them.
- At the forefront, a notable 94% of respondents confirm the presence of alarm buttons in courtrooms. This is followed closely by having secure and/or restricted access to their office areas at 88% followed by private corridors or secure building areas with restricted access (83%), building security personnel (79%), private or restricted elevators (78%) and secure and/or private parking area in close proximity to the courthouse (77%). Each of these is available to more than three-quarters of justices.
- On the flip side, security screening at the courtroom entrance is available for just 29% of participants while only 28% report the provision of perimeter security services. Online and social media support and security is the least common, with only 17% having access to such resources.
- The data show a strong inclination towards immediate response and access control measures, while areas like digital security and entry point screening at courtrooms remain comparatively underrepresented.

I have access to private parking close to a secure private entrance to my courthouse, but there is no security in the parking area. There should be SECURE parking for judges at every courthouse. Also, I have a distress/panic button in my chambers, but it does not work.

Perceived Adequacy of Security Measures and Supports

- Justices who indicated that each of the security measures or supports are in place were asked to indicate the degree to which the measures or supports are adequate. Their responses are summarized in the graph on the next page.
- The results reveal that among those who have each security measure, a significant majority rated them as either adequate or more than is needed. In fact, between 78% and 92% combined awarded one of these to ratings.
- Additionally, a very low proportion rated any of the security measures as highly inadequate (between 2% and 5%).
- However, there are some security measures that were rated as somewhat or highly inadequate by a larger proportion of respondents, including: building security personnel (22%), courtroom security personnel (19%), bailiff/sheriff resources for criminal proceedings (18%), security cameras in and around the buildings (16%), and perimeter security services (16%).

Perceived Adequacy of Security Measures and Supports (cont'd)

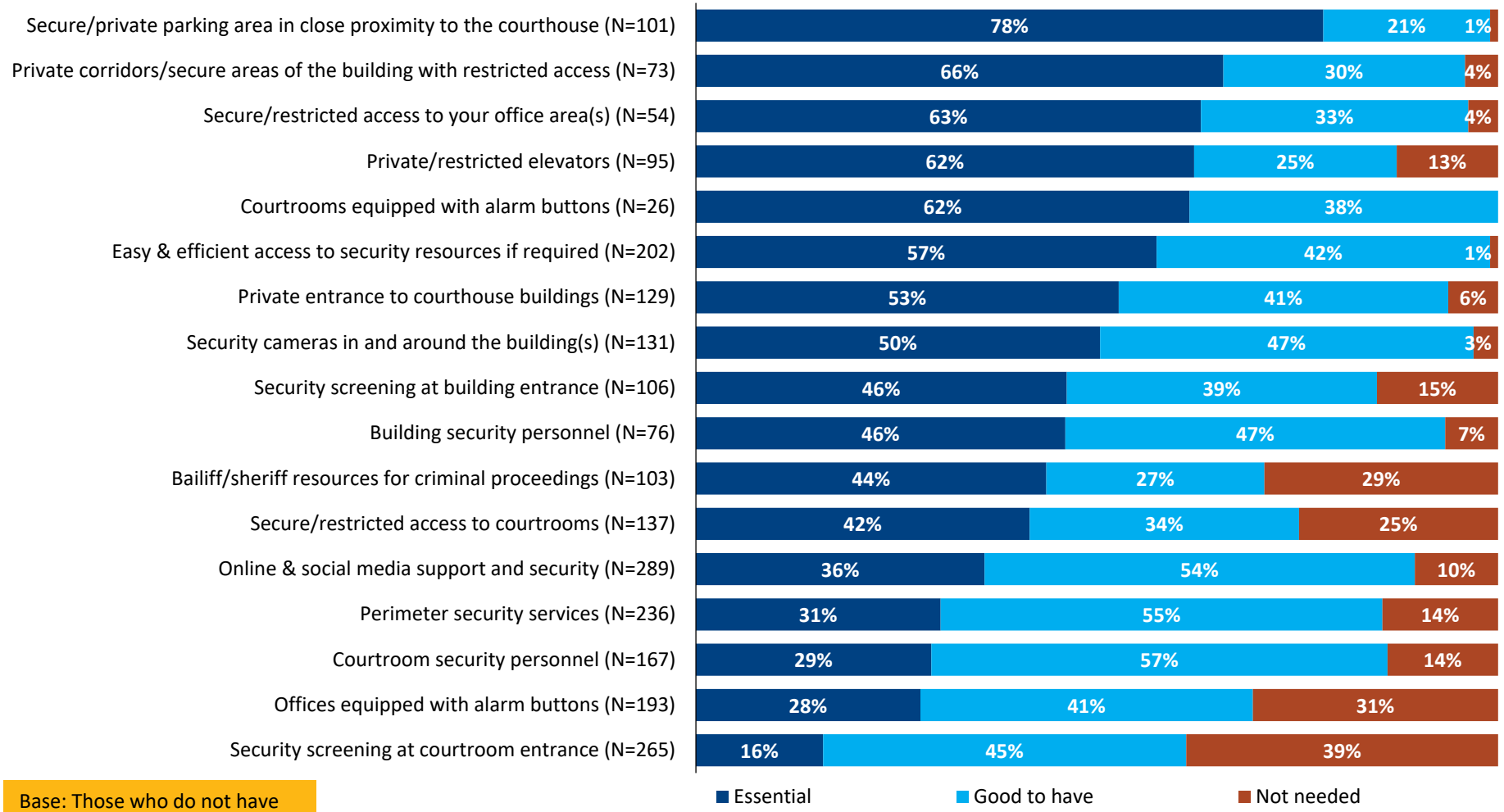


Base: Those who have each security measure.

Perceived Need for Absent Security Measures

- Justices who indicated that each of the security measures or supports is NOT in place were asked to indicate the extent to which each is needed. Their responses are summarized in the graph on the next page.
- While the graph shows the portion who feel each measure would be "good to have“ or not needed, the analysis focuses on the portion indicating measures are essential. Among the 17 measures, eight were ranked as essential by half or more of those who do not currently have it.
- The most essential security measures, where they are not currently provided, include parking and access control. 78% (of those who don't have it) felt that a secure or private parking area close to the courthouse was essential while 66% considered private corridors or secure zones with limited access in buildings to be essential and 63% viewed restricted access to their office spaces as essential as well.
- Other significant gaps where more than half of those without feel it is essential include alarm buttons in courtrooms (62%), private or restricted elevators (62%), easy and efficient access to security/police resources if/when required (57%), private entrance to courthouse buildings (53%) and security cameras in and around the building(s) (50%).
- At the other end of the spectrum, only 16% deem security screening at courtroom entrance as essential.
- For all other measures, between 28% and 46% of those who do not have them indicated that they are essential.

Perceived Need for Absent Security Measures (cont'd)

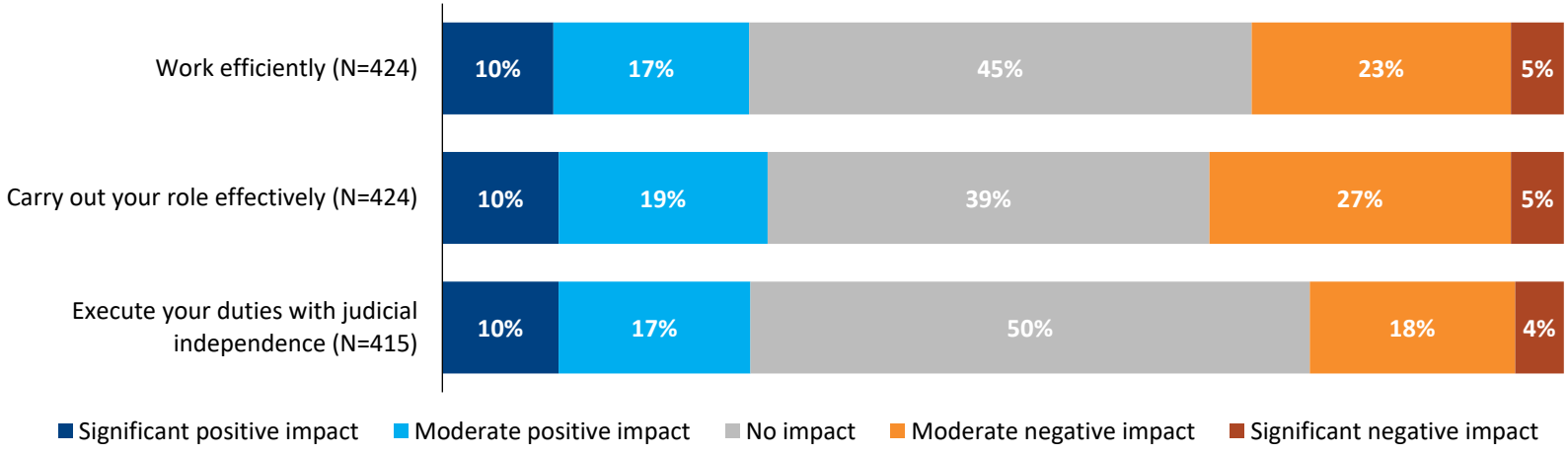


Base: Those who do not have each security measure.

Impact of Security Support and Safety Measures on Judicial Duties

- Participating justices were asked to indicate the extent to which the availability of security measures and support impacts their ability to work efficiently, carry out their role effectively, and execute their duties with judicial independence.
- Results are somewhat different than for other resources presented earlier.
- Moreover, respondents were far more likely to indicate no impacts on work efficiency (45%) and effectiveness (39%). Despite this shift, the portion indicating a negative impact is still sizable at 28% and 32% respectively.
- While half (50%) indicated there is no impact on their ability to execute duties with judicial independence, a significant one in five (22%) indicated there is a negative impact.

Impact of Security Support and Safety Measures on Judicial Duties

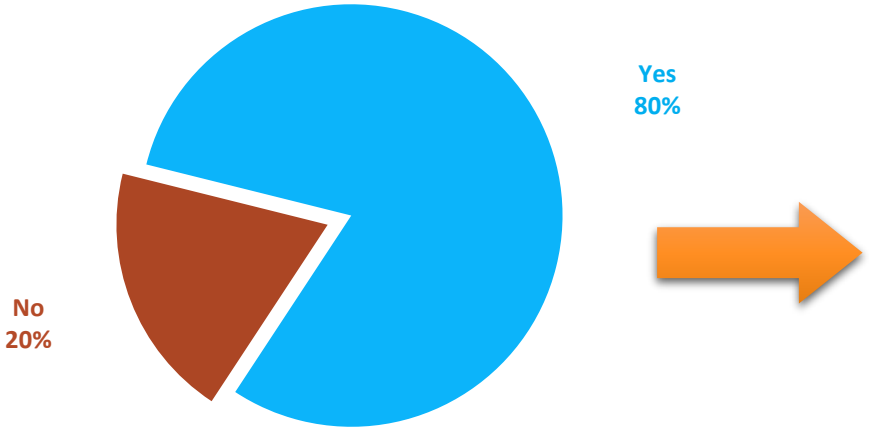


Visiting Judge

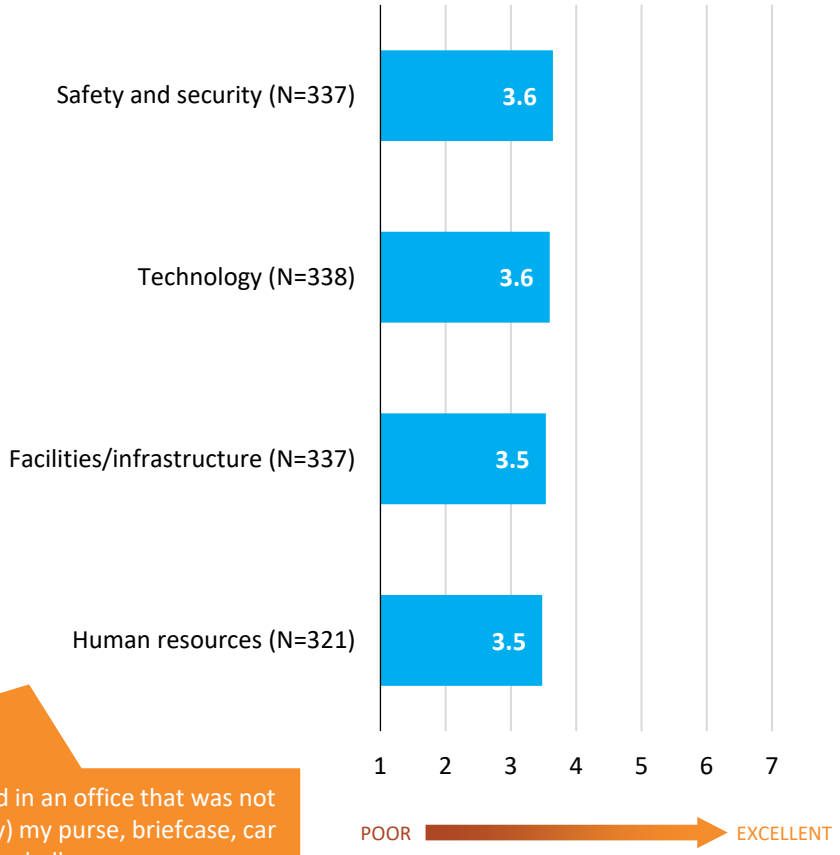
- Visiting Judge and Rating of Resources as Visiting Judge

Visiting Judge and Rating of Resources as Visiting Judge

Travel to Courts Other than Primary Work Location (N=433)



Ratings of Resources as a Visiting Judge



- The research indicates that four in five (80%) justices travel or circuit to serve in courts other than their primary work location.
- Visiting judges seem to have consistent feelings about the resources provided to them while away from their home court with all ratings hovering below the mid-point of the scale at 3.5 to 3.6. Clearly resources while travelling or circuiting are an issue as all resource categories received a failing grade.

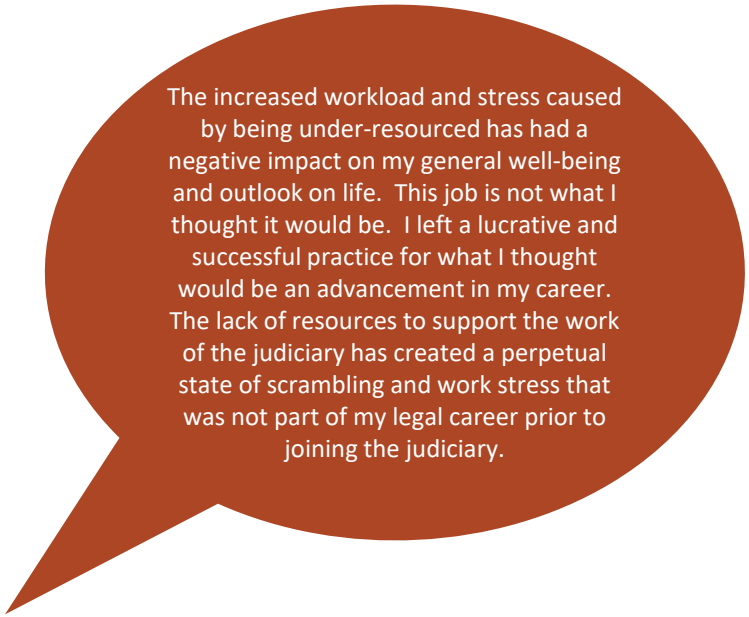
A recent example: I was assigned to a Courthouse that was not my home Court. I was placed in an office that was not secured and opened off the main hallway. When I went into Court (through a public hallway) my purse, briefcase, car keys, robes and all other personal belongings were in an unlocked office in the hallway.

Impacts of Resourcing

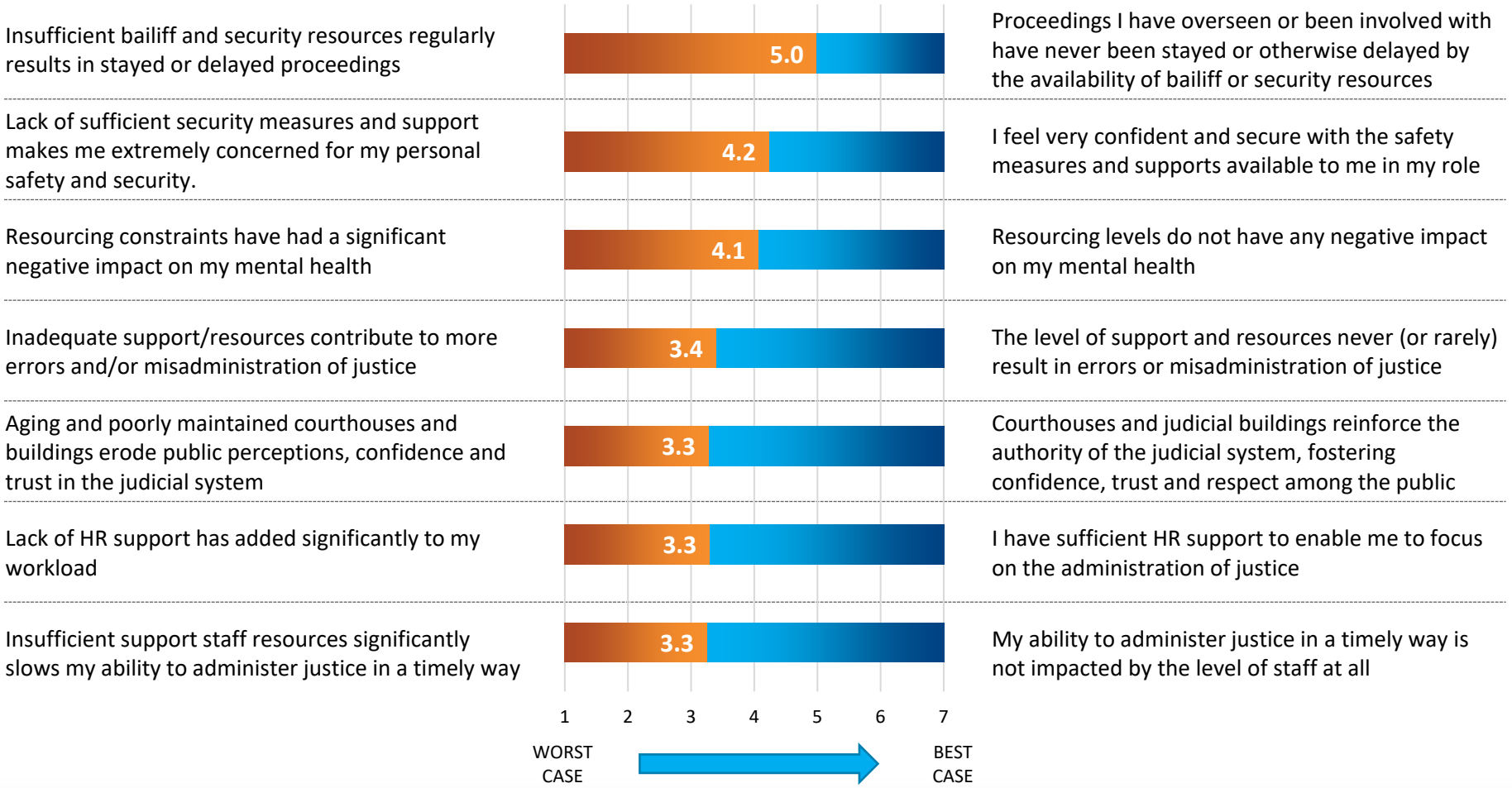
- Impacts of Resourcing on Judicial Independence
- Judges' Retirement Projections Versus Intentions
- Impacts of Resourcing on Decision to Retire Early

Impacts of Resourcing on Judicial Independence

- Participating justices were asked to evaluate a series of contrasting statements describing their current workplace environment on a scale of 1 to 7. A score of 4 signifies a neutral stance. Scores below this mark represent a negative workplace perception, while those above it suggest a positive view. To interpret the chart, a higher score is favorable.
- The only real positive observation from the results is that justices generally feel that proceedings are not affected by security bailiff or security resources, as evidenced by a score of 5.0 out of 7.
- Areas that scored close to the midpoint are borderline and include confidence in the existing measures and supports available to justices to allow them to perform their role (4.2) and the belief that resource levels do not adversely affect mental health (4.1).
- Areas of concern that received a failing grade include: The belief that levels of support rarely lead to errors in the administration of justice (3.4), adequate HR support enabling justices to concentrate solely on the administration of justice (3.3), the sentiment that courthouses and judicial buildings effectively uphold the authority of the judicial system (3.3), and the perception of the impact on delivering timely justice administration (3.3).

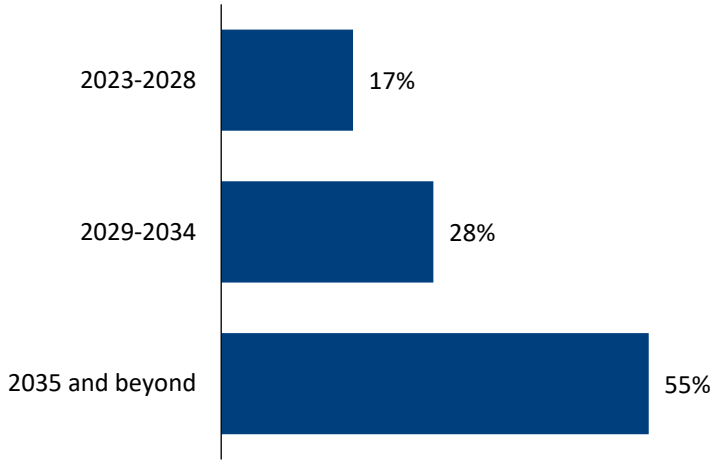


Impacts of Resourcing on Judicial Independence (Cont'd)

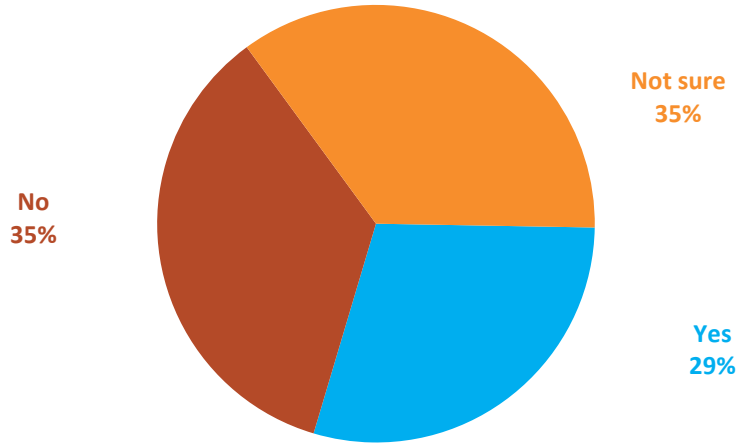


Judges' Retirement Projections Versus Intentions

Year when Mandatory Retirement Reached (N=415)



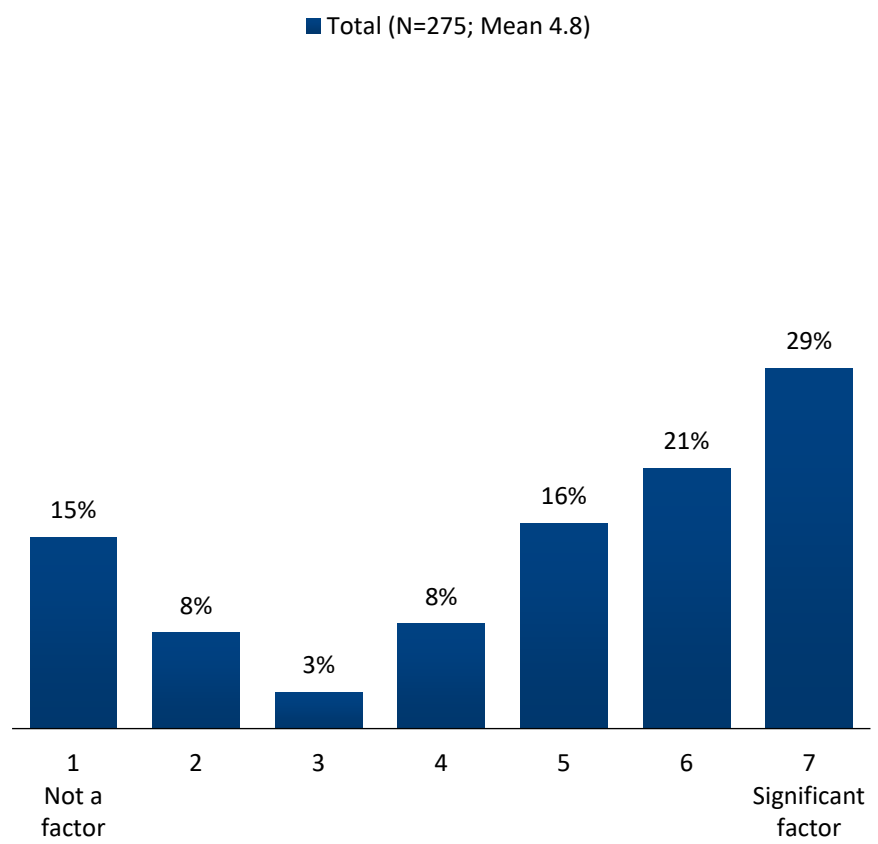
Planning to Serve Until Mandatory Retirement Date (N=416)



- While only 17% of judges are set for mandatory retirement within the upcoming five years (spanning from 2023 to 2028), a significant 55% won't reach their mandatory retirement until 2035 or later.
- When exploring their intentions to serve until that stipulated retirement date, only 29% express a commitment to do so. Equally, 35% either have decided against serving up to that date or remain uncertain about their decision.

Impacts of Resourcing on Decision to Retire Early

Impacts of Resourcing on Decision to Retire Early



Base: Those who so not plan to serve to the end of their term or who are unsure.

- The results indicate that among those who do not plan to serve to the end of their term or who are unsure, the current level of resourcing and support plays a role in the decision of many to retire or potentially retire early.
- A substantial 29% of respondents consider the current level of resourcing and support to be a significant factor (7 out of 7) in their decision to retire or potentially retire early while a further 37% of respondents rate its impact at a 5 or 6.
- The mean score of 4.8 indicates that, on average, the level of resourcing and support is viewed as moderately significant in influencing the decision to retire early among the participants.

The impact the lack of attention to the human and physical infrastructure required to administer justice in the province is significant for judges, judicial assistants, and individuals who work in the courtroom and in courts administration. I am very concerned that this significant (negative) impact will increase the rate at which judges retire as soon after the 10 year mark as they feel is reasonable.

Roles for the CSCJA

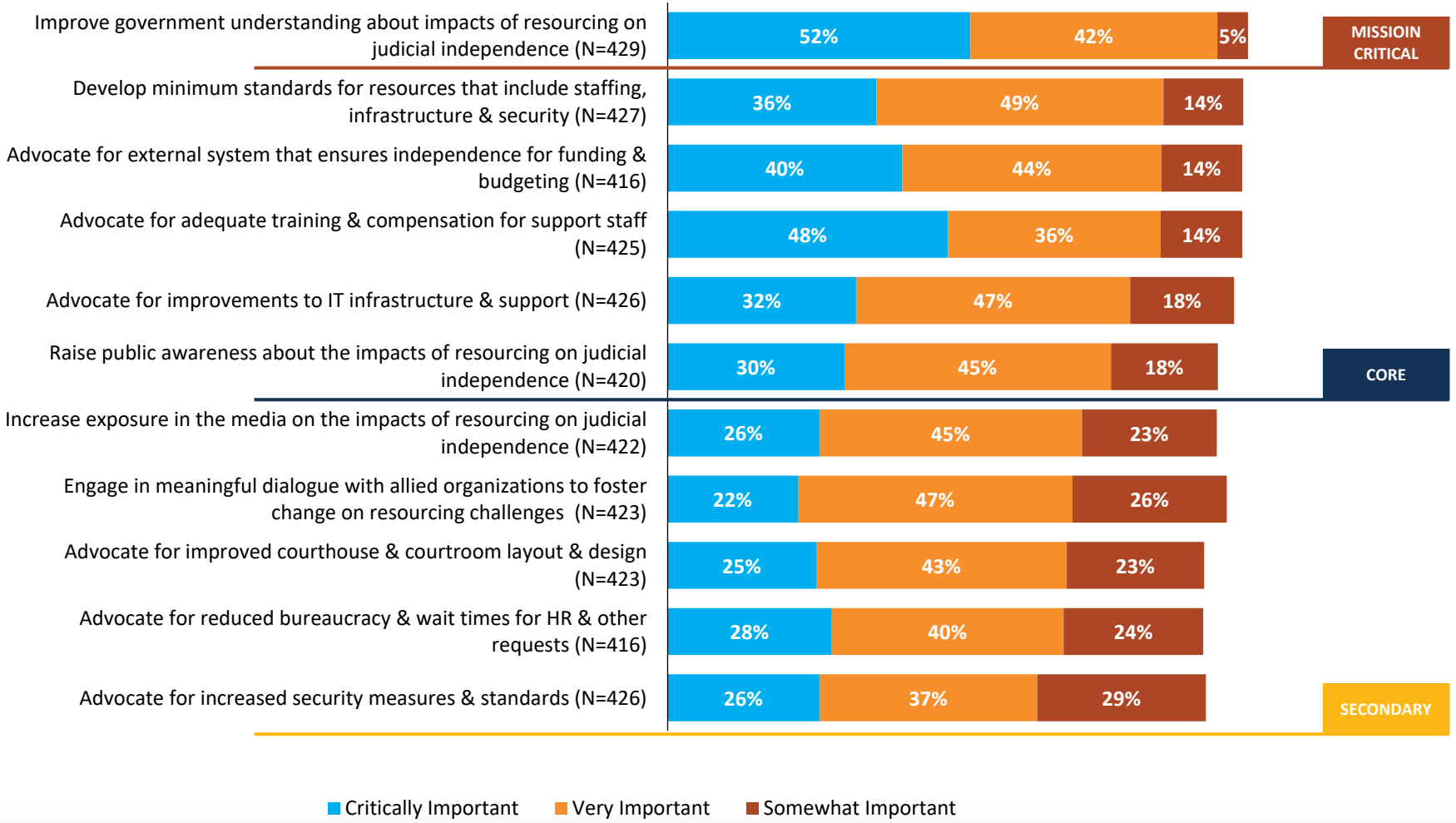
- Potential Roles for CSCJA to Address Resourcing Issues
- Order of Importance for Focus Areas

Potential Roles for CSCJA to Address Resourcing Issues

- Justices were asked to indicate how important eleven areas were for CSCJA to focus on when addressing resource issues that may impact judicial independence. All of the areas were rated as at least somewhat important by 92% of respondents or more, indicating that these all roles are important on some level to most members. However, looking at those that rated the focus areas as critically or very important combined, they can be divided into four categories as follows:
- **Mission Critical:** Mission critical focus areas are those that are ranked as at least very important by most members and critically important by more than 50% of members. For these areas, it is critical that CSCJA goes above and beyond in delivering them. Improving government understanding and awareness about the impacts of resourcing on judicial independence was the only areas rated as a mission critical, with 52% indicating that it's critically important and 94% rating as at least very important.
- **Core Roles:** These focus areas are rated at least very important by more than 75% of justices, but with fewer than half indicating they are critically important. These are areas where it is very important for CSCJA to deliver in the eyes of Justices. Core focus areas include: developing minimum standards for resources across areas that include staffing, infrastructure and security (85% critically plus very important), advocating for an external system that ensures independence when it comes to funding and budgeting for superior court justices (84%), advocating for adequate training and compensation for support staff (84%), advocating for improvements to IT infrastructure and support (79%), and raising public awareness about the impacts of resourcing on judicial independence (75%).
- **Secondary Roles:** Secondary focus areas are those that are important for justices, but they are not necessarily 'must-haves'. Areas in this category are rated as critically or very important by 50% to 74% of justices. Attributes in this group include: increasing exposure in the media on the impacts of resourcing on judicial independence (71%), engaging in meaningful dialogue with allied organizations to foster change on resourcing challenges that impact judicial independence (69%), advocating for improved courthouse and courtroom layout and design (68%), advocating for reduced bureaucracy and wait times for HR and other requests (68%) and advocating for increased security measures and standards (63%).
- **Niche Roles:** The final tier are only critically important to a small portion of judges. There were no areas that were rated as 'niche' by participating justices.

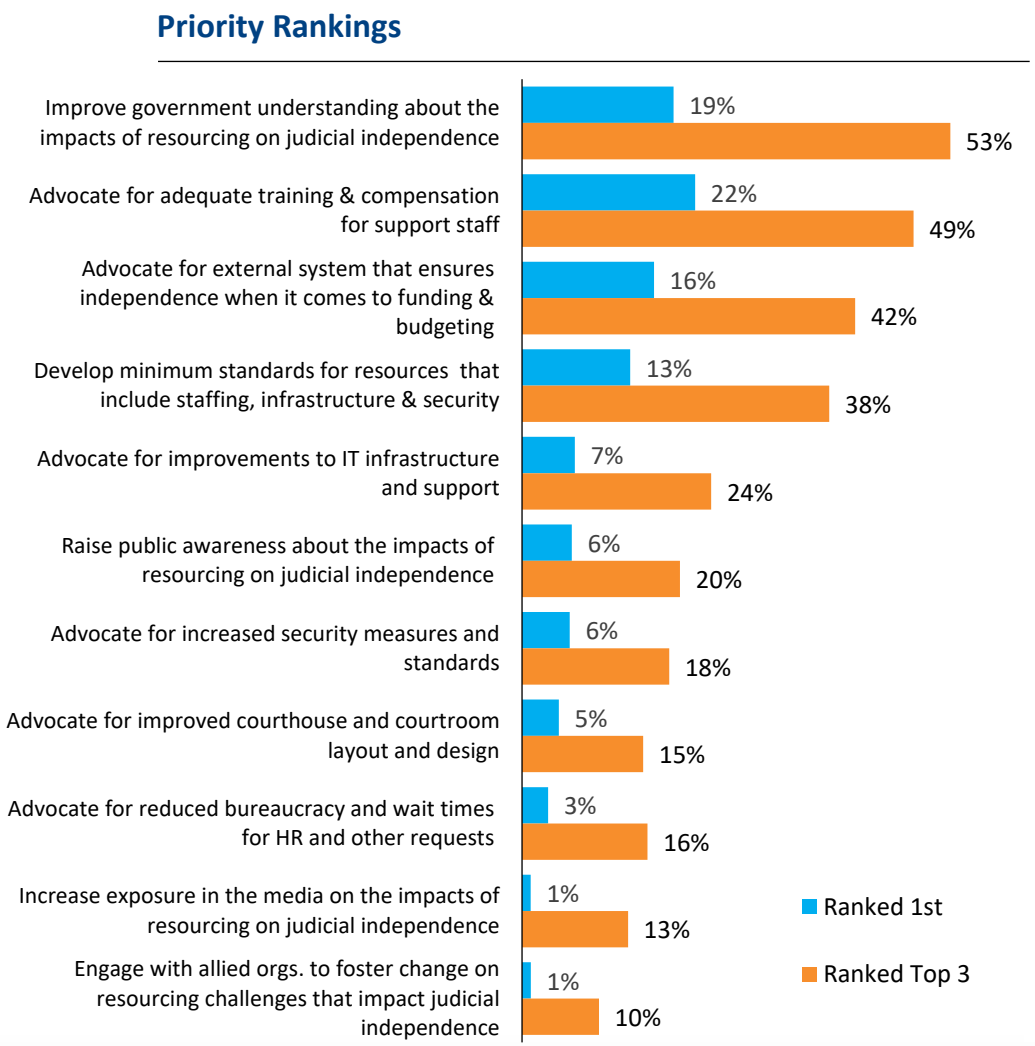
Potential Roles for CSCJA to Address Resourcing Issues (Cont'd)

Importance of Focus Areas



Order of Importance for Focus Areas

- In addition to rating importance, participating justices were also asked to rank the focus areas in order of importance.
- Improving government understanding and awareness about the impacts of resourcing on judicial independence is again the top role with just over half (53%) ranking it in their top three and one in five (19%) ranking it first. Advocating for adequate training and compensation for support staff is a close second with 49% picking it in their top three and 22% selecting it first overall.
- While the priority rankings show a clear top tier, they also show a second tier that is not far behind. Specifically, advocating for an external system that ensures independence when it comes to funding and budgeting for superior court justices (16% top choice and 42% top three) and developing minimum standards for resources across areas that include staffing, infrastructure and security (13% top choice and 38% top three) represent the second-tier areas of focus.
- Combined, the top four represent 70% of all first-place rankings.
- The remaining focus areas were rated within their top three by less than a quarter of justices, with increasing exposure in the media on the impacts of resourcing on judicial independence and engaging in meaningful dialogue with allied organizations to foster change on resourcing challenges that impact judicial independence as the bottom two.



Key Results by Segment

- Region
- Funding Source
- Experience

Results by Funding Source

Facilities

- Although justices from both provincially and federally funded courts report similar ratings for facilities and amenities, those from provincially funded courts are more likely to indicate a significant negative impact on their work efficiency, effectiveness in their roles, and ability to execute duties with judicial independence due to their facilities and amenities.

Technology

- Federally funded justices are more likely to provide a lower rating to a fast, secure, and reliable internet connection.
- Provincially funded justices are more likely to provide a lower rating to availability of standard office equipment, up-to-date and effective cybersecurity, availability and access to e-filing and other paperless data collection and storage applications, access to timely on-site or local technology support, and access to tech support, including after hours.

HR Support

- Provincially funded justices are more likely to have clerks/registrars/court service officers available upon request when compared to justices whose courts are federally funded. Meanwhile federally funded justices are more likely to have library resources and staff available upon request.
- Provincially funded justices are less likely to have access to lawyers/legal support when compared to justices whose courts are federally funded.
- Provincially funded justices are more likely to indicate that their support from clerks/registrars/court service officers as well as translation services is inadequate, while the reverse is true for federally funded justices.
- Justices whose courts are provincially funded are more likely to indicate that there is a negative impact on their work efficiency, effectiveness in their roles, and ability to execute duties with judicial independence due to their level of HR support when compared to justices whose courts are federally funded.

Security

- There are no material differences on security measures available based on funding source.
- Among justices who currently have building security personnel and bailiff/sheriff resources for criminal proceedings available to them, federally funded justices are more likely to indicate that these measures are adequate.
- Among justices who currently do not have this measure in place, provincially funded justices are more likely to indicate that perimeter security is not needed while federally funded justices are more likely to indicate that it is good to have.
- Provincially funded justices are also more likely to indicate that security cameras in and around the building, private corridors and/or secure areas of the building with restricted access and bailiff/sheriff resources are essential, while federally funded justices are more likely to indicate that the latter is not needed.
- There are no material differences when it comes to the impact of security on justices' ability to carry out their duties efficiently, effectively, and with judicial independence.

Visiting Judges

- Justices whose courts are federally funded are more likely to travel or circuit to serve courts other than their primary work location when compared to provincially funded justices, however there are not material differences when it comes to ratings of facilities, technology, human resources, and security while travelling.

Impacts of Resourcing on Judicial Independence

- Federally funded justices are more likely to have higher scores on ability to administer justice in a timely way due to level of staff, proceedings not being stayed or delayed by the availability of bailiff or security resources, level of support and resources never (or rarely) resulting in errors or misadministration of justice, and having sufficient HR support that enables focus on the administration of justice.

Intentions for Retirement

- Justices whose courts are federally funded are less likely to serve until their mandatory retirement date and are more likely to indicate that their current level of resourcing and support is a significant factor in that decision.

Results by Region

Facilities

- Justices residing in Quebec were more likely to give a lower average rating to the availability of courtrooms, whereas those in BC provided the highest average rating.
- Justices in the Atlantic region tended to rate building maintenance lower, while those in Ontario gave it the highest average rating.
- In Quebec, justices gave lower average ratings for access to amenities like drinking water, fridges, and microwaves.
- Justices who reside in the Atlantic region were more likely to provide a lower rating to access to dedicated/private parking while Justices in Alberta and BC had the highest average rating.
- Quebec justices provided lower average ratings regarding the sufficiency of courthouse staff and services compared to others.
- Justices in the Atlantic were more likely to report sharing courthouses or courtrooms with other judges or organizations.
- In BC, justices were less likely to report a negative impact on work efficiency due to facilities. No significant regional differences were noted in terms of carrying out roles effectively or maintaining judicial independence.

Technology

- Justices in the Prairies (incl. the Territories) gave a lower average rating to up-to-date and effective cybersecurity, while BC justices provided the highest ratings.
- Justices who reside in BC awarded a higher average rating to availability of standard office equipment.
- Justices in both the Prairies (incl. the Territories) and the Atlantic regions gave lower ratings to availability and access to e-filing and other paperless data collection and storage applications, availability and access to digital dictation, transcription and other similar tools and applications, access to technology training, and availability of secure office space and meeting rooms. BC justices, however, were more likely to provide a higher rating for the latter area.
- Justices in BC and Alberta gave higher average ratings for timely on-site or local technology support. In contrast, those in the Atlantic region rated this aspect lower.
- Regarding technology, BC justices were less likely than those in other regions to report negative impacts on work efficiency, role effectiveness, and judicial independence.

HR Support

- Justices in Quebec and the Atlantic region were less likely to report having direct access to judicial assistants.
- Direct access to clerks, registrars, or court service officers was reported to be less common among justices in Alberta and the Atlantic region.
- Justices in the Prairies (incl. the Territories) reported having less direct access to research assistance.
- Access to lawyers/legal support and library resources and staff was less common for justices in both the Prairies (incl. the Territories) and the Atlantic region.
- Justices who reside in BC were less likely to have direct access to translation services.
- Justices residing in BC were more likely to indicate that they have research assistance and lawyers/legal support but that it is inadequate while those in the Atlantic region were more likely to indicate that they do not have access to these supports but feel they need both.
- Those residing in Quebec were more likely to indicate that they either don't have access to translation services but need it or that they have this type of support, but it is inadequate. Those in Ontario were also more likely to indicate that their translation service support is inadequate.
- When it comes to library and resources staff, those residing in Prairies (incl. the Territories) were more likely to indicate that they either don't have access to this support but feel they need it or have access to this support, but it is inadequate.
- There were no material difference on work efficiency, carrying out role effectively, or on judicial independence due to HR support.

Results by Region (Cont'd)

Facilities Security *** Interpret with caution due to low sample sizes.**

- Justices residing in Alberta were more likely to have all security measures listed available to them aside from security cameras in and around buildings for which Prairies (incl. the Territories) was the highest, bailiff/sheriff resources for criminal proceedings for which BC was the highest, and easy and efficient access to security/police resources if/when required for which Ontario and Quebec were the highest.
- Justices who reside in BC were less likely to have perimeter security services, security screening at building entrance, courtroom security personnel, security screening at courtroom entrance, building security personnel, easy and efficient access to security/police resources if/when required, offices equipped with alarm buttons, and Secure and/or restricted access to courtrooms available to them.
- Justices residing in Prairies (incl. the Territories) were less likely to have courtrooms equipped with alarm buttons, private corridors and/or secure areas of the building with restricted access, private and/or restricted elevators and online and social media support and security available to them.
- Justices residing in Ontario were least likely to have bailiff/sheriff resources for criminal proceedings available to them.
- Justices residing in Quebec were less likely to have security cameras in and around the building(s), security screening at courtroom entrance, courtroom security personnel, bailiff/sheriff resources for criminal proceedings, and offices equipped with alarm buttons available to them.
- Judges residing in the Atlantic region were less likely to have perimeter security services, private entrance to courthouse buildings, private and/or restricted elevators, secure and/or restricted access to your office area(s), and secure and/or private parking area in close proximity to the courthouse available to them.
- Of those who have the listed security measures available to them, the only material differences in terms of adequacy was for offices equipped with alarm buttons and online social media support and security for which Quebec provided the lowest average rating, as well as for perimeter security services for which the Atlantic region was the lowest.
- Of justices who do not currently have this measure in place, those residing in BC were most likely to indicate that security and screening at building entrances is not needed. While those in Alberta were most likely to indicate that this measure is essential.
- Security screening at courtroom entrance was more likely to be not needed by justices residing in Alberta while courtroom security personnel was more likely to be deemed essential.
- Easy and efficient access to security/police resources if/when required was more likely to be deemed essential by justices residing in Quebec who do not currently have this measure in place.
- Offices equipped with alarm buttons, private entrance to courthouse buildings, private corridors and/or secure areas of the building with restricted access, and secure and/or restricted access to courtrooms were more likely to be deemed essential by justices residing in Quebec who do not currently have these measures in place.
- Private and/or restricted elevators and secure and/or restricted access to your office area(s) and online and social media support and security were more likely to be deemed essential by justices residing in Quebec and the Atlantic. Secure and/or private parking area in close proximity to the courthouse was also more likely to be deemed essential by justices residing in the Atlantic.
- Justices residing in the Atlantic were more likely to indicate a negative impact on efficiency and on judicial independence due to current security measures. There were no material difference for region on carrying out work effectively.

Visiting Judges

- Justices residing in Alberta, BC, and Quebec were more likely to travel or circuit to serve in courts other than their primary work locations than those in the other regions.
- Visiting judges whose primary work location is in BC provided lower ratings for facilities/infrastructure, human resources, and safety and security while giving a higher rating to technology when it comes to resources as a visiting judge.
- Visiting judges whose primary work location is the Atlantic provided a higher rating for facilities/infrastructure safety and security. Safety and security was also given a higher rating by justices whose primary work location is in Alberta.

Results by Region (Cont'd)

Impact on Judicial Independence

- The ability to administer justice in a timely way was given the lowest score by those residing in BC.
- Resourcing levels impact on mental health was given the lowest score by judges residing in Ontario.
- Courthouses and judicial buildings reinforcing the authority of the judicial system, fostering confidence, trust and respect among the public was given the lowest rating by those residing in the Atlantic region.

Importance of Focus Areas

- Justices residing in Quebec were more likely to give a higher importance score to advocating for adequate training and compensation for support staff.
- Justices residing in BC were more likely to give a lower importance score to increase exposure in the media on the impacts of resourcing on judicial independence, advocate for reduced bureaucracy and wait times for HR and other requests (supplies, equipment etc.), advocate for improved courthouse and courtroom layout and design, advocate for improvements to IT infrastructure and support, and engage in meaningful dialogue with allied organizations to foster change on resourcing challenges that impact judicial independence. Quebec was more likely to provide a higher importance score for the latter.
- Justices residing in Alberta were more likely to give a lower importance score to advocating for increased security measures and standards.
- Justices residing in BC were more likely to rank improve government understanding and awareness about the impacts of resourcing on judicial independence as their primary focus area.
- Justices residing in Quebec were more likely to rank advocate for adequate training and compensation for support staff as their primary focus area.
- Justices residing in Alberta were more likely to rank advocate for improved courthouse and courtroom layout and design as their primary focus area.

Retirement Intentions

- Justices residing in Ontario are least likely to indicate that they will not be serving until their mandatory retirement date.
- Justices residing in the Atlantic region and Prairies (incl. the Territories) are more likely to indicate that resourcing and support is not a factor in their decision to retire or potentially retire early, while Ontario is most likely to indicate that it is a factor.

Results by Years of Experience

Facilities

- As years of experience increases the average rating for availability of courtrooms decreases.
- Those with more than 20 years of experiences provided the highest rating for building maintenance.
- Those with 2 years or less of experience provided the highest rating for sufficient courthouse staff and services.
- Justices with more than 20 years of experience were less likely to indicate a negative impact on their ability to carry out their role effectively. There were no material differences for years of experience on the ability to work efficiently or execute duties with judicial independence.

Technology

- Up-to-date and effective cybersecurity was given the lowest rating by those with 2 years of experience or less.
- Availability and access to e-filing and other paperless data collection and storage applications and availability and access to digital dictation, transcription and other similar tools and applications was given the highest rating by the those with more than 20 years of experience.
- Those with more than 20 years of experience are more likely to indicate that technology has had a positive impact on their ability to work efficiently and carry out their role effectively. There was no material difference for executing duties with judicial independence.

HR Support

- There are no material differences for access to HR support or adequacy of HR support when it comes to years of experience.
- Those with more than 20 years of experience were more likely to indicate that HR support has had a positive impact on their ability to work efficiently, carry out their role effectively, and on executing duties with judicial independence.

Security

- As years of experience increases, justices were more likely to indicate that they have perimeter security services available to them.
- Those with more than 20 years of experience were most likely to indicate having secure and/or private parking area in close proximity to the courthouse and online social media support and security available to them.
- Of those who have the security measures listed available to them, there were no material differences based on years of experience when it comes to their adequacy.
- Among justices who do not currently have this measure, there is a tendency for those with more years of experience to be less likely to consider perimeter security services essential. There were no other material differences based on years on experience when it comes to security supports needed.
- There were no material differences for impact of security measures on work efficiency, carrying out role effectively or on judicial independence.

Visiting Judges

- There were no material differences for traveling or circuiting to serve in courts other than primary work location or for ratings for resources as a visiting judge based on years of experience, aside for technology where those with more than 20 years of experience provided a higher rating.

Impact on Judicial Independence

- Ability to administer justice in a timely way not being impacted by the level of staff at all, having sufficient HR support to enable focusing on the administration of justice, feeling very confident and secure with the safety measures and supports available in their role, and resourcing levels not having any negative impact on mental health were given the highest score by those with more than 20 years of experience.
- Level of support and resources never (or rarely) result in errors or misadministration of justice was given the lowest score by those with 2 years of experience or less and the highest score by those with more than 20 years of experience.

Results by Years of Experience

Importance of Focus Areas

- Advocate for an external system that ensures independence when it comes to funding and budgeting for superior court justices and advocate for adequate training and compensation for support staff were given a lower importance score by those with more than 20 years of experience.

Retirement Intentions

- While those with more than 20 years of experience are most likely to serve until their mandatory date for retirement, those with 2 years or less are most likely to be unsure, however, there is no material difference based on years of experience for whether resourcing and support is a factor in this decision.

Conclusions

Conclusion

The comprehensive member survey commissioned by the Canadian Superior Courts Judges Association (CSCJA) to assess the implications of government resource allocation towards Superior Courts yielded some significant insights.

Feedback regarding facilities and infrastructure was varied. While attributes like dedicated/private parking, clear visibility, and audibility in courtrooms, and the overall availability of courtrooms received strong ratings, there were areas of concern. Specifically, the adequacy of courthouse staff was flagged as a significant issue as evidenced by the dismal rating of 3.1 out of 7. Modern furnishings, ergonomic equipment, and building maintenance also received failing grades indicating the need for attention.

While there are some bright spots with respect to technology infrastructure, there are no areas that are outstanding. Top rated technology infrastructure includes up-to-date cybersecurity measures and the availability of standard office equipment. However, more modern utilities like e-filing and paperless data storage applications lag behind with a failing grade. Other areas with failing grades include video conferencing tools and access to digital dictation, transcription and related tools.

Conclusion Cont'd

On the human resources (HR) Support front, there are gaps for all positions tested, some bigger than others. Almost half of justices report inadequate or not having, but needing judicial assistants and clerks/registrars/court service officers. This rises to half reporting shortcomings for research assistance.

When it comes to security, a vast majority confirmed the presence of many essential safety measures like alarm buttons in courtrooms, secure/restricted office access, private corridor/areas of buildings with restricted access, building security personnel, private/restricted elevators and secure/private parking close to the courthouse. Yet, measures like digital security, perimeter security and courtroom entrance screening are only provided for a minority of justices.

Among those who have the various security measures in place, most feel they are adequate. Among those who do not have the security support, secure/private parking close to the courthouse is the most essential to provide. Other significant security resource gaps include private corridors/secure areas of the building with restricted access, secure/restricted access to your office area(s), courtrooms equipped with alarm buttons, private/restricted elevators and easy and efficient access to security resources if required.

Conclusion Cont'd

While the portions are different by resource type, the story is generally the same in terms of the impact resource availability has on justices' work efficiency, effectiveness and ability to execute their role with judicial independence. Justices report a high level of negative impact on their work efficiency (59% to 67% negative) and effectiveness (56% to 63% negative) and moderate negative impact on executing duties with judicial independence (29% to 38% negative). The exception is security measures where only 22% to 32% indicated a negative impact in each of the three areas.

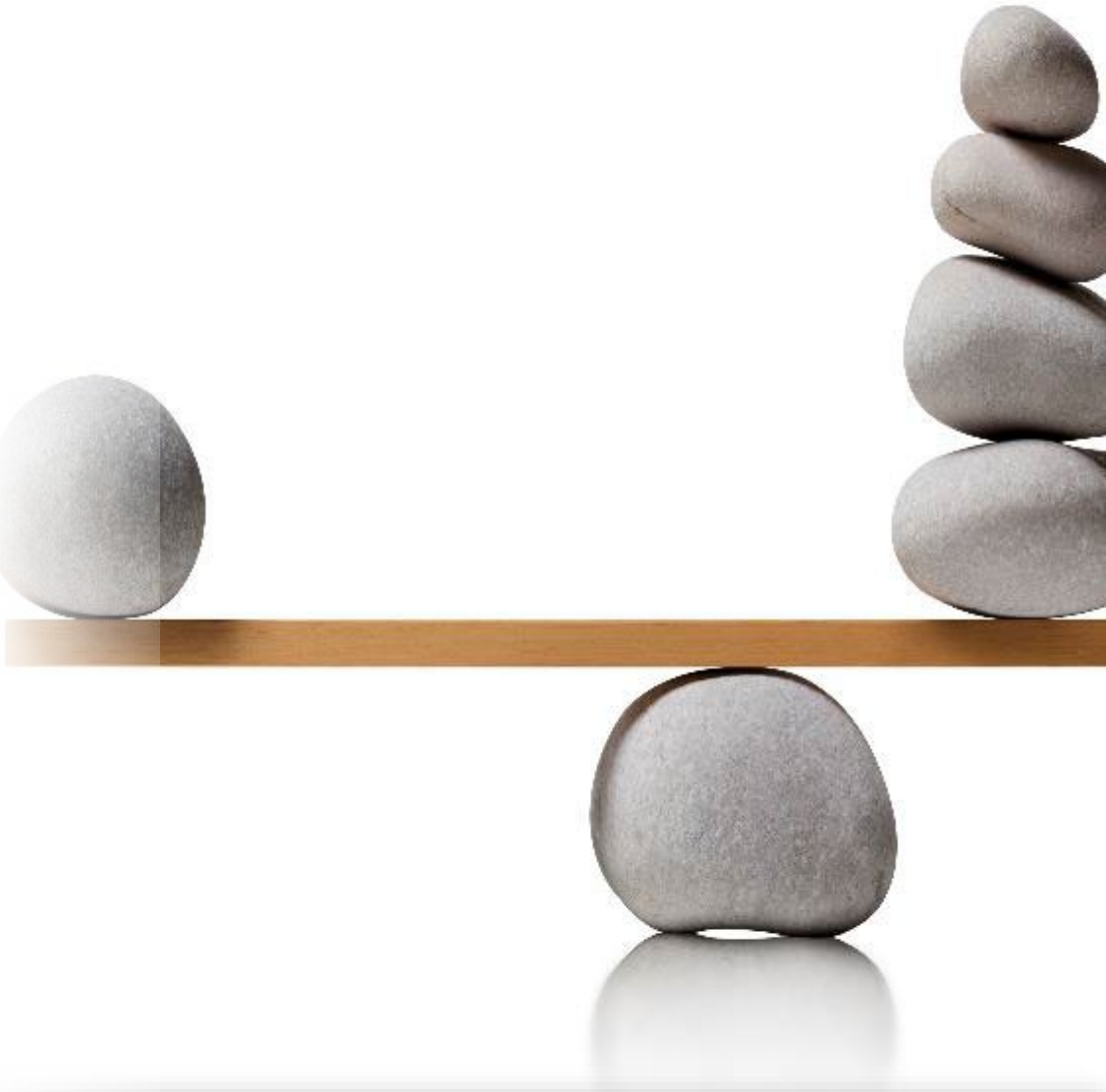
According to members, the top potential roles for CSCJA related to resource challenges were to improve government understanding of resourcing impacts on judicial independence, which rated as mission-critical, and advocacy for support staff training and compensation. Advocating for an external funding system and developing minimum standards for resources that include staffing, infrastructure and security also emerged as key areas of focus.

Conclusion Cont'd

Only 30% intend to serve until their stipulated retirement age. The balance are split between those who aren't sure and those who plan to retire early. Importantly, the results suggest that the current resource environment is influencing many justices' retirement considerations.

On the whole, the survey findings underscore many of the themes articulated through the in-depth interviews completed during the initial phase of this study. Justices articulate several areas where resource limitations are having varying degrees of impact on judicial independence, effectiveness, and impartiality. Likewise, while the impacts of resource constraints differ based on factors like region and funding sources, the impacts are clear: A reduced capacity to fulfil the judicial mandate, resulting in negative impacts on juridical effectiveness and impartiality.

The findings shed light on the challenges faced by Superior Court Justices in Canada. While certain areas received commendation, gaps in resource provisions, technological infrastructure, HR support, and security could impact judicial efficiency, effectiveness, and independence.



DELAY NO LONGER. THE TIME TO ACT IS NOW.

A CALL FOR ACTION ON DELAY IN THE CIVIL JUSTICE SYSTEM

2023

Table of Contents

DELAY NO LONGER. THE TIME TO ACT IS NOW.

The Advocates' Society calls on the federal, provincial and territorial governments to urgently dedicate additional resources to the civil and family justice system, and calls on all stakeholders in the justice system, including governments, the courts, the bar and the public, to take immediate and concerted action to solve the endemic delays plaguing the delivery of civil and family justice across Canada.

Introduction

Canada's civil and family justice system is in crisis. Many Canadians – separating spouses, small business owners, and others who need help enforcing their rights – wait months or years to have basic civil disputes scheduled and heard by the courts. This crisis pre-dates the COVID-19 pandemic, but was also exacerbated by it.

Lengthy delay in the delivery of civil justice is a critical barrier to access to justice for Canadians. Delays increase costs, deny timely relief, create opportunities for injustice, squeeze people out of the system, or discourage them from accessing it in the first place. Access to timely justice can be the difference between having a roof over one's head, putting food on the table, being safe from a violent ex-spouse, keeping a business going – or not. Justice delayed is justice denied, and for many, the consequences of justice being delayed are life-altering.

The civil justice system is foundational to the well-being of our constitutional order, our economy, and the lives of thousands and thousands of Canadians. Governments must dedicate greater resources to the civil justice system and concerted, urgent action must be taken by all justice stakeholders to prevent the system from failing entirely and losing the confidence of the public.

Why does the civil justice system matter?

The justice system, and the civil and family justice system in particular, does not generally receive attention and scrutiny from the media, the public or policymakers to the same extent as healthcare or education, despite being in a crisis of comparable severity. The harmful effects of the justice crisis are not felt until someone needs the system, at which point the effects are felt acutely. We, who work within the justice system and feel these effects every day, therefore begin our call to action with a broad reminder of why the civil justice system matters – to all of us.

The civil justice system resolves disputes between people, businesses and governments in a just and fair way. The civil justice system is critical to every person, family, organization and business in Canada, and to the peaceful and democratic society in which we live.

Nearly all Canadians will experience at least one civil or family justice issue in their lifetime.[1] The resolution, or lack thereof, of these issues by the civil justice system can alter the course of an individual's life – affecting their health, their family, their work or their finances.

A court's decision in a particular case may also become precedent, establishing and reinforcing norms for the community and shaping the law for future litigants. The existence of an open, impartial and trusted dispute resolution system ensures the rule of law and the maintenance of an orderly society.

The types of disputes that the civil justice system may address are vast and can be highly complex. And many of them require timely resolution — at the very minimum, on an interim basis. Some of the issues addressed by the civil justice system include:

- **Family law.** Families need timely access to the civil justice system to deal with all child-related matters, including child protection, parenting time, medical and other important decisions, and even child abduction; financial matters including child and spousal support, vacating or selling the home, and property division; and to protect victims of family violence.
- **Protection of vulnerable persons and estates law.** When a loved one falls ill or lacks capacity, families need timely access to the civil justice system to assist with powers of attorney and guardianship. After death, surviving dependants require timely access to the civil courts for financial support and wills and estates matters.
- **Compensation for injuries.** Individuals need timely access to the civil justice system to obtain compensation for injuries caused by the negligence of others, including to replace lost income and defray medical and other expenses.
- **Employment law.** Employers and employees need timely access to the civil justice system to resolve employment disputes, for example to obtain compensation in cases of discrimination.
- **Business disputes.** Small, family-owned businesses and multinational corporations alike need prompt access to the civil courts to protect their legitimate business interests, enforce contracts or restructure or liquidate in an orderly manner.
- **Holding government accountable.** The civil justice system holds federal, provincial and municipal governments to account when a government exceeds its lawful power or negligently harms citizens.

The civil justice system resolves these human differences in a reliable, open, impartial and consistent way. The alternative to a civil justice system that holds the confidence of the public is civil unrest and disorder, and the disintegration of the rule of law. As Dame Hazel Genn has aptly written,

> **[T]he machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights.** The civil justice system provides the legal architecture for the economy to operate effectively, for agreements to be honoured and for the power of government to be scrutinised and limited. The civil law maps out the boundaries of social and economic behaviour, while the civil courts resolve disputes when they arise. In this way, the civil courts publicly reaffirm norms and behavioural standards for private citizens, businesses and public bodies. [...] If the law is the skeleton that supports liberal democracies, then the machinery of civil justice is some of the muscle and ligaments that make the skeleton work.[2]

"Nothing is more important than justice and the just society. It is essential to flourishing of men, women, and children and to maintaining social stability and security. In this country, we realize that without justice, we have no rights, no peace, no prosperity."[3]

The Right Honourable Beverly McLachlin, Former Chief Justice of Canada

Delay in the civil justice system has become endemic across Canada

Although backlogs and delay in Canada's civil and family justice systems are universally acknowledged as problematic, reliable data about the magnitude and characteristics of the delay are challenging to find and even more challenging to interpret. As the Court of Appeal for Ontario recently commented:

> It is an unfortunate state of affairs that neither the Superior Court of Justice in Ontario nor the Court of Appeal for Ontario publishes information about how they manage and dispose of their caseload. The lack of detailed, consistent operational data from those courts and the resulting lack of transparency, impedes the ability to understand and then improve the performance of those courts.[4]

Similar comments apply to other jurisdictions across Canada.

Despite the lack of quantitative data, the day-to-day experiences of members of The Advocates' Society and the litigants we serve convince us that delay in scheduling and hearing matters before the courts is a standard feature of civil and family justice across the country. Some examples of the magnitude of this delay include:

- In **Quebec**, it was estimated that in 2021-2022, litigants would wait an average of 593 days between the filing of their claim in the Small Claims Division (for claims of less than $15,000) and trial.[5]

- In **British Columbia** in 2022, the Supreme Court "bumped" (i.e. delayed hearings because of the lack of judicial resources) 10.9% of all long chambers applications, 24.6% of civil trials (102 bumped compared to 312 heard) and 14.4% of family trials (26 bumped compared to 154 heard).[6]

- In **Alberta**, it routinely takes more than 9 months for an application longer than 20 minutes to be heard by a judge in Edmonton or Calgary; and 2 to 3 years for a trial longer than 5 days to be scheduled from the date the parties certify readiness.

- In **Ontario**, it currently takes almost 1.5 years for a motion longer than 2 hours to be heard by a judge in Toronto; more than 1.5 years after the trial management conference (or more than 4 to 5 years from the issuance of the original application) for a 3-week family law trial to be heard by a judge in Brampton; and more than 4 to 5 years for a civil action to proceed from commencement to trial.

Anecdotal evidence about the impacts of delay in Canada's civil and family justice system is plentiful.[7]

These are some of the stories we heard from our members about the impact of delay on their clients…

"I was interviewed by a potential client, a major international corporation, for an arbitration retainer. They told me they wanted to go to arbitration because the delay they encountered in litigation in Ontario was the worst they had ever encountered in their worldwide operations."

"A colleague of mine had fully prepared for a weeklong trial, and clients and witnesses had already flown in for the trial. The first day of the trial was cancelled because there was no judge available, but the court told the parties to stay in town and wait to see if one could be found. The next day, the rest of the trial was cancelled for lack of a judge. The costs of counsel's preparation for the trial and for participants' travel were completely wasted. This is not even that unusual, unfortunately."

"As a family lawyer, I have to tell my newly-separated clients that I cannot get court orders that will help them leave intolerable (and, in some cases, abusive) home situations for many months or more than a year, such as orders for temporary parenting or support. If they need the court's help on multiple issues in order to move out, it is considered a 'long motion', which are booking well over a year away — and this is for temporary relief, never mind a trial. Clients often start court applications earlier than they would otherwise, just to start the clock rolling. The financial and personal costs are unbearable for most family litigants."

"In May 2021, we issued a claim on behalf of a commercial property owner in relation to an overholding tenancy. We attempted to schedule a summary judgment motion in Fall 2021, and after several court attendances and case conferences, the motion was finally heard in October 2022, after an earlier adjournment because no judge was available to hear the matter. We still do not have a decision. While waiting for a court order evicting the tenant, our client had to find other space to lease."

"The plaintiff obtained a Certificate of Pending Litigation (CPL) in December 2022, shortly before the closing date of a real estate transaction. As counsel for the seller, my firm sought to bring a motion to set aside the CPL and close the transaction promptly, but was advised that the earliest hearing date was October 2023, some 10 months later. As a result, our firm's client was forced to settle the issue. Settlement should be encouraged, but the inability to bring a timely motion should not be the primary reason for a settlement."

"Timely resolution of Aboriginal law cases – which are often complex and expensive, and require aggressive case management – facilitates reconciliation. In contrast, when Indigenous litigants are forced to abandon meritorious cases due to delay-associated costs, Aboriginal rights have no more force than mere words on paper, and Indigenous Canadians are still denied access to justice in this country's courts. For example, in one time-sensitive case regarding ongoing negative impacts of industrial activity, there are no two-day court hearing dates available for more than a year — and in the meantime, the First Nation's traditional territory continues to be degraded."

"My client separated from their partner in 2019. The action was brought in the spring of 2020 and has been ready for trial since 2022. We could not get a trial scheduling conference until April 2023, and then set the earliest possible trial date —more than one and a half years down the road. We will have to re-do all of the financial disclosure and update all of the expert reports before the trial, at great expense to the parties, because the information will be stale by the time of the trial. In the meantime, my client is bearing a temporary monthly support order that significantly favours their ex-spouse, which means the other party has no motivation to settle."

"A member of my firm recently appeared before the senior scheduling judge to arrange a date for a special application to resolve various document and production issues. The court advised that due to vacancies on the court and judicial leaves of absence, the earliest available date was in 18 months."

The impact of delays in civil and family justice are severe and far-reaching

Lengthy delays have severe negative consequences not only for the litigants, but for the justice system as a whole.

1. Delay compromises access to justice

The right to access the civil justice system is a fundamental pillar of the protection of the rights of Canadians. Delays in having civil and family legal issues heard and decided by courts across Canada mean that litigants are unable to have their rights determined or enforced for years on end, effectively rendering their rights non-existent in the interim. This state of affairs leads litigants to make decisions they would not otherwise have to make, and to suffer consequences that would not otherwise arise. As Chief Justice Wagner observed in 2018,

> It can take a year or more even to get a date for a trial that might last two months. In the meantime, parties suffer financial losses or family disharmony; physical and mental health issues remain unresolved. An injured person might be persuaded to take a lower settlement because he can't work and needs to pay the bills. Delays cause people to make difficult, and life-altering, choices.[8]

As the Supreme Court stated in *Hryniak v. Mauldin,* "[p]rompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice."[9]

2. Delay damages the rule of law

The Supreme Court of Canada has held that the rule of law "is a highly textured expression, [...] conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority"[10] and that "[a]t its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs."[11]

The alternative to the rule of law is "anarchy, warfare, and constant strife."[12] If the public views the civil justice system as failing to prosecute and enforce a person's rights and obligations in a timely manner, there is a greater risk of a lack of accountability, and parties will act accordingly. Potential litigants may be tempted to take matters into their own hands when resolution of a dispute by the justice system is a remote and unattainable option.

The public may further feel disenfranchised from the justice system when it is not responsive to citizens' needs, which weakens the legitimacy of the entire justice system – and by extension, the legitimacy of our democracy as a whole.

3. Delay makes wars of attrition into a successful litigation strategy

Delay in the context of civil litigation does not just extend the litigation process; often, it determines the outcome in a way that is manifestly unjust and perpetuates inequality.

Delay *drives* costs, as lengthier civil proceedings often result in more correspondence, more disclosure updates, more motions, more case management conferences, and more procedural steps.[13] When litigants cannot access courts in a timely fashion, civil cases often become wars of attrition, in which success is determined not on the merits of the case but by the resources of the parties. As a result, many meritorious cases never even reach the trial stage; litigants (typically plaintiffs) run out of money and are forced to either accept unfair settlements or no resolution at all. Delay also forces lawyers who work on a contingency fee basis to be more selective in taking on cases, because delays inflate the cost of prosecuting or defending a matter; this reduces access to justice for people who simply cannot afford to pay a lawyer up front.

For cases with public interest dimensions – such as those involving Aboriginal or *Charter* rights, or with potential precedential value – the negative impacts of the court system's delay extend beyond the individual case and may affect broad segments of the population.

4. Delay undermines substantive results for parties

Delay can also unfairly diminish the actual substantive relief to which a party is entitled, simply by virtue of the passage of time and the changing of an individual's life circumstances over the course of a delayed proceeding. For example, the damages owing to personal injury claimants may reduce substantially over time due to statutory provisions applicable to the calculation of damages.

For parties who need real-time financial relief, such as child support or salary continuance, delay can mean the difference between an individual or family keeping a roof over their head – or not. In family law, delay can deprive children of time with a parent, contrary to their best interests and resulting in possible long-term harm to the child's well-being.

5. Delay risks the privatization of civil justice

When litigants cannot access the courts in a timely manner, they increasingly rely upon private alternative dispute resolution (ADR) mechanisms, such as mediation and arbitration. While there can be many benefits to using ADR, a systemic overreliance on it – coupled with an abandonment of the courts – can have negative effects on the justice system as a whole.

First, the courts' central role in upholding the rule of law is diminished. Second, ADR processes are almost always carried out in private and on a confidential basis. While this is often a benefit to the immediate parties, justice cannot be seen by the public to be done between parties. No legal precedents that are public and binding can develop from such a process, which, combined with limited rights to appeal, prevents the law from evolving. Third, a systemic overreliance on ADR mechanisms can create a two-tier legal system, in which litigants with deeper pockets can avail themselves of a speedy alternative to the backlogged public court system and less economically advantaged litigants are relegated to the public system.[14]

It also bears emphasis that ADR requires the consent of the parties. Parties that benefit from delays often decline to engage in ADR. This is another way in which litigants with greater power and resources can wage a war of attrition at the expense of justice.

6. Delay diminishes public confidence in the justice system

The negative impacts of delay described above all diminish public confidence in the civil justice system. As the Saskatchewan Court of Appeal noted in 2022,

> Delay in civil proceedings tends to have deleterious effects on the parties. Witnesses die, become unavailable or simply forget things. Documents disappear. Costs soar. However, the consequences of delay go beyond the parties to an action. [... U]nnecessary delay inevitably saps public confidence in the judicial process as a method for dispute resolution.[15]

CALL TO ACTION

The Advocates' Society calls on the federal, provincial and territorial governments to urgently dedicate additional resources to the civil and family justice system, and calls on all stakeholders in the justice system, including governments, the courts, the bar and the public, to take immediate and concerted action to solve the endemic delays plaguing the delivery of civil and family justice across Canada.

Potential ideas to explore

The Advocates' Society calls upon justice system stakeholders across Canada to come together as soon as possible and dedicate resources to developing solutions that will diminish the delay in civil and family justice, and, in particular, diminish the time between when a matter is ready to be determined by a judge (either at a conference, motion, application, or trial) and when it can be heard by a judge.

Below we set out some ideas that stakeholders may wish to explore, to determine their feasibility and helpfulness in a particular jurisdiction. The Advocates' Society emphasizes that none of these ideas will, alone, fix the problem of delay in the delivery of civil justice. While we believe the current crisis situation calls for immediate action to lessen delay as much as possible in the short term, we caution that a piecemeal approach will not solve delay over the long term. The civil justice system must be the subject of global and comprehensive consideration, with a view to developing a multi-pronged and coordinated plan of action that targets the root causes of delay.

The below ideas are offered as starting points for discussions about effective solutions to the problem of delay.

1. Measure delay and set targets

Data collection and analysis can help locate pain points in a system and develop remedies. The Advocates' Society believes that collecting data about delay in the justice system is an essential first step to developing and targeting policies to improve access to justice over the long term.[16] While we are advocates and not data scientists, the collection of the metrics listed in Appendix A, and other data, by courts and governments may help us understand the source and magnitude of the delay problem better and develop effective solutions to permanently diminish delay.

Measurement of relevant data also makes it possible to work towards targets and to measure the progress made toward hitting those targets. The Advocates' Society suggests that it would be reasonable to work towards a civil and family justice system in which you can always book a long motion within 90 days of the request and a trial within a year of the request. Urgent motions, such as some family law motions and other time-sensitive matters, should be triaged and addressed on a prompt target timeline as well.

2. Increase resources and deploy them flexibly

(i) Greater overall funding for the justice system

The civil and family justice system has been chronically underfunded for decades. The Advocates' Society believes it is time for governments to remedy this longstanding neglect and make real, forward-looking investments in the civil and family justice system to bring it on par with other critical democratic institutions. Delay and backlogs simply cannot be remedied, and will continue to grow, without allocating more dollars to justice. Below, we identify some key funding priorities for consideration.

(ii) Judicial resources

The experiences of members of The Advocates' Society strongly indicate that there are simply not enough judges at present to handle the caseload before the courts – to manage matters, hear matters, and issue decisions after hearings in a timely fashion. We need more judges and more support for judges in the form of court staff and law clerks.

The Advocates' Society has long encouraged the federal government to fill judicial vacancies on superior courts across the country in a timely manner to decrease delays in scheduling and hearing matters before the courts.[17] As of June 1, 2023, there remained 79 judicial vacancies on Canadian superior courts and courts of appeal.[18] We continue to recommend that the government establish and adhere to a policy mandating that judicial vacancies be consistently filled within a reasonably brief period of time after they arise.

Moreover, there is currently no publicly available formula for determining the adequacy of Canada's federal judicial complement (the number of judicial positions) in relation to its population. The baseline for the current complement of federally appointed judges was established in 1990 when the population of Canada was approximately 27.5 million, and individual judicial positions have since been added from time to time. Given that the Canadian population is now estimated at over 39 million people (representing an almost 42% increase in population over the past 32 years), it is hard to imagine that the current judicial complement is sufficient to meet the justice needs of Canadians. The Government of Canada, in cooperation with provincial and territorial governments, ought to consider whether it is time to undertake an assessment of the current federal judicial complement as part of a larger commitment to correcting court delay.

Attention should also be paid to the adequacy of other judicial resources, and whether current processes create a bottleneck in the system that can be remedied. In some courts, associate judges, applications judges, masters, or special clerks have jurisdiction over important matters in civil actions. For example, in Alberta, applications judges are the gatekeepers for an average of 110,000 active civil actions per year. In Edmonton and Calgary, the two most populous cities in the province, there are currently only 6 full-time applications judges and 2 part-time applications judges, exacerbating significant delay.

(iii) Court staff

Courts across the country are suffering from high turnover and shortages in court staff, which slows down every aspect of the civil litigation process. Court staff are essential to the proper functioning of all levels of court. Their work includes providing information about policies and procedures to the public, processing court filings, collecting fees, maintaining court records, scheduling court cases, managing the jury system, providing administrative and courtroom support to judges, organizing court interpretation services, and court reporting. Adequate human resources to support the courts, judges, and parties, including thorough training, are crucial to the optimal functioning of the civil and family justice system.

(iv) Flexibility

The recent implementation of technology and virtual proceedings presents an unprecedented opportunity to efficiently mobilize the courts' judicial and other human resources across a given jurisdiction to support busier or more backlogged regions. Technology can be used to redeploy judicial resources to areas within a province or territory where they are most needed, without having to incur the significant cost and disruption of travel or permanent relocation. The Advocates' Society encourages courts to continue to explore this potential, in particular to support backlogged courts in addressing shorter civil matters such as pre-trials or motions, so local judges are free to focus on longer motions or trials.

3. Improve the use of technology

Courts across Canada pivoted in record time to adopt the use of technology to permit virtual hearings as a result of the COVID-19 pandemic. Unfortunately, in other areas, the courts have not made full use of technology that could reduce costs and delay. The Advocates' Society encourages governments and the courts to continue to commit the necessary resources, monetary and otherwise, for the thoughtful integration of technology into the administration of justice. In particular, The Advocates' Society recommends the implementation of technology to improve court filing and scheduling systems across the country as an essential step towards curing the delay crisis.

While some Canadian courts developed electronic filing systems either before or during the COVID-19 pandemic, others still require litigants to file paper materials, either in person or by fax. The Advocates' Society urges these courts, and their respective provincial governments, to explore e-filing solutions to alleviate the delay occasioned by the need to move, file and store paper materials.

Another area where the use of technology can diminish delay is in scheduling court dates. There are many software solutions that would permit court users to schedule their own dates, automatically send reminders and automatically strike matters from the list if deadlines are not met. More sophisticated software might be able to predict the likelihood of certain types of cases resolving or proceeding and use that information to maximize the effective use of court time. To our knowledge, apart from some small pilot projects, this software is not being used by Canadian courts, and scheduling is still done manually via email, fax or telephone. The implementation of online scheduling applications that centralize and automate the scheduling of appearances before the court could greatly reduce inefficiencies and errors, and save money by freeing up court staff to focus on other important tasks.[19]

4. Review and revise procedural rules that are roadblocks

At the opening of the Ontario courts in 2014, then-Chief Justice George Strathy observed as follows:

> We have built a legal system that has become increasingly burdened by its own procedures, reaching a point that we have begun to impede the very justice we are striving to protect. With the best of intentions we have designed elaborate rules and practices, engineered to ensure fairness and achieve just results. But perfection can be the enemy of the good, and our justice system has become so cumbersome and expensive that it is inaccessible to many of our own citizens.[20]

The Advocates' Society welcomes comprehensive overhauls of antiquated and overly complex rules of civil procedure that do not account for modern realities.[21] The nature of how parties before the court conduct their lives and affairs has changed dramatically, and some rules have not kept pace. In addition, experience has shown that certain rules allow the parties to introduce significant delay in the pre-trial phase without sanction, which requires reform. Complete rewrites of rules of procedure should and will take thought to avoid unintended consequences, however. These types of projects will require broad consultation with stakeholders, changes to administrative processes and infrastructure, and education for the judiciary, court staff and counsel.

In the meantime, the rewriting of rules of civil procedure should not prevent more discrete changes to rules and legislation from being made now, keeping in mind the need to consider the impacts on the system as a whole. Some possible examples include:

- **Consider setting trial dates early**. In many jurisdictions, owing to certain rules of procedure, a trial date is not set until after the discovery process is complete. Setting an early trial date (and ordering a realistic timetable to ensure the case is ready for trial) might prevent cases from getting dragged out for months or years in the discovery process, and can avoid the months- or years-long delay that now often occurs between completing discoveries and trial. Associated rules may be required to encourage parties to continue to try to resolve the matter and narrow the issues in dispute while waiting for their trial date; and to ensure parties cannot easily adjourn an early trial date unless the justice of the case demands it.

- **Expand the use of applications and summary trials**. Many cases may be determined without the need for *viva voce* evidence on all issues. Applications, "trials of an issue" and summary trials should be used more often (and where necessary, rules should be amended to permit their use) to ensure the just determination of disputes on their merits in a proportionate way.

- **Reduce discovery-related disputes and deal with them efficiently when they arise**. The discovery process is often the most costly and time-consuming part of civil litigation, and in some jurisdictions, discovery-related motions clog up the civil justice system. Changes to rules of procedure may help to streamline the discovery process and avoid using scarce resources on discovery-related motions: for example, encouraging or requiring discovery questions to which an examinee objects to be answered (unless privilege is at issue or the question is blatantly irrelevant or an abuse of process) and reserving the question of relevance for the trial judge;[22] stipulating an adverse inference for failure to answer discovery questions; strictly enforcing time limits on discoveries; or providing for presumptive awards of substantial indemnity costs if a party acts unreasonably or abusively in the discovery process. In addition, courts may wish to consider establishing weekly motions lists to deal with simple procedural issues that can be heard in a short period of time, such as discovery disputes.[23]

- **Increase the availability of case management.** Case management can be an effective way to reduce the number of contested hearings before a court. Having one judge assigned to a civil case from the outset, as envisioned in single-judge case management models frequently used in the United States and piloted in certain jurisdictions in Canada,[24] can go even further towards encouraging parties to act efficiently and proportionately throughout the proceeding. Also, having a judge that is familiar with the case would save significant court time, as parties

would not need to bring a different judge up to speed each time a motion or application is brought. The Advocates' Society recommends that courts explore ways to implement greater case management. Judges must be trained in case management techniques, and empowered by the rules of procedure to make tough decisions as case managers.[25]

5. Ensure lawyers continue to support the efficient use of court resources

Lawyers have several roles to play in reducing the delays plaguing the civil and family justice system.

A number of sources conclude that lawyers assist in the functioning of an efficient civil justice system. Studies have found that early access to legal advice increases the opportunity for the early resolution of disputes;[26] judges believe self-represented litigants slow the court process;[27] court staff report that self-represented litigants in family law matters use greater court staff resources;[28] lawyers and judges report that self-represented litigants in family cases "take up more court time, are less likely to settle, and that when one party is represented, the legal costs for that party increase";[29] lawyers help move matters through the courts more quickly and reduce the burdens on the courts; [30] and legal representation has positive impacts on court processes.[31] In addition, the participation of lawyers in the civil justice system ensures meaningful access to justice for litigants, acting as the guardians of the client's best interests and ensuring the client is aware of their legal rights. On a principled basis, an independent bar is fundamental to ensuring an effective civil justice system.

Lawyers can ensure they contribute to diminishing pre-trial delay by resisting any efforts by clients to use delay as a tactic, resolving or narrowing the issues for decision by the court, being accountable to the court, abiding by timelines, informing the court of any expected delays, keeping adjournments to a minimum, and overall ensuring each case progresses effectively to disposition. [32] Courts can encourage this accountability on the part of lawyers by refusing to enable complacency or unreasonableness on the part of parties or their counsel, and when warranted, sanctioning conduct that unreasonably delays or extends proceedings. Hearing dates must be available in the reasonably near future to ensure the court's oversight, however; parties may take unreasonable positions when they know the other side has little meaningful recourse.

Lawyers can also support the efficiency of the civil justice system by remaining up-to-date on new technology and best practices.[33]

It is clear that in these ways, lawyers can play a key role in making the civil justice system work more effectively and efficiently.

Conclusion

Delay in the civil justice system is negatively impacting the rights of thousands of Canadian individuals, families, businesses and other organizations. The Advocates' Society calls on the federal, provincial and territorial governments to urgently dedicate additional resources to the civil and family justice system, and calls on all stakeholders in the justice system, including governments, the courts, the bar and the public, to take immediate and concerted action to solve the endemic delays plaguing the delivery of civil and family justice across Canada.

The Advocates' Society looks forward to working with other stakeholders to facilitate meaningful change.

The Advocates' Society Task Force on Civil Justice Delay

Hilary Book, Chair, *Book Law* (Toronto)

Daniel Baum, *Langlois Avocats, S.E.N.C.R.L.* (Montreal)
Sheree Conlon, K.C., *Nijhawan McMillan & Conlon Barristers* (Halifax)
Scott R. Fairley, *Dooley Lucenti LLP* (Barrie)
Craig A.B. Ferris, K.C., *Lawson Lundell LLP* (Vancouver)
Sheila Gibb, *Epstein Cole LLP* (Toronto)
Jennifer Hunter, *Lerners LLP* (Toronto)
Leona Kung, *Koskie Minsky LLP* (Toronto)
Aria Laskin, *JFK Law LLP* (Vancouver)
Robin A. Lepere, *Petrone & Partners* (Thunder Bay)
Douglas A. McGillivray, K.C., *Burnet, Duckworth & Palmer LLP* (Calgary)
Tamara Prince, *Cassels Brock & Blackwell LLP* (Calgary)
Jeffrey Robinson, *Rush Ihas Hardwick LLP* (Kelowna)
Stephen G. Ross, *Rogers Partners LLP* (Toronto)
Tara Sweeney, *Soloway Wright LLP* (Ottawa)

Appendix A: Data to Collect about the Civil Justice System

- Number of civil and family cases in the system in a given year, and their age
- Number of civil and family cases entering and exiting the system in a given year
- Time between when a motion is sought and when it is scheduled
- Time between when a motion is scheduled and when it is heard
- Time between motion hearing and issuance of decision
- Time between commencement of matter and when it is set down for trial
- Time between when a matter is set down for trial and trial
- Time between trial and issuance of decision (if judge-alone trial)
- Time between commencement of matter and final disposition
- Percentage of actions that get set down for trial
- Percentage of actions that proceed to trial
- Percentage of actions in which motions are brought (and types of motions)
- Length of trial
- Number and length of adjournments of hearings, broken down by reason for the adjournment, e.g.:
    - Plaintiff request/default
    - Defendant request/default
    - Judicial discretion
    - Lack of court resources (e.g. no judge, no clerk)
    - Exceeding allotted time
- Final disposition type, e.g.:
    - Default judgment
    - Settlement
    - Withdrawal
    - Dismissal for delay
    - Summary judgment motion
    - Decision after trial

It may assist to be able to break down these metrics further, for example by case type and proceeding type.

Of course, data ought to be collected and recorded in a manner that makes aggregate and disaggregate analysis relatively straightforward to conduct. The Advocates' Society suggests that the ongoing development and implementation of new technology for the courts, in particular online platforms for filing, scheduling and case management, create excellent opportunities to build in data collection and analysis at the front end.

[1] Trevor C. W. Farrow *et al.*, "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report" (2016), online: <https://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>.
[2] Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2009), pp. 3-4 [references omitted].
[3] Supreme Court of Canada, "The Challenges We Face*:* Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada" (March 8, 2007), online: <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2007-03-08-eng.aspx>.
[4] *Moffitt v. TD Canada Trust*, 2023 ONCA 349, at footnote 2.
[5] Kathryne Lamontagne & Pascal Dugas Bourdon, « Petites créances: les délais ont triplé depuis l'arrivée de la CAQ » *Le Journal de Montréal* (18 mai 2022), en ligne : <https://www.journaldemontreal.com/2022/05/18/les-delais-explosent-aux-petites-creances>.
[6] Supreme Court of British Columbia, *2022 Annual Report*, online: <https://www.bccourts.ca/supreme_court/about_the_supreme_court/annual_reports/2022_SC_Annual_Report.pdf>.
[7] See Jacques Gallant, "'Your whole life on hold': As feds fail to fill judicial vacancies, Ontarians are waiting years for civil hearings" *Toronto Star* (May 24, 2023), online: <https://www.thestar.com/news/gta/2023/05/24/your-whole-life-on-hold-as-feds-fail-to-fill-judicial-vacancies-ontarians-are-waiting-years-for-civil-hearings.html>.
[8] "Access to Justice: A Societal Imperative", Remarks of the Right Honourable Richard Wagner, P.C., Chief Justice of Canada, 7th Annual Pro Bono Conference (Vancouver, British Columbia) (October 4, 2018), online: <https://www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx?pedisable=true>.
[9] *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 24.
[10] *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 805-806.
[11] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 70-71.
[12] Quoted in *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at para. 60.
[13] Report of the Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* (August 2016), >, at p. 8, online: Senate of Canada, <https://sencanada.ca/content/sen/committee/421/LCJC/Reports/CourtDelaysStudyInterimReport_e.pdf; Roy Weinstein *et al.*, "Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings" (March 2017) *Micronomics Economic Research and Consulting*, online <https://go.adr.org/rs/294-SFS-516/images/Economic%20Impact%20of%20Delay%20Micronomics%20Final%20Report%20%282017-03-07%29.pdf>.
[14] Trevor C. W. Farrow, "Privatizing our Public Civil Justice System" *News & Views on Civil Justice Reform* (2006), Volume 9, p. 16, online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=2929&context=scholarly_works>.; Barbara A. Billingsley, "Book Review: Civil Justice, Privatization, and Democracy by Trevor C. W. Farrow" *Osgoode Hall Law Journal* 54.1 (2016): 317-323, online: <https://digitalcommons.osgoode.yorku.ca/ohlj/vol54/iss1/11/>.
[15] *Huard v. The Winning Combination Inc.*, 2022 SKCA 130, at para. 86.
[16] Action Committee on Court Operations in Response to COVID-19, "Roadmap to Recovery: Orienting Principles for Reducing Court Backlogs and Delays", online: <https://www.fja.gc.ca/COVID-19/Orienting-Principles-Reducing-Backlog-and-Delays-Principes-d-orientation-reduire-les-engorgements-et-delais-eng.html>.
[17] See The Advocates' Society Letter to The Honourable David Lametti, P.C., M.P., Minister of Justice and Attorney General of Canada re: Judicial Vacancies and Access to Justice in Canada, dated December 12, 2022, online: <https://www.advocates.ca/Upload/Files/PDF/Advocacy/Submissions/JudicialVacancies/The_Advocates_Society_Letter_to_Minister_of_Justice_re_Judicial_Vacancies_December_12_2022.pdf>.
[18] Office of the Commissioner for Federal Judicial Affairs Canada, "Number of Federally Appointed Judges as of June 1, 2023", online: <https://www.fja.gc.ca/appointments-nominations/judges-juges-eng.aspx>.

[19] Action Committee on Court Operations in Response to COVID-19, "Roadmap to Recovery: Orienting Principles for Reducing Court Backlogs and Delays", online: <https://www.fja.gc.ca/COVID-19/Orienting-Principles-Reducing-Backlog-and-Delays-Principes-d-orientation-reduire-les-engorgements-et-delais-eng.html>. See Section 10. "Optimizing Case Flow Processes and Eliminating Administrative Inefficiencies".
[20] "Opening of the Court of Ontario for 2014: Remarks of the Honourable George R. Strathy, Chief Justice of Ontario" (September 9, 2014), online: <https://www.ontariocourts.ca/coa/about-the-court/archives/opening-of-the-courts-of-ontario-for-2014/>.
[21] At the 2022 Opening of the Ontario Courts, Chief Justice Geoffrey Morawetz of the Ontario Superior Court of Justice called for Ontario's *Rules of Civil Procedure* to be overhauled for the first time in 40 years, explaining that civil proceedings have become bogged down by process, and there is an opportunity to create a new, simpler path forward: "Opening of the Courts – Remarks of Chief Justice Geoffrey B. Morawetz" (October 3, 2022), online: <https://www.ontariocourts.ca/scj/opening-of-the-courts-remarks-2022/>.
[22] See e.g., *Federal Courts Rules*, SOR/98-106, rule 95(2) ("A person may answer a question that was objected to in an oral examination subject to the right to have the propriety of the question determined, on motion, before the answer is used at trial."); *Nova Scotia Civil Procedure Rules*, rule 18.17(1) ("Making no objection to a question, or making an objection but giving an answer, at a discovery is not an admission that the subject of the question, or the answer, is admissible."). In Nova Scotia, courts have made clear that counsel are expected to act reasonably and streamline the discovery process as much as possible; as such, where a discovery question is objected to on the basis of relevance, it is accepted that the best practice is to object but allow the witness to answer.
[23] This solution has been effective in multiple jurisdictions. See e.g. Superior Court of Justice, *Notice to the Public and the Profession Regarding Civil Matters in Ottawa as of April 19, 2022*, online: <https://cdn.ymaws.com/www.ccla-abcc.ca/resource/resmgr/pp-civlit/OttawaCivilScheduling_revMar.pdf> (section 2 regarding "Express motions"); *Nova Scotia Civil Procedure Rules*, Rule 24 (regarding "Appearance Day Chambers").
[24] See Superior Court of Justice, *Practice Advisory Concerning the Provincial Civil Case Management Pilot – One Judge Model*, online: <https://www.ontariocourts.ca/scj/practice/civil-case-management-pilot/>.
[25] See the Action Committee on Court Operations in Response to COVID-19, "Roadmap to Recovery: Orienting Principles for Reducing Court Backlogs and Delays", online: <https://www.fja.gc.ca/COVID-19/Orienting-Principles-Reducing-Backlog-and-Delays-Principes-d-orientation-reduire-les-engorgements-et-delais-eng.html>.
[26] "White Paper on Justice Reform, Part Two: A Timely, Balanced Justice System" *British Columbia Ministry of Justice*, (2013) at pp. 6, 9, online: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/whitepapertwo.pdf>.
[27] Linda Klein, "Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts (Preliminary)" *ABA Coalition for Justice* (July 12, 2010), at pp. 14-15, online: <https://legalaidresearch.org/2020/02/04/report-on-the-survey-of-judges-on-the-impact-of-the-economic-downturn-on-representation-in-the-courts/>. This is a report documenting the conclusions of a 2009 survey of judges across the United States. 78% of judges surveyed said the courts were negatively impacted when parties are not well represented. 90% of those judges said that one of the negative impacts was that court procedures were slowed.
[28] Government of Canada Research and Statistics Division, "JustFacts: Self-Represented Litigants in Family Law" (June 2016), online: <https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/srl-pnr.html>.
[29] *Ibid.*
[30] Lisa Moore & Trevor C. W. Farrow, "Investing in Justice: A Literature Review in Support of the Case for Improved Access to Justice" Canadian Forum on Civil Justice (2019), online: <https://cfcj-fcjc.org/wp-content/uploads/Investing-in-Justice-A-Literature-Review-in-Support-of-the-Case-for-Improved-Access-by-Lisa-Moore-and-Trevor-C-W-Farrow.pdf>; Sharon Matthews, "Making the Case for the Economic Value of Legal Aid – Supplemental Briefing Note" *Canadian Bar Association British Columbia Branch* (2012), at pp. 1, 5, online: <https://www.cbabc.org/CBAMediaLibrary/cba_bc/pdf/ForThePublic/LegalAid/ReportsResearchPapers/Economic_Value_of_Legal_Aid.pdf >.
[31] "Judicial Council Report to the Legislature: Sargent Shriver Civil Counsel Act" *Judicial Council of California* (2017).

[32] Action Committee on Court Operations in Response to COVID-19, "Roadmap to Recovery: Orienting Principles for Reducing Court Backlogs and Delays", online: <https://www.fja.gc.ca/COVID-19/Orienting-Principles-Reducing-Backlog-and-Delays-Principes-d-orientation-reduire-les-engorgements-et-delais-eng.html>. See Section 4. "Promoting the Accountability of Parties and their Counsel".

[33] The Advocates' Society has published a number of best practices to assist lawyers in using court resources effectively, including *Best Practices for Civil Trials* (2015), *Principles of Civility and Professionalism for Advocates* (2020), and *Best Practices for Remote Hearings* (2nd ed. 2021). See The Advocates' Society's Best Practice Publications page for these publications and more, online: <https://www.advocates.ca/TAS/Publications/Best_Practices_Publications/TAS/Publications_Resources/Best_Practices_Publications.aspx?hkey=12ee9725-d4e8-408d-93bc-462a365c7d82>.

Presented By

ZSA

2024 Private Practice Lawyer Salary Guide

PUBLISHED: JUNE 2024

Total Compensation by Location

TORONTO

Private Practice

YEARS OF EXPERIENCE	LARGE FIRM	MEDIUM FIRM	SMALL FIRM
1 year	$130,000	$110,000	$90,000
2 years	$150,000	$120,000	$105,000
3 years	$175,000	$140,000	$115,000
4 years	$195,000	$156,000	$130,000
5 years	$215,000	$172,000	$140,000
6 years	$235,000	$188,000	$155,000
7 years	$255,000	$204,000	$175,000+

Want to know more about legal salaries in Toronto?

Contact us at info@zsa.ca

MONTREAL

Private Practice

YEARS OF EXPERIENCE	LARGE FIRM	MEDIUM FIRM	SMALL FIRM
1 year	$110,000	$80,000	Varies
2 years	$120,000	$90,000	
3 years	$135,000	$105,000	
4 years	$150,000	$120,000	
5 years	$165,000	$130,000	
6 years	$175,000	$140,000	
7 years	$190,000	$150,000	

Want to know more about legal salaries in Montreal?

Contact us at montreal@zsa.ca

VANCOUVER

Private Practice

YEARS OF EXPERIENCE	LARGE FIRM	MEDIUM FIRM	SMALL FIRM
1 year	$115,000	$92,000	Varies
2 years	$125,000	$100,000	
3 years	$140,000	$112,000	
4 years	$155,000	$124,000	
5 years	$175,000	$140,000	
6 years	$190,000	$152,000	
7 years	$200,000	$160,000	

Want to know more about legal salaries in Vancouver?

Contact us at vancouver@zsa.ca

CALGARY

Private Practice

YEARS OF EXPERIENCE	LARGE FIRM	MEDIUM FIRM	SMALL FIRM
1 year	$100,000	$80,000	Varies
2 years	$115,000	$92,000	
3 years	$145,000	$116,000	
4 years	$165,000	$135,000	
5 years	$190,000	$150,000	
6 years	$205,000	Varies	
7 years	$225,000		

Want to know more about legal salaries in Calgary?

Contact us at calgary@zsa.ca

Please note that the salary information provided pertains to base salaries only, and does not include additional guaranteed or anticipated compensation, including signing or retention bonuses, equity-related compensation or other incentives, allowances or expenses.

First-Year Lawyer

First-Year Lawyer Job Description

First year lawyers in Canada typically assist more experienced and senior lawyers with various aspects of client matters within your designated practice area (e.g., corporate law, family law, criminal law).

Typical First Year Lawyer Duties:

- Conducting legal research and analysis of case law and relevant legislation.
- Drafting legal documents such as contracts, letters, and memoranda.
- Assisting with client communication and file management.
- Preparing for client meetings, court appearances, and other legal proceedings (under supervision).
- Develop your legal research and writing skills through assigned projects and tasks.
- Stay up-to-date on legal developments within your practice area.

Looking for a first year lawyer or a first year lawyer job?

Submit your resume or request talent now and our expert recruiters will be with you shortly.

Robert Half can assist you with your lawyer first year staffing needs.

Salary for First-Year Lawyer

$80,000 - $120,250

25TH PERCENTILE

$80,000

The candidate is new to the role and building the needed skills, experience and autonomy.

50TH PERCENTILE

$95,750

The candidate has the experience to perform core responsibilities without direct supervision and is comfortable with the role's processes and subject matter.

75TH PERCENTILE

$120,250

The candidate delivers value beyond the stated job duties, has advanced qualifications and experience, and is ready for the next career level.

First-Year Lawyer in Edmonton, AB

First-Year Lawyer Job Description

First year lawyers in Canada typically assist more experienced and senior lawyers with various aspects of client matters within your designated practice area (e.g., corporate law, family law, criminal law).

Typical First Year Lawyer Duties:

- Conducting legal research and analysis of case law and relevant legislation.
- Drafting legal documents such as contracts, letters, and memoranda.
- Assisting with client communication and file management.
- Preparing for client meetings, court appearances, and other legal proceedings (under supervision).
- Develop your legal research and writing skills through assigned projects and tasks.
- Stay up-to-date on legal developments within your practice area.

Looking for a first year lawyer or a first year lawyer job?

Submit your resume or request talent now and our expert recruiters will be with you shortly.

Robert Half can assist you with your lawyer first year staffing needs.

Salary for First-Year Lawyer in Edmonton, AB

$82,000 - $123,256

25TH PERCENTILE

$82,000

The candidate is new to the role and building the needed skills, experience and autonomy.

50TH PERCENTILE

$98,144

The candidate has the experience to perform core responsibilities without direct supervision and is comfortable with the role's processes and subject matter.

75TH PERCENTILE

$123,256

The candidate delivers value beyond the stated job duties, has advanced qualifications and experience, and is ready for the next career level.

First-Year Lawyer in Vancouver, BC

First-Year Lawyer Job Description

First year lawyers in Canada typically assist more experienced and senior lawyers with various aspects of client matters within your designated practice area (e.g., corporate law, family law, criminal law).

Typical First Year Lawyer Duties:

- Conducting legal research and analysis of case law and relevant legislation.
- Drafting legal documents such as contracts, letters, and memoranda.
- Assisting with client communication and file management.
- Preparing for client meetings, court appearances, and other legal proceedings (under supervision).
- Develop your legal research and writing skills through assigned projects and tasks.
- Stay up-to-date on legal developments within your practice area.

Looking for a first year lawyer or a first year lawyer job?

Submit your resume or request talent now and our expert recruiters will be with you shortly.

Robert Half can assist you with your lawyer first year staffing needs.

Salary for First-Year Lawyer in Vancouver, BC

$83,200 - $125,060

25TH PERCENTILE

$83,200

The candidate is new to the role and building the needed skills, experience and autonomy.

50TH PERCENTILE

$99,580

The candidate has the experience to perform core responsibilities without direct supervision and is comfortable with the role's processes and subject matter.

75TH PERCENTILE

$125,060

The candidate delivers value beyond the stated job duties, has advanced qualifications and experience, and is ready for the next career level.

First-Year Lawyer in Montreal, QC

First-Year Lawyer Job Description

First year lawyers in Canada typically assist more experienced and senior lawyers with various aspects of client matters within your designated practice area (e.g., corporate law, family law, criminal law).

Typical First Year Lawyer Duties:

- Conducting legal research and analysis of case law and relevant legislation.
- Drafting legal documents such as contracts, letters, and memoranda.
- Assisting with client communication and file management.
- Preparing for client meetings, court appearances, and other legal proceedings (under supervision).
- Develop your legal research and writing skills through assigned projects and tasks.
- Stay up-to-date on legal developments within your practice area.

Looking for a first year lawyer or a first year lawyer job?

Submit your resume or request talent now and our expert recruiters will be with you shortly.

Robert Half can assist you with your lawyer first year staffing needs.

Salary for First-Year Lawyer in Montreal, QC

$81,600 - $122,655

25TH PERCENTILE

$81,600

The candidate is new to the role and building the needed skills, experience and autonomy.

50TH PERCENTILE

$97,665

The candidate has the experience to perform core responsibilities without direct supervision and is comfortable with the role's processes and subject matter.

75TH PERCENTILE

$122,655

The candidate delivers value beyond the stated job duties, has advanced qualifications and experience, and is ready for the next career level.

First-Year Lawyer in Ottawa, ON

First-Year Lawyer Job Description

First year lawyers in Canada typically assist more experienced and senior lawyers with various aspects of client matters within your designated practice area (e.g., corporate law, family law, criminal law).

Typical First Year Lawyer Duties:

- Conducting legal research and analysis of case law and relevant legislation.
- Drafting legal documents such as contracts, letters, and memoranda.
- Assisting with client communication and file management.
- Preparing for client meetings, court appearances, and other legal proceedings (under supervision).
- Develop your legal research and writing skills through assigned projects and tasks.
- Stay up-to-date on legal developments within your practice area.

Looking for a first year lawyer or a first year lawyer job?

Submit your resume or request talent now and our expert recruiters will be with you shortly.

Robert Half can assist you with your lawyer first year staffing needs.

Salary for First-Year Lawyer in Ottawa, ON

$80,400 - $120,851

25TH PERCENTILE

$80,400

The candidate is new to the role and building the needed skills, experience and autonomy.

50TH PERCENTILE

$96,229

The candidate has the experience to perform core responsibilities without direct supervision and is comfortable with the role's processes and subject matter.

75TH PERCENTILE

$120,851

The candidate delivers value beyond the stated job duties, has advanced qualifications and experience, and is ready for the next career level.

First-Year Lawyer in Calgary, AB

First-Year Lawyer Job Description

First year lawyers in Canada typically assist more experienced and senior lawyers with various aspects of client matters within your designated practice area (e.g., corporate law, family law, criminal law).

Typical First Year Lawyer Duties:

- Conducting legal research and analysis of case law and relevant legislation.
- Drafting legal documents such as contracts, letters, and memoranda.
- Assisting with client communication and file management.
- Preparing for client meetings, court appearances, and other legal proceedings (under supervision).
- Develop your legal research and writing skills through assigned projects and tasks.
- Stay up-to-date on legal developments within your practice area.

Looking for a first year lawyer or a first year lawyer job?

Submit your resume or request talent now and our expert recruiters will be with you shortly.

Robert Half can assist you with your lawyer first year staffing needs.

Salary for First-Year Lawyer in Calgary, AB

$83,600 - $125,661

25TH PERCENTILE

$83,600

The candidate is new to the role and building the needed skills, experience and autonomy.

50TH PERCENTILE

$100,059

The candidate has the experience to perform core responsibilities without direct supervision and is comfortable with the role's processes and subject matter.

75TH PERCENTILE

$125,661

The candidate delivers value beyond the stated job duties, has advanced qualifications and experience, and is ready for the next career level.

First-Year Lawyer in Toronto, ON

First-Year Lawyer Job Description

First year lawyers in Canada typically assist more experienced and senior lawyers with various aspects of client matters within your designated practice area (e.g., corporate law, family law, criminal law).

Typical First Year Lawyer Duties:

- Conducting legal research and analysis of case law and relevant legislation.
- Drafting legal documents such as contracts, letters, and memoranda.
- Assisting with client communication and file management.
- Preparing for client meetings, court appearances, and other legal proceedings (under supervision).
- Develop your legal research and writing skills through assigned projects and tasks.
- Stay up-to-date on legal developments within your practice area.

Looking for a first year lawyer or a first year lawyer job?

Submit your resume or request talent now and our expert recruiters will be with you shortly.

Robert Half can assist you with your lawyer first year staffing needs.

Salary for First-Year Lawyer in Toronto, ON

$83,440 - $125,421

25TH PERCENTILE

$83,440

The candidate is new to the role and building the needed skills, experience and autonomy.

50TH PERCENTILE

$99,867

The candidate has the experience to perform core responsibilities without direct supervision and is comfortable with the role's processes and subject matter.

75TH PERCENTILE

$125,421

The candidate delivers value beyond the stated job duties, has advanced qualifications and experience, and is ready for the next career level.

Department of Finance Canada | Ministère des Finances Canada

2024 Fall Economic Statement

Canada


2024
Fall Economic
Statement

This document is available at canada.ca/fall-economic-statement

Cette publication est aussi disponible en français.

Cat No.: F1-52E-PDF

ISSN 2370-5418

In case of discrepancy between the printed version and the electronic version, the electronic version will prevail.

Committee on Canada-U.S. Relations, ensuring a coordinated, whole-of-government approach to managing the bilateral relationship. This initiative also facilitates ongoing engagement with business leaders and workers across key economic sectors, ensuring that Canada's economic interests are effectively represented.

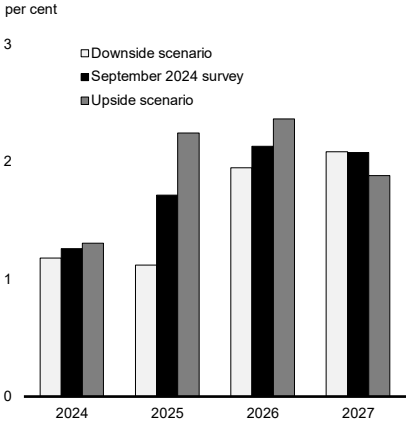
To facilitate prudent economic and fiscal planning, the Department of Finance has developed scenarios that incorporate uncertainties around the outlook and consider slower and faster growth tracks.

The incoming U.S. administration's economic agenda could have different impacts for the economic outlook for both North America and the rest of the world. Such outcomes are only partly accounted for in the scenarios; on the upside through stronger U.S. growth; and on the downside through lower business and consumer confidence and investment due to geopolitical tensions. Given the importance of trade to the Canadian economy, the uncertainty surrounding North American and global trade policies suggests that the balance of risks to growth are tilted to the downside. This is reflected in the scenarios, where the downside risks result in a larger drag on growth compared to the boost in the *upside scenario*.

The *downside scenario* sees a prolonged period of subdued growth in Canada as the impact from lower interest rates takes longer to support growth, consumer and business sentiment remain subdued, and the labour market weakens further. Confidence is further weighed down by heightened uncertainty globally around geopolitics and renewed disruptions to global trade, creating a chill on investment. These factors lead to weaker consumption and a smaller rebound in housing market activity. Lower global demand also leads to lower oil prices. These developments result in slower economic growth in Canada (Chart 39). Overall, the level of nominal GDP in Canada is $42 billion below the survey, on average per year, in the *downside scenario* (Chart 40).

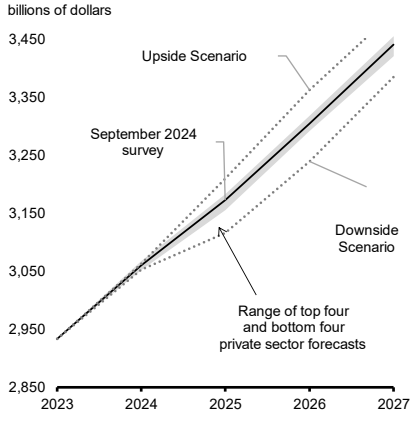
In contrast, the *upside scenario* sees further improvement in the supply side of the economy both globally and in Canada, including a greater reversal of Canada's recent decline in real GDP per capita. This allows central banks, including the Bank of Canada, to increase the pace of monetary policy easing thereby getting rates to unrestrictive territory faster, leading to stronger demand and improved growth. Higher consumer confidence, along with generally resilient household finances, and a normalization of higher saving rates, supports robust consumer spending, while lower rates lift business investment. Globally, these developments translate into higher commodity prices, which Canadian producers benefit from on global markets. These developments result in economic growth picking up faster than expected. Overall, the level of nominal GDP is $34 billion above the survey, on average per year, in the *upside scenario*.

Chart 39
Real GDP Growth



Source: Department of Finance Canada September 2024 survey of private sector economists, which has been adjusted to incorporate the historical revisions and the actual results of the National Accounts for the third quarter of 2024 released on November 29, 2024; Department of Finance calculations.

Chart 40
Nominal GDP Level



Source: Department of Finance Canada September 2024 survey of private sector economists, which has been adjusted to incorporate the historical revisions and the actual results of the National Accounts for the third quarter of 2024 released on November 29, 2024; Department of Finance calculations.

3. Fiscal Outlook

Canada's Responsible Economic Plan

Careful and responsible fiscal management has put Canada in an enviable fiscal position relative to our global peers. The government's responsible economic plan has delivered tangible results—supporting the Bank of Canada's effort to bring down first inflation, and now interest rates, and enabling important investments in housing, child care, health care, dental care, and pharmacare to support Canadians, while also making critical investments in an innovative economy, including more power generation, that will boost long-term prosperity.

The *2024 Fall Economic Statement* upholds the government's commitment to responsible fiscal management, through targeted investments that will provide short-term relief, while laying the groundwork for a more productive economy in the years to come. With new measures in the *2024 Fall Economic Statement,* policy actions taken since Budget 2024, and incorporating the results of the September 2024 survey of private sector economists, a deficit of $48.3 billion, or 1.6 per cent of GDP, is projected in 2024-25. In 2026-27, the deficit is expected to fall below 1 per cent of GDP, fulfilling the government's ongoing fiscal objective. By the end of the forecast horizon in 2029-30, a smaller deficit of $23 billion, or 0.6 per cent of GDP, is projected (Table 3).

An important fiscal sustainability metric—and the government's fiscal anchor—is to maintain a declining federal debt-to-GDP ratio. The *2024 Fall Economic Statement* respects this anchor, with a debt-to-GDP ratio projected to decline in each and every year of the forecast horizon, from 41.9 per cent in 2024-25, down to 38.6 per cent in 2029-30.

Table 3
Economic and Fiscal Developments, Policy Actions and Measures
billions of dollars

	Projection						
	2023–2024	**2024–2025**	**2025–2026**	**2026–2027**	**2027–2028**	**2028–2029**	**2029–2030**
Budgetary balance - Budget 2024	**-40.0**	**-39.8**	**-38.9**	**-30.8**	**-26.8**	**-20.0**	
Economic and fiscal developments since Budget 2024	-21.8	-3.0	1.4	2.9	-2.6	-3.0	
Budgetary balance before policy actions and measures	**-61.9**	**-42.8**	**-37.4**	**-27.9**	**-29.4**	**-23.0**	**-18.7**
Policy actions since Budget 2024		-3.4	-1.1	-0.2	1.3	0.8	0.4
***2024 Fall Economic Statement* measures (by chapter)**							
1. Reducing Everyday Costs		-1.7	-0.6	-0.3	-0.2	-0.2	-0.2
2. Investing to Raise Wages		-0.1	-2.7	-2.8	-2.4	-5.6	-4.9
3. Safety, Security, and Fair Governance		-0.3	-0.4	0.3	0.3	0.3	0.4
Subtotal - *2024 Fall Economic Statement* Measures		-2.1	-3.7	-2.8	-2.3	-5.5	-4.7
Total – Policy actions since Budget 2024 and *2024 Fall Economic Statement* measures		-5.5	-4.7	-3.1	-1.0	-4.7	-4.3
Budgetary balance	**-61.9**	**-48.3**	**-42.2**	**-31.0**	**-30.4**	**-27.8**	**-23.0**
Budgetary balance (per cent of GDP)	-2.1	-1.6	-1.3	-0.9	-0.9	-0.8	-0.6
Federal debt (per cent of GDP)	42.1	41.9	41.7	41.0	40.2	39.5	38.6
Budgetary balance - upside scenario	***-61.9***	***-46.0***	***-34.8***	***-19.5***	***-16.5***	***-15.8***	***-14.9***
Budgetary balance (per cent of GDP)	*-2.1*	*-1.5*	*-1.1*	*-0.6*	*-0.5*	*-0.4*	*-0.4*
Federal debt (per cent of GDP)	*42.1*	*41.8*	*40.9*	*39.7*	*38.6*	*37.8*	*37.0*
Budgetary balance - downside scenario	***-61.9***	***-49.7***	***-51.6***	***-41.6***	***-36.8***	***-32.0***	***-27.0***
Budgetary balance (per cent of GDP)	*-2.1*	*-1.6*	*-1.7*	*-1.3*	*-1.1*	*-0.9*	*-0.7*
Federal debt (per cent of GDP)	*42.1*	*42.0*	*42.8*	*42.5*	*41.7*	*40.8*	*39.9*
Budgetary balance - Budget 2024	***-40.0***	***-39.8***	***-38.9***	***-30.8***	***-26.8***	***-20.0***	
Budgetary balance (per cent of GDP)	*-1.4*	*-1.3*	*-1.2*	*-0.9*	*-0.8*	*-0.6*	
Federal debt (per cent of GDP)	*42.1*	*41.9*	*41.5*	*40.8*	*40.0*	*39.0*	

Note: Totals may not add due to rounding. A negative number implies a deterioration in the budgetary balance (lower revenue or higher expenses). A positive number implies an improvement in the budgetary balance (higher revenue or lower expenses).

THE 1994 YEAR BOOK

of
The Canadian Bar Association
and the
Minutes of Proceedings
of its

Seventy-Sixth Annual Meeting

held in
Toronto, Ontario
August 21-24, 1994

ANNUAIRE 1994

de
L'Association du Barreau canadien
et
procès-verbal
de sa

Soixante-seizième Assemblée annuelle

tenue à
Toronto (Ontario)
du 21 au 24 août 1994

CBA PROCEEDINGS 1994 PROCÈS-VERBAL-ABC
VOL. 77

The 1994 Year Book of the Canadian Bar Association and the unedited minutes of Proceedings of its 76th Annual Meeting held in Toronto, Ontario, August 21-24, 1994

Annuaire 1994 de l'Association du Barreau canadien et procès-verbal non publié des délibérations de sa 76e Assemblée annuelle tenue à Toronto (Ontario) - Du 21 au 24 août 1994

ISSN 0318-4935

Published by The Canadian Bar Association
Publié par l'Association du Barreau canadien
November 1994/Novembre 1994

Price/Prix $45.00

The other thing that I want to mention in particular is that you may have heard by now that we have the pleasure of the company of Janet Reno, the Attorney General of the United States, who will be joining us for lunch on Wednesday. So, if you do not have a ticket for that lunch, the awards lunch on Wednesday, or if you would like to bring a guest, a friend, a colleague from the office with you, there are special event tickets available. You can buy a ticket just for that lunch, they are available at the registration desk.

We are expecting a very large turnout. The media have indicated that they want to cover Ms. Reno's remarks to us, and we think that it is going to be one of the highlights of the week. So, if you have not made plans to be there and you would like to be there, please speak to the people upstairs at the registration desk.

Emile.

M. E. KRUZICK (Co-président du comité, Toronto): Merci, Michelle.

Bienvenue, encore une fois, à Toronto. C'est avec joie et fierté que la ville de Toronto et la province d'Ontario accueillent les délégués à l'Assemblée annuelle à Toronto.

We are indeed very happy to have you all here to join us in what we think and we hope will be a pleasurable experience for all of you. Michelle has already mentioned some of the things that we wanted to highlight. I simply wanted to add that our exhibitors are going to be on this floor starting on Monday and through to Wednesday.

N'oubliez pas de jouer Lotto ABC. This year, we are going to have CBA Lotto at the exhibitors. Nous avons plus de 10 000 $ en prix. The rules are in your kits and I invite all of you to play. The grand prize is two tickets anywhere that Air Canada flies in North America. Le grand tirage aura lieu mercredi. You do not have to be in attendance for the grand prize which will be drawn on Wednesday.

I also wanted to urge you to attend the CLE. Michelle had already alluded to the CLE. The CLE programs begin on Monday and go through until Wednesday. Brian Bucknall, Lynda Tanaka and Peter Cullen from the National Sections Council have put together what is perhaps one of the most ambitious programs that we have put on at an Annual Meeting. I urge you to attend. There are not only topical issues on that menu, but also programs that I think will be of benefit to all of us in the profession.

Enfin, avec Michelle et notre comité local, nous profiterons de cette occasion pour vous souhaiter une excellente assemblée et un séjour très agréable ici à Toronto. Merci.

CHAIRPERSON: Thank you both.

It is an honour for me to introduce our next speaker. As you know, we have a very, very busy but very accessible Chief Justice of Canada. He has blessed us with his presence at every one of our Council meetings. We are very fortunate and we will never take that for granted in terms of how he shares his message with us at this meeting. So, with great pride, I introduce the Chief Justice of Canada, the Right Honourable Antonio Lamer.

RAPPORT DU JUGE EN CHEF DU CANADA

LE TRÈS HON. A. LAMER (Juge en chef du Canada, Ottawa): Mes chers amis, pour le bénéfice de ceux qui voudraient suivre mes remarques en français, j'ai plusieurs copies de mes remarques en français qui sont sur la table en arrière. Vous pouvez me suivre et voir si je quitte mon texte ou pas. C'est ce que je fais d'habitude, mais je me console à la pensée que vous avez aussi la traduction simultanée. Alors, voilà.

Madam President, honoured guests, members of Council, I intend to depart from what has become my usual format. Instead of reviewing in some detail each of my areas of judicial responsibility, I will address one theme which, I believe, is timely and important: judicial independence. I know that you have heard about it very often, but from what I read in the press and from what I hear, I think it has to be reiterated and explained and explained and explained again, not only to the general public but to some judges also, what it is not.

But let me just very briefly speak of the Supreme Court of Canada. As you know, having been told so by myself in the past, the Court, for the last three years, has completely eliminated its backlog of cases to be heard. If you want delay, about the worst place to go is the Supreme Court of Canada because you cannot get any, it is impossible. Without the cooperation and dedication of my colleagues and indeed also my colleagues for the two or three years before I became Chief Justice, this would not have been achieved.

We have also reduced, in the vast majority of cases, the time between reserving judgments and the delivery of judgment. It is now, on the average, around three months. When considering these three months, you must remember that as a matter of law, save a few

exceptions where urgency may dictate otherwise, all of our judgments are in both official languages, and that included in this time, this average of about three months, one must realize that a minimum of six weeks is there for translation and revisions. So we are turning them out as fast, as decently as we can.

Some of you might have noticed that more frequently than a few years ago, we hand down a judgment immediately or very shortly after the hearing with reasons to follow. Now, this is something that I have encouraged. This is in order to accommodate one group of our two clients. We have two clients. We have the litigants. They do not care why they win; they just want to know if they win or lose. Then we have the other clients. It is the profession, the legal community. So the litigants, while taking a desirable time to pronounce upon the law adequately in order to fulfil our duty to the legal system, which is our other client.

We have now turned our minds to the delays in the leave process. It is taking too much time. Actually, it presently roughly takes as much time to get leave as it takes to be heard and, on average, get judgment. This, to me and to my colleagues, is to be remedied. There is no reason for this. It should not be so. We already enjoy an excellent relationship with a joint committee. We have a joint committee of the Bar and the Court. It works fine and I know that together we will find a solution.

However, we must realize the obvious. We judges and you lawyers are going to have to stop doing certain things that we are currently doing and do certain other things differently. Though I do not know what has to be done, we have already taken steps as regards our end of the thing so that we are shortening the process. As of the moment, everything is in. Starting September 1, we will be doing our end of things differently.

I think we are going to have to put in place mechanisms to sort of have the Bar meet the times that are set down. I think especially respondents are not putting in their materials in a timely fashion. While we do not want to dispose of a matter without reading or having the benefit of the views of the respondent, I do not know what the solution can be, but we will see.

So I will go no further today in this regard, but I will get back to you at your next meeting. By that time, I am sure that we will have a solution or maybe we will no longer have a problem.

Now, for judicial independence. As Chief Justice of Canada, I am concerned that the principle of judicial independence is not well understood and that its importance is not sufficiently appreciated. I am not just saying not understood by the general public or the Bar, I am saying that I get the impression that it is not really understood by some judges. I am not sure that the public and perhaps even the legal profession fully understand what is at stake.

Unfortunately, judicial independence is often linked with situations in which judges are seen as wanting something, and I cannot blame people for thinking that. I do not want to and in fact cannot address any specific situation; you can understand that. What I do want is to begin the process of reminding some of and for others explaining the basic principle of judicial independence, and then to touch on some important questions as examples of the complex and important issues involved.

One of the reasons that judicial independence is not well understood is that it is so fundamental. It is hard to imagine our system of government without it. Judicial independence is part of our culture, like the rule of law or the presumption of innocence, but, like all fundamental concepts, it is worthwhile, now and then, to go back to the root of the matter. We need to do this to keep our fundamental principles alive and current.

Judges must rule upon the important matters affecting people and sometimes the country as a whole. One person wishes to take another's property; the government takes away a licence necessary to earn a livelihood; the state wants to punish someone for a crime; one level of government seeks to exceed its legislative authority.

The rule of law, interpreted and applied by impartial judges, is the guarantee of everyone's rights and freedoms. We cannot expect judges to be superhuman; we can expect them to be as impartial as it is humanly possible to be and to allow them, indeed require them to work in institutions where the conditions promote and protect that impartiality.

Otherwise, how could the system work? How could the accused get a fair trial if the judge is not independent and seen to be independent of the prosecution? How could one government in a dispute with another have confidence in the absence of actual and perceived impartiality?

Judicial independence is, at its roots, concerned with impartiality, in appearance and in fact, and these of course are elements essential to an effective judiciary. Independence - and I have been saying this to judges to the point that they now hate me, I think - is not a perk of judicial office. It is a guarantee of the institutional conditions of impartiality.

We hear much about "accountability" - a buzzword these days, "accountability." But what is meant by accountability in the context of the judiciary? If what is meant is that an arm of the Executive Branch of government will tell a judge how to be a judge, you can count me out, and there will be a hell of a fight. If what is meant is that a judge's conduct should be subject to public scrutiny, I fully and wholeheartedly agree, provided that the scrutiny does not undercut the judge's capacity to be a judge.

I find it hard to think of any public servant whose official actions are more public than those of a judge. The judge presides at public hearings, makes rulings in public and gives reasons which are public. These reasons are subject to minute scrutiny by appellate courts, who similarly give public reasons for their decisions. The decision of courts stand or fall on their justice and wisdom. They are subject to intense public scrutiny and often media attention. A federally-appointed judge is ultimately responsible to the representatives of the people - Parliament - for his or her fitness to be a judge. I do not understand how any of this makes a judge unaccountable.

Put yourself in the position of a judge sentencing an accused after a conviction for a serious crime. On one side of the courtroom, you have the accused and his or her family; on the other, the victim. Perhaps there are members of support groups or special interest groups monitoring the hearing. The jury, which wrestled with the case and brought in a guilty verdict, may still be there. The press is present and members of the public, of your community. Your decision will be seen and known by all. It is not a committee decision; it is yours alone. It is subject to community discussion, media coverage, and appellate review. You, as this imaginary judge, may feel many things as you impose that sentence, but unaccountable is surely not one of them.

If everybody always thought that judges were right and always liked what they did, judicial independence would not be so important. But it is inherent in the job of the judge that at least half of the litigants will be disappointed or worse. But we need judges who conscientiously do their best to apply the law as they believe it to be. In fact, we do not need any other kind of judge.

So much for what is not controversial. But there is lots of evidence that judicial independence gives rise to difficult, practical questions which require very, very careful consideration. I know, I know, I have looked at your programs and I urge you to give some thought to that with some caution.

In what follows, I do not want to offer my opinion, but to explain what is at stake. We need to be open to change. God knows, if I have been accused of anything, it has been of being too open to too much change. So I am open to change, but we must be careful not to water down our fundamental principles.

Consider the area of judicial conduct. It is easy to say that judges need to be "accountable" - that buzzword - that they should be disciplined, that judicial conduct should not be the preserve of judges. Now, it is easy to say that. As I said to you last year, I can see merit in many proposals for change and I have not changed my mind about that. Sometimes, however, in our rush to be progressive, we overlook some important issues.

There must be a mechanism to review judicial conduct. I think that we all agree on that. Independence brings with it great responsibility. It is crucial that the judiciary be and be seen to be the most skilled and committed persons possible. The present system for federally-appointed judges leaves the ultimate decision about the judge's conduct to Parliament. The Canadian Judicial Council can make recommendations for removal of a judge, but the removal can be done only by Parliament. While there may be great merit in changing this approach, there are also some important questions.

There is a first and fundamental question: how do we ensure that the review of judicial conduct does not undermine the conditions of independent decision-making? This is not a philosophical or hypothetical question. Many complaints - I really can say most if not nearly all - about federally-appointed judges are in fact complaints about the judge's decision on the merits of the case, not about the conduct apart from that decision.

I have looked through them. They say "My case was an obvious case. This judge obviously is incompetent because I did not win." Now, that is the equation. When you read about 90 complaints against judges in Canada - we put it in our annual report - 87 or 86 of those complaints are that, in different forms or fashions, it is about that. So we are not dealing with a haemorrhage here, we are not dealing with a great big problem. We have 975 federally-appointed judges who, day in and day out, are handing out judgments and hearing cases and they are doing it very well. I do not have to tell you, you are there.

Obviously, the remedy for these complaints is appeal. Those are the letters that are being sent to these people, saying "Look, speak to your lawyer and go to appeal if you think he..."

Not an investigation of judicial conduct. Such investigation has the potential to undermine the independent decision-making which is the core of the judicial function.

Drawing the line between error and misconduct is not always easy. Sure, because there are certain situations where it is a hybrid, where the judge's conduct is involved, and where there is a perception that the judge, let us say, was biased. So it is an appeal problem, but it also maybe. It depends on how the bias has been conveyed. Drawing the line between error and misconduct, as I said, is not always easy, but drawing it is fundamentally important to the rule of law and the independent decision-making of the judge.

We had a case recently where the line was so difficult. We had a very, very irate judge, and I could understand his point of view. You know, "How the hell do you people dare interfere in my judicial independence?" I think he was right. We made a close call and I am not sure that we made the right one. So it is not easy. Do not forget, we are experts at it.

I throw this out because it is nice to say, "Let us bring in some lay person." I do not know, there is no virtue in not being trained for the job that you are going to do. And I should add that, upon becoming a chief justice, you do not appoint a chief justice by lobotomizing a judge - chief justices are judges - and say, "We will have a judge." Well, I am a judge and the other 36 chief justices in Canada are all judges. The only problem is that maybe we have been around long enough to know more about what we are doing than when we started. Some of us maybe have been around too long, but you will let me know when that happens.

A second question is more institutional or structural. Assuming that there is to be judicial discipline, that is that judges should be subject to sanctions short of removal, who is to do this?

I do not mean the identity of the people, but the nature of the institution. Is it problematic to have an arm of the Executive Branch carrying out such a role? Judicial independence is, in large part, to insulate the judiciary from pressure from the other branches of government. Are those who will be doing the disciplining an arm of the Executive? To whom and for what are those doing the disciplining to be accountable?

Right now, and I reminded my colleagues on the Canadian Judicial Council - some of them did not realize that because we are all chief justices, when we sit and we look at each other, we think we are in court - but we are a creation of the Executive. The Canadian Judicial Council is an arm of the Executive.

Right now, that is tolerable for two reasons. One, we are all judges. Secondly, we are not disciplining anybody, we are recommending; we are not removing, we are recommending removal to Parliament. But, as soon as you move away from that into disciplining, it is a different ball game.

Thirdly, I would note that there is a constitutional dimension to this discussion. Is discipline short of removal of a federally-appointed judge constitutional by any mechanism other than by both Houses of Parliament? I do not think that many people have thought about this. Is a judge who has been, say, suspended for 30 days removed from office for those 30 days? If so, how do you accomplish the suspension in view of Section 99 of the Constitution which says that a judge is removable by the Governor General on address of both Houses of Parliament? We may be looking at a constitutional amendment. I will be long retired before we can get an amendment to our Constitution, as far as I have experienced in the last few years.

Finally, quite apart from the legality of these ideas, is disciplining judges wise? Maybe it is; I am not saying it is not. Can parties legitimately complain that they do not wish their case heard by a judge who has been disciplined? While I can see considerable, practical merit and appeal - and I said that much a year ago - in having the power to impose sanctions short of removal, we must not turn a blind eye to the problems.

These are some of the examples of the practical issues of judicial independence which arise in the field of judicial conduct. I, for one, do not find them easy. I know in saying this that I run the risk of appearing to be a judge sticking up for judges. But I am most certainly not sticking up for judges in the sense of wanting to insulate them from criticism or, in the popular jargon, to make them "unaccountable." I am sticking up for the institution of an independent judiciary. I do so because an independent judiciary is a fundamental constitutional safeguard of the rights and liberties of everyone and an essential element in a federal democratic state. It is part of my job, that is what I am paid for, so that is why I am sticking up for it.

The field of judicial conduct, by no means, exhausts the practical issues of judicial independence. There is also the large question of how the judiciary and the Executive should interact on questions where each has its legitimate areas of responsibility and concern. For example, the elected representatives of the people justly exercise ultimate budgetary responsibility, but the resources made available to the judiciary also may touch on areas of

judicial independence. More significantly, the judiciary must be able to stay out of the political fray, but at the same time be assured that the public interest in a properly functioning judiciary is being fairly responded to by government.

In this regard, I think that we need to work much harder at finding acceptable mechanisms that keep judges out of the political process, while at the same time fairly and promptly dealing with the legitimate requirements of an effective judiciary. We have had many examples, over the last year or so, showing why such mechanisms are badly needed. Of course, ultimate budgetary authority, in the sense of making large policy decisions about society's priorities, must stay where it belongs: with the elected representatives.

An example of one such mechanism is the Federal Triennial Commission process established by the Judges Act. Its objective is to keep judicial compensation and benefits out of the political arena while preserving proper political accountability for the expenditure of public funds. It looks good on paper, but it has one problem: it just does not work. Why? Because the Executive and Parliament have never given it a fair chance.

While I favour giving it a fair chance - and the process will be repeated in 1995, so there will be an opportunity soon to make it work - maybe over the long term there are some other models that could be studied, and indeed this is an area where the Bar could be of great help. We need a mechanism that would have the confidence of the legislature, the judiciary and the public. It must be capable of meeting the legitimate and important expectations of each. This would be a tremendous achievement in the practical application of judicial independence to the day-to-day work of the judiciary.

The Canadian Judicial Council, which I chair, is concerned about these and many other issues related to judicial independence. Members of Council, as judges and chief justices, live with these issues. We understand their importance, we also understand their difficulty. That is why we have commissioned a detailed study of these matters. The study is only a step in what must be a painstaking and rigorous analysis. This must be done in the knowledge that we are working at the very heart of democracy based upon the rule of law. We must not take the easy way out and react in an ad hoc way to perceive problems with vague or careless solutions. The cure must not be worse than the disease.

Judicial independence is one of our core values. We must treat it with great care and enormous respect. We must not put judicial independence aside too easily. On the other hand - and this I have been telling some judges - we must not risk trivializing it by invoking it inappropriately. I will not say much more about that, given my position.

Let me turn to judicial education, because judicial education is linked in very practical ways to the notion of judicial independence. The independence conferred upon judges is a great responsibility. It requires that judges be as well trained as is possible. Moreover, judicial education, like the courts, requires resources. Government has to supply the money and legitimately wants it spent well, but there is also the need to ensure that judicial independence is respected. Judges need to have ultimate control over judicial education.

How would the defence lawyers here like judges being required to attend courses on sentencing put on by the Attorney General? This is not a farfetched, hypothetical situation. In 1962, the Attorney General of a province - I will not identify the province, but you will guess it - tried it. At the time, I was active in the Criminal Law Section of the Canadian Bar Association and I called a press conference. That was the end of that, but I am not sure the public really understood the danger of such an initiative.

The National Judicial Institute is the vehicle in Canada to take the lead in responding to the educational needs of the judiciary. It is an independent body, answerable to a Board of Governors, which I chair. Government funds the Institute and is kept up to date on its activities.

The Institute, in its relatively short existence, has accomplished a great deal. The Institute offers over 30 courses each year to both federally and provincially-appointed judges. Over 1,000 judge registrants participated last year in courses dealing with substantive law, judicial skills and sensitivity training.

One must add to that - and I said this at the Mid-Winter Meeting - there are other bodies giving training to judges. Some of them not only to judges, but to lawyers and judges; others have specific programs for judges. So when I say that there are 1,000, that is only at the Judicial Institute. But my guess would be that it is closer to 2,000 judges last year who attended courses at some point in time. As I said at your Mid-Winter Meeting, you know, the main job of a judge is to hear cases and sit. We cannot always be training. So there is training going on. When we say that we must train our judges, we are being trained.

The Institute has high-quality, training videos in the areas of family violence, child abuse, gender bias and race relations. Every newly-appointed judge in Canada receives an orientation

kit from the Institute which includes videos on gender equality and race relations. These topics are addressed in the Institute's courses on early orientation for newly-appointed judges. The Institute also offers programs on family violence and child sexual abuse which have been attended by a large number of judges at a variety of locations across Canada.

Over and above the material and training for newly-appointed judges, approximately two thirds of the federally-appointed judiciary have participated in gender equality training through programs organized by the Institute. More than half have participated in programs dealing with cultural awareness. These numbers are going up almost every month. Since 1990, race and/or gender issues have been dealt with in 20 courses offered by the Institute.

I recently announced the appointment of the new Associate Director of the Institute, a position that has been vacant since Judge Dolores Hansen left that position to become the Institute's Executive Director. The new Associate Director is Madam Justice Louise Charron of the Ontario Court, General Division, in Ottawa. She brings to the job extensive practice, academic and judicial experience. I believe that we have in place at the Institute a superb team, headed by our two very capable and committed leaders, Judge Hansen and Justice Charron. The judiciary and the public are very fortunate to have such fine leadership in the area of judicial education.

There are challenges though. One is the precarious financial arrangements for the institution. The help of the federal government and most provinces and territories has been exemplary. But there are exceptions. Indeed, two provinces do not contribute at all, although, surprisingly, they continue to send their judges to the courses. The level of funding is barely adequate. It is not guaranteed on a long-term basis, making planning very difficult.

As regards those two provinces, I have written to the Premier of each of those two provinces with the hope that we will solve the problem. I do not think we will, getting the response of one and the acknowledgement of receipt of the other. In fairness to all, I will identify the provinces: Quebec and Manitoba. It is on the agenda of the next meeting of the Board of Governors of the Institute, we will not see the other provinces subsidize these two provinces on legal education, as long as I am Chair. So we will settle that problem. It will not be a pleasant settlement, but at least we will settle it for the future.

I say this because it is unfortunate. Everybody is asking that judges be trained more and more, but yet our budgets are being cut. We are asked to cut by 10%, and some people are not coughing up, they are not paying at all. I do not know how you give more education with less money. It is just impossible. Unless people start making donations, I do not see any solution to the problem. We are going to have to reduce. We pay our bills, so we are going to have to find the money somewhere.

No doubt the public has trouble understanding the importance of the principle of judicial independence and the things that flow from it. What is happening in judicial education is probably not ever going to be the subject of discussion by most people at their office or plant coffee break, but these issues are vitally important to everyone. I believe the judiciary can do a better job of communicating on these sorts of issues.

I also believe that you, the Bar, could help. In fact, I raise these matters here not to complain. I could give a press conference. I raise them because I and my colleagues chief justices, we need your help, and it has always been that way. You can inform yourselves about these matters, share your considered views, and above all help your clients and the people in your communities to understand better what is at stake.

Judicial independence is not about money or power or privilege. I have said it until I am blue in the face, although some papers keep printing the contrary of what I say. I am in favour of the freeze. In fact, I go further, and the judges hate me for saying this: had we not been frozen, I would have invited the government to freeze us. Yet, they will still print that what I am talking about here is money, that I want a raise for judges. That is not what we are talking about. The vast majority of your judges in Canada accept the freeze, understand that there has to be one and understand the financial situation.

So I say it - I know it will not come out that way, but anyway - I will still say that we are not talking here about money. It is about justice under the law, the resolution of disputes through reasoned argument, and the respect of every person's rights. I would certainly not urge unquestioning acceptance of the status quo - it is not in my nature - but I would urge that all judges, lawyers and members of the public treat this fundamental principle with care and respect when considering change.

I wish you all the very best in your upcoming deliberations. It is always, Madam President, a pleasure for me to visit with you. I have been doing it now twice a year, Mid-Winter and Annual. I hope that I will be doing this for many years to come, as long as you keep inviting me, and I wish you a very good week.

I am sorry that I cannot stay with you, I have other duties awaiting me and I will be flying back this afternoon. But I wish you well and, as you know, you are always welcome into my chambers if and when you come to the Supreme Court of Canada. I usually have the losing side up with the winning side also whenever it is possible. So thank you, good luck.

CHAIRPERSON: Thank you, Chief Justice. Rest assured that the Canadian Bar stands ready, guarded to defend the vital issue and safeguard judicial independence.

I also, Chief Justice, want to advise you that we have also advised the Minister of Justice that we are poised to help and assist in terms of review of the Triennial Commission. In conjunction with that, we deliberated yesterday and have determined that the Standing Committee on Pensions and Judges' Salaries will review, as part of our submission, there will be a review of the Triennial Commission as we make our submission for the 1995 Triennial Commission.

So thank you very much indeed for your kind words.

I now have the honour of introducing the federal Minister of Justice, the Honourable Allan Rock Q.C.

I must thank him in advance of his speaking because he has been available to us on many fronts during the course of this meeting. He will attend the bear pit session tomorrow, he will be attending the Government Lawyers Conference. He has been very supportive of this initiative. He has been very supportive of the Canadian Bar this year. He has, as I told you over and over again, as I spoke across this country, been one of the most successful Ministers of Justice that we have encountered. He has set up biannual meetings with the President. His door is always open and, as a result of that, I believe that he is convincing the federal government of the importance of the priority of the administration of justice and justice issues in this country.

We are honoured and delighted to have him in attendance to address you today. Please warmly welcome the Minister of Justice and Attorney General of Canada, Allan Rock, Q.C.

REPORT OF THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA

THE HON. A. ROCK (Minister of Justice and Attorney General of Canada, Ottawa): Good morning. Thank you, Cecilia, for the very warm introduction. Good morning to all of you.

It is delightful to see so many old friends again and familiar faces. Just this morning, in the half hour that I was here and outside in the hall, I renewed acquaintances with a lot of people whom I had practised with and saw in court over the years. It is hard to believe that it is now a year since I left practice for my new line of work. In fact, I would not have believed it myself except that some of my former partners pointed out that my receivables are now in the 365-day column, so it must be right.

This summer has been a nice break from the session of Parliament that finished at the end of June. I am sure that it has been a great relief for everybody. Who was it who said that "the liberty of the subject is never in greater jeopardy than when the legislature is in session"?

For my part, I have spent the summer travelling across Canada. I have been, in fact, in nine of the provinces in the weeks since the House adjourned, speaking with members of the Liberal caucus, meeting Canadians directly on a variety of justice issues, including but not limited to gun control, although gun control has figured prominently in a lot of those public meetings. I must say that it is nice to come into a meeting without having to pass through a metal detector first. It is a nice change.

The meetings on gun control have produced sort of a mixed response. You know, people have strong feelings on that subject one way or the other. Coming back from the tour, I feel sort of like the coach of the team that came back from a road trip with a record of four and four and said, "Well, you know, it could just as easily have gone the other way."

But one thing about that trip and this job is that it does diminish the time available to spend at home with my family. I think in recent weeks there is accumulating evidence that I have to spend more time there. I came home about three weeks ago, went into the house and Debbie was there. The children were upstairs, so she said, "Kids, come and say hello to your father." So Andrew ran across the floor and picked up the phone. But I think that now that things are getting onto a more regular footing, that will sort itself out and we will get things organized for the fall.

I do want to congratulate Cecilia and the CBA for yet another extraordinary convention, and particularly Michelle Fuerst and Emile Kruzick whose hard work with the Organizing Committee has produced a really well-organized, interesting, thought-provoking week.

Statement of Principles
on Self-represented Litigants and Accused Persons

Adopted by the Canadian Judicial Council
September 2006

CANADIAN JUDICIAL COUNCIL

STATEMENT OF PRINCIPLES ON SELF-REPRESENTED LITIGANTS AND ACCUSED PERSONS*

PREAMBLE

Whereas the system of criminal and civil justice in Canada is predicated on the expectation of equal access to justice, including procedural justice, and equal treatment under the law for all persons;

Whereas the achievement of these expectations depends on awareness and understanding of both procedural and substantive law;

Whereas access to justice is facilitated by the availability of representation to all parties, and it is therefore desirable that each person seeking access to the court should be represented by counsel;

Whereas those persons who do remain unrepresented by counsel both face and present special challenges with respect to the court system;

Therefore, judges, court administrators, members of the Bar, legal aid organizations, and government funding agencies each have responsibility to ensure that self-represented persons are provided with fair access and equal treatment by the court; and

Therefore, it is desirable to provide a statement of principles for the guidance of such persons in the administration of justice in relation to self-represented persons.

*Notes:

1. Throughout this document, the term “self-represented” is used to describe persons who appear without representation. The use of this term is not meant to suggest inferences about the reasons the individual is without representation, nor the quality of their self-representation, and recognizes that some individuals prefer to represent themselves.

2. The Statements, Principles and Commentaries are advisory in nature and are not intended to be a code of conduct.

A. PROMOTING RIGHTS OF ACCESS

STATEMENT:

Judges, the courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation.

PRINCIPLES:

1. Access to justice for self-represented persons requires all aspects of the court process to be, as much as possible, open, transparent, clearly defined, simple, convenient and accommodating.

2. The court process should, to the extent possible, be supplemented by processes that enhance accessibility, informality, and timeliness of case resolution. These processes may include case management, alternative dispute resolution (ADR) procedures, and informal settlement conferences presided over by a judge.

3. Information, assistance and self-help support required by self-represented persons should be made available through the various means by which self-represented persons normally seek information, including for example: pamphlets, telephone inquiries, courthouse inquiries, legal clinics, and internet searches and inquiries.

4. In view of the value of legal advice and representation, judges, court administrators and other participants in the legal system should:
   (a) inform any self-represented parties of the potential consequences and responsibilities of proceeding without a lawyer;
   (b) refer self-represented persons to available sources of representation, including those available from Legal Aid plans, *pro bono* assistance and community and other services; and
   (c) refer self-represented persons to other appropriate sources of information, education, advice and assistance.

COMMENTARY:

1. Informed opinion and research suggests that the numbers of self-represented persons in the courts are increasing. However, the average person may be overwhelmed by the simplest of court procedures.

2. Self-represented persons are generally uninformed about their rights and about the consequences of choosing the options available to them; they may find court procedures complex, confusing and intimidating; and they may not have the knowledge or skills to participate actively and effectively in their own litigation.[1]

3. Many self-represented persons have limited literacy skills, and many speak Canada's official languages as a second language, if at all. As a result, many self-represented persons tend to access information about the courts through means other than the written word. For this reason, it is essential that information be provided using other means, including videos and pictures. Further, having an official available to answer questions posed by self-represented persons should, to the extent possible, supplement pre-packaged materials.

4. Given these factors, it is important that judges, court administrators and others facilitate, to the extent possible, access to justice for self-represented persons.

5. Providing the required services for self-represented persons is also necessary to enhance the courts' ability to function in a timely and efficient manner.

[1] Hann, Robert *et al*. *A Study of Unrepresented Accused in Nine Canadian Courts*. Ottawa: Department of Justice, 2003.

B. PROMOTING EQUAL JUSTICE

STATEMENT:

Judges, the courts and other participants in the justice system have a responsibility to promote access to the justice system for all persons on an equal basis, regardless of representation.

PRINCIPLES:

1. Judges and court administrators should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.

2. Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.

3. Where appropriate, a judge should consider engaging in such case management activities as are required to protect the rights and interests of self-represented persons. Such case management should begin as early in the court process as possible.

4. When one or both parties are proceeding without representation, non-prejudicial and engaged case and courtroom management may be needed to protect the litigants' equal right to be heard. Depending on the circumstances and nature of the case, the presiding judge may:
   (a) explain the process;
   (b) inquire whether both parties understand the process and the procedure;
   (c) make referrals to agencies able to assist the litigant in the preparation of the case;
   (d) provide information about the law and evidentiary requirements;
   (e) modify the traditional order of taking evidence; and
   (f) question witnesses.

COMMENTARY:

1. It is consistent with the requirements of judicial neutrality and impartiality for a judge to engage in such affirmative and non-prejudicial steps as described in Principles 3 and 4. A careful explanation of the purpose of this type of management will minimize any risk of a perception of biased behaviour.

2. Judges must exercise diligence in ensuring that the law is applied in an even-handed way to all, regardless of representation. The Council's statement of *Ethical Principles for Judges* (1998) has already established the principle of equality in principles governing judicial conduct. That document states that, "Judges should conduct themselves and proceedings before them so as to ensure equality according to law."

3. However, it is clear that treating all persons alike does not necessarily result in equal justice. The *Ethical Principles for Judges* also cites *Eldridge v. British Columbia (Attorney General)*[2] on a judge's duty to "rectify and prevent" discriminatory effects against particular groups.

4. Self-represented persons, like all other litigants, are subject to the provisions whereby courts maintain control of their proceedings and procedures. In the same manner as with other litigants, self-represented persons may be treated as vexatious or abusive litigants where the administration of justice requires it. The ability of judges to promote access may be affected by the actions of self-represented litigants themselves.

[2] [1997] 3 S.C.R. 624 *per* LaForest, J. for the court at 667.

C. RESPONSIBILITIES OF THE PARTICIPANTS IN THE JUSTICE SYSTEM

STATEMENT:

All participants are accountable for understanding and fulfilling their roles in achieving the goals of equal access to justice, including procedural fairness.

PRINCIPLES:

For Both the Judiciary and Court Administrators

1. Judges and court administrators should meet the needs of self-represented persons for information, referral, simplicity, and assistance.

2. Judges and court administrators should develop forms, rules and procedures, which are understandable to and easily accessed by self-represented persons.

3. To the extent possible, judges and court administrators should develop packages for self-represented persons and standardized court forms.

4. Judges and court administrators have no obligation to assist a self-represented person who is disrespectful, frivolous, unreasonable, vexatious, abusive, or making no reasonable effort to prepare their own case.

For the Judiciary

1. Judges have a responsibility to inquire whether self-represented persons are aware of their procedural options, and to direct them to available information if they are not. Depending on the circumstances and nature of the case, judges may explain the relevant law in the case and its implications, before the self-represented person makes critical choices.

2. In appropriate circumstances, judges should consider providing self-represented persons with information to assist them in understanding and asserting their rights, or to raise arguments before the court.

3. Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.

4. The judiciary should engage in dialogues with legal professional associations, court administrators, government and legal aid organizations in an effort to design and provide for programs to assist self-represented persons.

For Court Administrators

1. Court administrators should seek to provide self-represented persons with the assistance necessary to initiate or respond to a case and to navigate the court system.

2. In particular, court administrators should be given sufficient resources to be able to:
   (a) provide, on request, all public information contained in dockets or calendars, case files, indexes and existing reports;
   (b) provide, on request, access to or a recitation of relevant common, routinely employed rules, court procedures, and fees and costs;
   (c) provide, on request, information about where to find applicable laws and rules
   (d) identify and provide, on request, applicable forms and written instructions;
   (e) answer questions about how to complete forms, but not about how answers should be phrased;
   (f) define, on request, terms commonly used in court processes;
   (g) provide, on request, phone numbers for Legal Aid, lawyer referral services, local panels, or other assistance services, such as Internet resources, known to court staff; and
   (h) provide, to the extent possible, and in compliance with applicable law, appropriate aids and services for individuals with disabilities.

3. Court administrators shall not provide legal advice.

4. Court administrators should educate court personnel regarding the importance of public access to the courts and should provide training to court personnel as to how they should assist self-represented persons.

5. Court administrators should allocate the necessary resources to allow court personnel to provide meaningful assistance.

For Self-Represented Persons

1. Self-represented persons are expected to familiarize themselves with the relevant legal practices and procedures pertaining to their case.

2. Self-represented persons are expected to prepare their own case.

3. Self-represented persons are required to be respectful of the court process and the officials within it. Vexatious litigants will not be permitted to abuse the process.

For the Bar

1. Members of the Bar are expected to participate in designing and delivering legal aid and *pro bono* representation to persons who would otherwise be self-represented, as well as other programs for short-term, partial and unbundled legal advice and assistance as may be deemed useful for the self-represented persons in the courts of which they are officers.

2. Members of the Bar are expected to be respectful of self-represented persons and to adjust their behaviour accordingly when dealing with self-represented persons, in accordance with their professional ethical obligations. For example, members of the Bar should, to the extent possible, avoid the use of complex legal language. Members of the Bar may be guided by the Canadian Bar Association's *Code of Professional Conduct* and the codes of each jurisdiction (see Guiding Principle XIX (8))and references therein.

For Others

1. Government departments with overall responsibility for court administration should provide Legal Aid plans with sufficient resources to provide a proper range of required services for financially eligible persons, including: education, short-term information and advice, and representation.

2. In addition to providing representation, Legal Aid organizations should be encouraged to create flexible options and models for addressing the challenges of self-represented persons, including programs providing education and short-term information and advice.

3. Providers of judicial education should develop educational programs for judges and court administrators on broad-based methods of assisting and managing the cases of self-represented persons.

4. Government agencies with overall responsibility for court administration should provide courts with the resources and assistance necessary to train court administrators and to provide the funding necessary for them to provide meaningful, broad-based assistance to self-represented persons, including awareness and communications training.

5. Government agencies with overall responsibility for court administration should provide funding for self-help programs for self-represented persons, as well as for programs of assistance to self-represented persons, which falls short of representation.

COMMENTARY:

1. The adoption of these principles in individual courts should be guided, as much as possible, by statistical information about self-represented persons and their cases in each particular court jurisdiction.

2. The design of programs to assist self-represented persons should be a collaborative effort among the judiciary, the courts, the Bar, Legal Aid providers, the public, and relevant governmental agencies.

3. A key requirement is that court personnel understand the distinction between legal information and legal advice, which they are forbidden from providing. Legal advice would include, among other things, advising someone on whether or how to best pursue a case, and explaining the law (as opposed to the process, or distributing information on how to access the law). Research suggests that many court officials may be uncomfortable with providing assistance to self-represented persons for reasons that include uncertainty about how far they may go in answering questions from self-represented persons. Training of court personnel helps them to give meaningful assistance without giving legal advice. Training packages may include such elements as multi-step "protocols" for court personnel and scripts for answering frequently asked questions.

4. Education packages for judges may also include multi-step "protocols" which may include possible scripts for commonly experienced situations. Suggested language for judges typically covers the need to explain the process, the elements and potential consequences, the burden of presenting evidence, the types of evidence which may be presented, the rules governing non-lawyers assisting self-represented persons, and so on.

5. Self-help support for self-represented persons may include such elements as conveniently accessible (e.g., online) forms; "virtual libraries" containing Rules of Court, relevant law, and guidelines to the judiciary in issuing key types of orders or rulings; directions to courthouses; summaries of key areas of law; e-filing; clearinghouses for access to legal services; how-to pamphlets on how to prepare and present a case; and the like.

6. Scheduling should take into account the special challenges and needs of self-represented persons.

Ethical Principles for Judges

Principes de déontologie judiciaire

CJC
CCM
Canadian Judicial Council
Conseil canadien de la magistrature

Foreword

As the Canadian Judicial Council marks its 50th anniversary of service to Canadians, it is timely that we have revised and modernized *Ethical Principles for Judges*. From their first publication in 1998, these principles have laid out the ethical frame of reference to which all judges aspire: judicial independence, integrity and respect, diligence and competence, equality and impartiality.

Canada is fortunate to be served by a highly competent and skilled judiciary. Judges can face ethical questions as we go about our personal and professional lives. While the 1998 document served us well, and indeed was the model on which other judicial systems around the world relied, we understand that ethical considerations evolve and need to keep pace with society's expectations.

When I was appointed Chief Justice of Canada, I was pleased to learn that the Canadian Judicial Council had embarked on a public consultation exercise to hear firsthand from Canadians and our valued partners, what they expect of our judges. From those extensive consultations, and the tireless work of the Council's Judicial Independence and Appointment Process Committee, co-chaired by Chief Justice Martel D. Popescul and Chief Justice Deborah K. Smith, a new and refreshed document emerged.

Préface

L'édition revue et actualisée des *Principes de déontologie* judiciaire arrive à point nommé, alors que le Conseil canadien de la magistrature célèbre 50 ans de service à la population canadienne. Depuis la parution de la première édition en 1998, ces principes constituent le cadre de référence déontologique auquel tous les juges aspirent : l'indépendance judiciaire, l'intégrité et le respect, la diligence et la compétence, l'égalité et l'impartialité.

Le Canada a la chance d'être servi par une magistrature hautement compétente et qualifiée. Les juges sont parfois confrontés à des questions déontologiques dans leur vie personnelle et professionnelle. Bien que l'édition de 1998 nous ait bien servi, et qu'elle ait été prise pour modèle par d'autres systèmes judiciaires du monde entier, nous comprenons que les considérations d'ordre déontologique évoluent et qu'elles doivent s'adapter aux attentes de la société.

Lorsque j'ai été nommé juge en chef du Canada, j'ai été heureux d'apprendre que le Conseil canadien de la magistrature avait amorcé un processus de consultation publique pour entendre directement ce que la population canadienne et nos partenaires estimés attendent de nos juges. À la suite de ces vastes consultations et du travail inlassable du Comité sur l'indépendance judiciaire et le processus de nomination du Conseil, coprésidé par le juge en chef Martel D. Popescul et la juge en chef Deborah K. Smith, un nouveau document actualisé a pris forme. Je sais que le comité a examiné attentivement tous les commentaires qu'il a reçus, et je remercie personnellement toutes les personnes qui ont fait connaître leurs points de vue.

I know that the Committee carefully considered every comment received and I personally extend my thanks to every person who provided his or her views.

The revised *Ethical Principles* build on the original publication, and explore new and emerging issues relevant to our modern times: case management and settlement conferences, social media, interacting with self-represented litigants, professional development and the post-judicial role. While these principles are intended to assist judges with the ethical and professional questions they may confront, they are also written to provide the public with a better understanding of the judicial role.

I am proud of this document and proud of the dedication of those who developed it. It is my sincere hope that *Ethical Principles* will be consulted regularly by judges for years to come.

Sincerely,

The Right Honourable
Richard Wagner, P.C.

Chief Justice of Canada and
Chairperson of the Canadian
Judicial Council

Cette version révisée des *Principes de déontologie judiciaire* s'appuie sur l'édition originale et traite de questions nouvelles et naissantes qui ont rapport à nos temps modernes : la gestion des instances et les conférences de règlement, les médias sociaux, l'interaction avec les parties non représentées par un avocat, le perfectionnement professionnel, et le rôle des juges après leur départ de la magistrature. Ces principes visent à aider les juges à trouver réponse aux questions déontologiques et professionnelles qui peuvent se poser à la magistrature, mais ils sont aussi rédigés pour permettre au public de mieux comprendre le rôle des juges.

Je suis fier de ce document et fier du dévouement des personnes qui y ont travaillé. J'espère sincèrement que les juges consulteront régulièrement les *Principes de déontologie judiciaire* dans les années à venir.

Je vous offre mes meilleures salutations.

Le très honorable
Richard Wagner, c.p.

Juge en chef du Canada et
Président du Conseil canadien
de la magistrature

Table of Contents

Table des matières

Introduction

Purpose

1. *Ethical Principles for Judges [Ethical Principles]* provides ethical guidance for federally appointed judges. In doing so, it expresses a vision of what it means to be a judge. Taken together, the principles of independence, integrity and respect, diligence and competence, equality and impartiality define the judicial role. *Ethical Principles* was drafted with confidence that it would be read by judges and the public as an expression of the judiciary's highest ethical aspirations in the service of justice and the rule of law.

2. An independent and impartial judiciary is the right of all and constitutes a fundamental pillar of democratic governance, the rule of law and justice in Canada. Everyone needs and deserves impartial, competent, and respectful judges. All members of the judiciary commit to perform their role in such a manner so as to maintain the confidence of the public. The guidance that follows describes the high ethical standards that all judges strive to maintain in their professional and personal lives. While the overarching principles that guide the judiciary are largely immutable, evolving expectations of the public, societal developments and new understandings of issues relevant to the judiciary will serve to constantly inform the interpretation of *Ethical Principles* in the future.

Introduction

Objet

1. Les *Principes de déontologie judiciaire [Principes de déontologie]* offrent des conseils d'ordre déontologique aux juges de nomination fédérale. Ce faisant, ils expriment une vision de ce que cela représente que d'être un juge. Le rôle des juges est défini par les principes d'indépendance, d'intégrité et de respect, de diligence et de compétence, d'égalité et d'impartialité. Les Principes de déontologie se veulent l'expression des idéaux d'ordre déontologique les plus élevés auxquels aspirent les juges, au service de la justice et de la primauté du droit; c'est l'intention que devraient y lire les juges et le public.

2. Piliers fondamentaux de la gouvernance démocratique, de la primauté du droit et de la justice, l'indépendance et l'impartialité de la magistrature sont des droits reconnus à chacun. Toute personne doit et mérite d'être entendue par des juges impartiaux, compétents et respectueux. Tous les membres de la magistrature s'engagent à exercer leur charge de manière à préserver la confiance du public. Les recommandations qui suivent exposent les normes d'ordre déontologique élevées que les juges s'efforcent d'observer dans leurs fonctions professionnelles et dans leur vie personnelle. Si les grands principes qui guident les juges demeurent largement immuables, en revanche les attentes du public, la société elle-même et notre compréhension des questions qui touchent la fonction judiciaire évoluent, et cette évolution éclairera de façon constante l'interprétation des *Principes de déontologie* à l'avenir.

3. A judge must be and be seen to be free to decide honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone. Nothing in *Ethical Principles* can or is intended to limit or restrict this judicial independence in any manner. Judges have the duty to uphold and defend judicial independence, not as a privilege of judicial office but as the constitutionally guaranteed right of everyone to have their disputes heard and decided in a fair way by impartial and independent judges.

4. The ethical principles articulated in this document are aspirational. They are not intended to be a code of conduct that sets minimum standards. They are advisory in nature and are designed to (i) describe exemplary behaviour which all judges strive to maintain; (ii) assist judges with the difficult ethical and professional issues that confront them; and (iii) help members of the public better understand the judicial role. The guidance provided in *Ethical Principles* does not preclude reasonable disagreements about their application in particular cases or imply that any departure from them necessarily warrants disapproval. The ethical principles are intended to be applied in light of all of the relevant circumstances and consistently with the requirements of judicial independence and the law. They should not be viewed as an exhaustive expression of the ethical considerations that judges may face in their professional or personal lives.

3. Les juges doivent être libres et paraître libres de juger avec intégrité et impartialité sur le seul fondement du droit et de la preuve présentée, sans pressions ni influences extérieures et sans crainte d'ingérence de la part de qui que ce soit. Les *Principes de déontologie* ne sauraient limiter ou restreindre en aucune façon cette indépendance de la magistrature et ils ne visent pas à le faire. Les juges sont tenus de soutenir et de défendre l'indépendance de la magistrature, non parce qu'elle constitue un privilège rattaché à leur charge, mais parce que la Constitution garantit à quiconque le droit de voir son litige entendu et tranché de façon équitable par des juges impartiaux et indépendants.

4. Les principes d'ordre déontologique exposés dans ce document articulent un idéal à atteindre. Ils ne constituent pas un code de conduite imposant des normes minimales à suivre. Ce sont des recommandations ayant pour objectif (i) de décrire la conduite exemplaire que les juges s'efforcent d'observer; (ii) d'aider les juges à résoudre les épineuses questions d'ordre déontologique et professionnel auxquelles ils sont confrontés; et (iii) d'aider les membres du public à mieux comprendre la fonction judiciaire. Il n'est pas exclu que les recommandations énoncées dans les *Principes de déontologie* puissent faire l'objet d'interprétations divergentes raisonnables quant à leur application dans un cas donné; de plus, le fait d'énoncer ces recommandations n'implique pas qu'il y aurait nécessairement matière à réprobation si on s'en écartait. Les principes de déontologie doivent être appliqués au regard de toutes les circonstances pertinentes ainsi qu'en conformité avec le principe de l'indépendance de la magistrature et avec le droit. On ne saurait y voir l'énumération complète des questions éthiques auxquelles les juges peuvent faire face dans l'exercice de leurs fonctions ou dans leur vie personnelle.

Context

5. The Canadian Judicial Council [the CJC] has been attentive to judicial ethics for decades. It published *Commentaries on Judicial Conduct* in 1991. This was followed by *Ethical Principles for Judges [Ethical Principles 1998]*. It provided ethical guidance to judges aligned with a set of central principles and better informed the public about the high ideals which judges embrace and toward which they strive. While drawing heavily on existing resources, *Ethical Principles 1998* was the most comprehensive treatment of the subject at that time in Canada. Further, it was uniquely the work of Canadian judges. An extensive process of consultation within the judiciary and beyond ensured that *Ethical Principles 1998* was the subject of painstaking examination and vigorous debate. The intention was that Canadian judges would accept *Ethical Principles 1998* as reflective of their high ethical aspirations and would find it worthy of respect and deserving of careful consideration when facing ethical issues

Contexte

5. Le Conseil canadien de la magistrature [le Conseil] s'intéresse aux questions de déontologie judiciaire depuis des décennies. En 1991, il a publié des *Commentaires sur la conduite des juges*. Puis, a suivi les *Principes de déontologie judiciaire [Principes de déontologie de 1998]* qui a proposé un ensemble de principes fondamentaux pour guider les juges sur des questions d'ordre déontologique et mieux renseigner le public sur les normes élevées auxquelles les juges adhèrent et qu'ils s'efforcent d'observer. Les *Principes de déontologie de 1998*, qui puisaient abondamment aux sources existantes, représentaient néanmoins l'exposé le plus complet en cette matière jamais publié au Canada. De plus, ils étaient entièrement le fruit du travail de juges canadiens. De vastes consultations menées auprès de la magistrature et du public avaient permis de soumettre les *Principes de déontologie de 1998* à un examen minutieux et à un débat vigoureux. Cette démarche avait pour but d'assurer que les juges du Canada verraient dans les *Principes de déontologie de 1998* le reflet de leurs aspirations élevées en matière de déontologie, qu'ils les considéreraient comme un document digne de respect et leur accorderaient une attention soutenue lorsqu'ils seraient confrontés à des questions d'ordre déontologique.

6. Over the past twenty years *Ethical Principles 1998* has provided valuable ethical guidance to federally appointed judges in a broad range of complex circumstances. It has become a crucial resource in the training provided to judges upon appointment, and forms part of ongoing discussions in professional development settings throughout a judge's career. In addition, the publication of *Ethical Principles 1998* coincided with the establishment of an Advisory Committee on Judicial Ethics [Advisory Committee] to which specific ethical questions have been submitted by judges. The Advisory Committee continues to respond to these queries with advisory opinions that contribute to the ongoing review and elaboration of the subjects dealt with in *Ethical Principles 1998*. These opinions may also identify new issues that this version of *Ethical Principles* does not directly address. The Advisory Committee continues to ensure that help is readily available to judges looking for guidance.

6. Depuis deux décennies, les *Principes de déontologie de 1998* ont fourni aux juges de nomination fédérale des conseils précieux en matière déontologique dans un éventail de situations complexes. Les *Principes de déontologie* sont au cœur de la formation offerte aux juges à la suite de leur nomination, et ils sont examinés et discutés dans les programmes de perfectionnement professionnel auxquels participent les juges tout au long de leur carrière. Par ailleurs, la publication des *Principes de déontologie de 1998* a coïncidé avec la création d'un comité consultatif sur la déontologie judiciaire [le Comité consultatif] auquel les juges soumettent depuis des questions précises touchant la déontologie. Les avis que le Comité consultatif fournit en réponse à ces demandes contribuent à l'examen et à l'approfondissement continus des questions traitées dans les *Principes de déontologie de 1998*. Ils peuvent également contribuer à mettre en lumière des problèmes qui ne sont pas abordés directement dans la présente version des *Principes de déontologie*. Le Comité consultatif continue de veiller à ce que les juges qui recherchent des conseils puissent aisément recevoir de l'aide.

7. A document of this nature can never be viewed as the "final word" on such an important and complex subject. After more than twenty years from its initial publication, *Ethical Principles 1998* needed modernization to address significant societal changes, changes in the role of the judiciary, and the social context in which judges serve. In 2016, the revision of *Ethical Principles 1998* was commenced by the Judicial Independence and Appointment Process Committee of the CJC [Independence Committee], with input from Chief Justices and puisne judges from across Canada. As was done in 1998, broad consultations were conducted within the judiciary and beyond to ensure that *Ethical Principles* is responsive to the needs of judges and takes community expectations into account. The consultations included an on-line survey of issues relevant to judicial ethics and a series of meetings and dialogue with organizations representing the judiciary and other interested parties. Once a draft document was prepared it was made public and judges, judges' organizations, other professional organizations and members of the public were invited to provide comments and feedback. Throughout the project, the Independence Committee reviewed every submission and every proposed amendment, and incorporated into the final version of *Ethical Principles* many of the proposals and suggestions submitted to it.

7. De par sa nature, un document comme celui-ci ne saurait prétendre apporter une réponse définitive sur un sujet aussi important et complexe. Plus de vingt ans après leur publication, les *Principes de déontologie de 1998* étaient mûrs pour une mise à jour qui permette de traiter d'enjeux importants soulevés par l'évolution de la société, de la fonction judiciaire et du contexte social dans lequel les juges s'acquittent de leur charge. À partir de 2016, le Comité sur l'indépendance judiciaire et le processus de nomination du Conseil [Comité sur l'indépendance] s'est attelé à la tâche de réviser les *Principes de déontologie de 1998*, avec l'apport des juges en chef et des juges puînés de partout au Canada. Comme ce fut le cas en 1998, de vastes consultations ont été menées au sein de la magistrature et auprès du public afin que les *Principes de déontologie* répondent aux besoins des juges et tiennent compte des attentes du public. Ces consultations ont compris, entre autres, un sondage en ligne sur des questions de déontologie judiciaire, de même qu'une série de rencontres et d'échanges avec des organisations représentant la magistrature et d'autres parties intéressées. L'ébauche rédigée à la suite de ces consultations a été rendue publique, et les juges, les associations qui les représentent, des organismes professionnels et les membres du public ont été invités à présenter des commentaires. Tout au long du projet, le Comité sur l'indépendance s'est penché sur chacun des commentaires reçus et chacune des modifications proposées et a intégré dans la version définitive des *Principes de déontologie* bon nombre des propositions et suggestions qui lui avaient été soumises.

8. Today, judges' work includes case management, settlement conferences, judicial mediation, and frequent interaction with self-represented litigants. These responsibilities invite further consideration with respect to ethical guidance. In the same manner, the digital age, the phenomenon of social media, the importance of professional development for judges and the transition to post-judicial roles all raise ethical issues that were not fully considered twenty years ago. Judges are expected to be alert to the history, experience and circumstances of Canada's Indigenous peoples, and to the diversity of cultures and communities that make up this country. In this spirit, the judiciary is now more actively involved with the wider public, both to enhance public confidence and to expand its own knowledge of the diversity of human experiences in Canada today.

9. The format of *Ethical Principles 1998* is preserved. Each chapter is organized hierarchically, beginning with a Statement, followed by a set of Principles and then a series of Commentaries aligned with each Principle. At the highest level of abstraction, each Statement expresses a fundamental value or theme of judicial ethics. The Principles identify components of each Statement and articulate behaviours that would constitute the highest aspirations of an ethical judge with respect to that Principle. With occasional exceptions, the Statements and Principles are stated in 'declarative' language – essentially statements of what an ethical judge does or how an ethical judge acts, consistent with the goal of describing the attributes of an ethical judge. The Commentaries associated with each Principle provide explanations, context and further elucidation of the Principles, almost always in aspirational language, often using concrete examples.

8. De nos jours, les responsabilités des juges s'étendent à la gestion des instances ainsi qu'aux conférences de règlement et aux séances de médiation judiciaires. De plus, il arrive fréquemment que les juges doivent interagir avec des parties non représentées. Ces responsabilités appellent une nouvelle réflexion sur le soutien à apporter en matière déontologique. Parallèlement, d'autres phénomènes soulèvent des enjeux déontologiques qui n'avaient pas été pleinement considérés il y a vingt ans : l'arrivée de l'ère numérique, l'émergence des médias sociaux, l'importance du perfectionnement professionnel des juges et le passage de certains de ceux-ci à une autre carrière après leur départ de la magistrature. On attend des juges qu'ils soient sensibles et au fait de l'histoire, du vécu et de la réalité des peuples autochtones au Canada, ainsi que de la diversité des cultures et des communautés qui composent le pays. C'est dans cet esprit que la magistrature joue un rôle plus actif qu'auparavant auprès du public, aussi bien pour soutenir la confiance que le public accorde à la magistrature que pour approfondir sa connaissance de la diversité des expériences humaines au Canada.

9. L'organisation générale des matières établie dans les *Principes de déontologie de 1998* a été préservée. Structuré de façon hiérarchique, chaque chapitre commence par un Énoncé, suivi par des Principes auxquels succèdent une série de Commentaires liés à chacun des Principes. L'Énoncé exprime une valeur ou un thème fondamental de la déontologie judiciaire, à un niveau élevé d'abstraction. Les Principes exposent les éléments qui découlent de l'Énoncé et décrivent la conduite idéale vers laquelle tendrait le juge éthique au regard de ceux-ci. En règle générale, les Énoncés et les Principes sont rédigés de manière déclarative, énonçant essentiellement ce que fait un juge éthique ou comment il agit, l'objectif étant de décrire la conduite exemplaire d'un juge éthique. Quant aux Commentaires, ils servent à expliquer les Principes et à les mettre en contexte, presque toujours sous la forme de recommandations, et présentent souvent des exemples concrets.

10. When an ethical issue arises for a judge more than one principle may be relevant. The approach taken in *Ethical Principles* is to discuss the aspects of each Principle discretely, recognizing that multiple Principles and chapters of *Ethical Principles* may need to be considered in obtaining comprehensive guidance in the resolution of the ethical issue. The comprehensive Index, as well as links within electronic versions of *Ethical Principles*, will enable the reader to identify and access associated Principles and Commentaries.

11. The language adopted in this edition of *Ethical Principles* provides greater consistency of meaning between the English and French versions. *Ethical Principles* was co-drafted in English and French and each version is equally authoritative. As well, the document is written in gender-neutral language. Whenever pronouns are used, they are intended to be inclusive of all genders.

12. This edition of *Ethical Principles* also addresses circumstances associated with judges contemplating or undertaking post-judicial legal careers. In particular, it discusses unique ethical issues that may arise in the transition to post-judicial legal careers and those that continue after judges leave office. This guidance is provided to present and former judges for their benefit and with a view to maintaining public confidence in the judiciary.

10. Lorsqu'un juge fait face à une question d'ordre déontologique, il se peut que plus d'un principe entre en jeu. L'approche retenue dans les *Principes de déontologie* consiste à aborder de façon distincte les différents aspects de chaque principe; il est donc possible qu'il faille considérer plusieurs principes et consulter plus d'un chapitre des *Principes de déontologie* pour obtenir des conseils sur l'ensemble des éléments permettant de résoudre une question. L'index détaillé et les hyperliens insérés dans les versions électroniques des *Principes de déontologie* permettront au lecteur de repérer les principes pertinents et les commentaires qui s'y rapportent, et d'y accéder facilement.

11. La présente édition des *Principes de déontologie* assure une meilleure harmonisation des versions française et anglaise. Les *Principes de déontologie* ont fait l'objet d'une corédaction, et les versions anglaise et française ont la même valeur. De plus, le présent document est rédigé sans distinction de genre. L'utilisation d'un genre inclut tous les genres.

12. La présente édition des *Principes de déontologie* traite également de la situation des juges qui envisagent ou amorcent une nouvelle carrière après leur départ de la magistrature. Ainsi, elle examine certaines des questions particulières qui sont susceptibles de se poser sur le plan déontologique à l'occasion du passage à une nouvelle carrière, ainsi que les principes qui continuent de s'appliquer après le départ de la magistrature. Ces conseils s'adressent aussi bien aux juges en poste qu'aux anciens juges et visent à préserver la confiance du public envers la magistrature.

I. Judicial Independence

Statement

An independent judiciary is indispensable to impartial justice under law. Judges uphold and exemplify judicial independence in both its individual and institutional aspects.

Principles

A. Judges exercise their judicial functions independently and free of extraneous influence.

B. Judges firmly reject improper attempts to influence their decisions in any matter before the court.

C. Judges exhibit and promote high standards of judicial conduct so as to reinforce public confidence in the independence of the judiciary.

D. Judges encourage and uphold arrangements and safeguards to maintain and enhance the institutional and administrative independence of the judiciary.

I. Indépendance de la magistrature

Énoncé

L'indépendance de la magistrature est indispensable à l'exercice d'une justice impartiale sous un régime de droit. Les juges soutiennent l'indépendance de la magistrature et l'incarnent tant dans ses éléments individuels qu'institutionnels.

Principes

A. Les juges exercent leurs fonctions judiciaires de façon indépendante, à l'abri de toute influence extérieure.

B. Dans les affaires dont la cour est saisie, les juges repoussent fermement toute tentative inappropriée visant à influencer leur décision.

C. Les juges observent des normes élevées de conduite judiciaire et en favorisent l'application, afin de renforcer la confiance du public envers l'indépendance de la magistrature.

D. Les juges encouragent et soutiennent les mesures et les garanties qui visent à préserver et à accroître l'indépendance de la magistrature, tant sur le plan institutionnel qu'administratif.

Commentary

General

1.A.1 Judicial independence refers to the liberty and responsibility of judges to hear and decide cases that come before them in accordance with their conscience, without interference from others. The guarantee of judicial independence aims to make judges impervious to improper external intervention in the exercise of their functions. Judges are, and must reasonably be perceived to be, independent, both individually and institutionally. Judicial independence is not the private right of judges. It is the foundation of judicial impartiality and a constitutional right of all. The right to be tried by an independent and impartial tribunal is an integral principle of fundamental justice protected by the *Canadian Charter of Rights and Freedoms*.

1.A.2 Judges are called upon to resolve a wide array of disputes and generally to determine legal rights and obligations. Public confidence in the judiciary rests on the fact that their decisions are made according to law.

1.A.3 Judicial independence refers to a state of mind or attitude in the actual exercise of judicial functions. It also connotes a status or relationship with others, including the executive branch of government and other judges. Judicial independence is the foundation for impartial decision-making. The first qualification of a judge is the ability to make independent and impartial decisions. Judges apply the law without fear or favour and without regard to whether the decision is popular. This is a cornerstone of the rule of law, and it is secured through respect for the principle of judicial independence.

Commentaires

Général

1.A.1 L'indépendance judiciaire s'entend de la liberté et de la responsabilité du juge d'instruire et de trancher une affaire donnée selon sa conscience, sans l'intervention d'autres personnes. La garantie d'indépendance judiciaire vise à rendre les juges imperméables aux interventions extérieures indues dans l'exercice de leurs fonctions. Les juges sont indépendants et doivent être raisonnablement perçus comme tels, tant sur le plan individuel que sur le plan institutionnel. L'indépendance judiciaire n'est pas un droit qui appartient en propre à chaque juge. Elle constitue le fondement de l'impartialité judiciaire et est un droit constitutionnel qui appartient à chacun. Le droit d'être jugé par un tribunal indépendant et impartial est un principe essentiel de justice fondamentale garanti par la *Charte canadienne des droits et libertés de la personne*.

1.A.2 Il incombe aux juges de trancher une large gamme de litiges et, de manière générale, de déterminer les droits et obligations juridiques. La confiance du public envers la magistrature s'appuie sur le fait que les décisions des juges sont rendues en fonction du droit.

1.A.3 L'indépendance judiciaire désigne un état d'esprit ou une attitude dans l'exercice concret des fonctions judiciaires. Elle connote aussi un statut ou une relation à l'égard d'autrui, y compris le pouvoir exécutif et les autres juges. L'indépendance judiciaire est le fondement permettant la prise de décisions impartiales. La qualité première du juge réside dans sa capacité de rendre des décisions de manière indépendante et impartiale. Les juges appliquent la loi, sans crainte de représailles ni favoritisme, et indépendamment de l'accueil, favorable ou non, de leur décision. C'est là une des pierres angulaires de la primauté du droit, garantie par le respect du principe d'indépendance de la magistrature.

1.A.4 Judicial independence is fundamental to ensuring that decisions are made without external influence and to maintaining individual and public confidence in the administration of justice. Preserving the constituent elements of judicial independence is critical to the public's perception of the impartiality of judges. In that sense, judicial independence is an important means to a fundamental end. Judicial independence ensures that judges are impartial in fact, and also that they are perceived to be so.

1.A.5 Judges protect judicial independence not for their own benefit but for the benefits of all Canadians. Solely self-interested claims for judicial independence risk undermining public confidence in the judiciary.

1.A.6 Informing the public with respect to the role of the judiciary and judicial independence is an important judicial function. It is in the public interest for judges to take advantage of appropriate opportunities to enhance the public's understanding of the fundamental importance of judicial independence.

Avoiding and Rejecting Improper Influence

1.B.1 Judges should avoid all communications with anyone external to a case that might raise reasonable concerns about judicial independence. Judges must firmly reject improper attempts to influence their decisions. Communications intended to influence a specific judicial decision can only be received within the judicial process.

1.A.4 L'indépendance de la magistrature est fondamentale afin d'assurer que les décisions sont rendues sans influence extérieure et de soutenir la confiance individuelle et collective dans l'administration de la justice. Le maintien des conditions de l'indépendance de la magistrature est essentiel à la perception qu'a le public de l'impartialité des juges. En ce sens, l'indépendance de la magistrature constitue un moyen crucial d'atteindre cet objectif fondamental. L'indépendance de la magistrature garantit l'impartialité objective des juges et fait en sorte qu'ils soient perçus comme des personnes impartiales.

1.A.5 Les jugent protègent l'indépendance de la magistrature dans l'intérêt de tous, et non par intérêt personnel. Revendiquer la protection de l'indépendance de la magistrature par pur intérêt personnel risquerait de miner la confiance du public à l'endroit des juges.

1.A.6 L'une des fonctions importantes des juges consiste à renseigner le public sur le rôle de la magistrature et sur son indépendance. Il est dans l'intérêt public que les juges profitent d'occasions appropriées pour aider le public à mieux comprendre l'importance fondamentale de l'indépendance de la magistrature.

Éviter et repousser les tentatives d'influence indue

1.B.1 Les juges devraient éviter toute communication – avec quiconque est étranger à l'affaire dont ils sont saisis – qui pourrait soulever des craintes raisonnables en ce qui concerne l'indépendance de la magistrature. Les juges doivent fermement repousser toute tentative inappropriée d'influencer leurs décisions. Les communications ayant pour objet d'influencer une décision dans une affaire donnée doivent s'inscrire dans le cadre du processus judiciaire.

1.B.2 Attempts to influence judges may come from many sources, including social media. Judges should be cautious in their communications on social media relating to matters that could come before the court. Also, their social media activities should be undertaken in ways that avoid compromising public confidence in the judiciary.

Public Confidence

1.C.1 Judicial independence and judicial ethics are interrelated. Judges should exemplify and promote high standards of judicial conduct as one element of assuring the independence of the judiciary. In turn, the independence and integrity of the judiciary preserves public confidence in the rule of law and acceptance of court decisions. Unethical conduct by judges erodes that confidence. Thus, judges share a collective responsibility to promote and observe high standards of conduct.

Institutional and Administrative Independence

1.D.1 Judicial independence is secured by institutional and operational structures that protect judges and courts from external influence so that judicial decisions are made according to law in a fair process. For example, judges have security of tenure and their remuneration is set through an independent process so that neither fear of sanction nor hope of reward stands in the way of rendering justice. For the same reasons, judges also have immunity from liability in relation to their decisions.

1.B.2 Les tentatives d'influencer les juges peuvent provenir de plusieurs sources, y compris les médias sociaux. Les juges devraient se garder de diffuser dans les médias sociaux des communications qui concernent des affaires dont la cour pourrait être saisie. De plus, l'activité des juges dans les médias sociaux ne devrait pas avoir pour effet d'affaiblir la confiance du public à l'endroit de la magistrature.

Confiance du public

1.C.1 L'indépendance judiciaire et le respect des principes déontologiques sont interdépendants. Les juges devraient observer des normes de conduite élevées contribuant à assurer l'indépendance de la magistrature et en favoriser l'application. En retour, l'indépendance et l'intégrité des juges préservent la confiance du public dans la primauté du droit et l'acceptation par celui-ci des décisions des tribunaux. Une conduite contraire à l'éthique de la part d'un juge mine cette confiance. C'est pourquoi les juges ont la responsabilité collective de favoriser et d'observer des normes de conduite élevées.

Indépendance institutionnelle et administrative

1.D.1 L'indépendance de la magistrature est garantie par des structures institutionnelles et opérationnelles qui protègent les juges et les tribunaux contre toute influence extérieure afin qu'ils puissent rendre leurs décisions judiciaires conformément au droit, dans le cadre d'un processus équitable. Ainsi, afin d'assurer que ni la crainte d'une sanction ni l'espoir d'un gain ne puissent nuire à l'application juste du droit, les juges sont inamovibles et leur rémunération est déterminée dans le cadre d'un processus indépendant. Pour les mêmes raisons, les juges jouissent d'une immunité contre les poursuites à l'égard des décisions qu'ils rendent.

1.D.2 In keeping with the principle of judicial independence, professional development for judges is organized, designed and delivered under the authority of the judiciary.

1.D.3 At an institutional level, courts require sufficient autonomy to guarantee that the administration of justice is free from any political or other improper influence.

1.D.4 The judiciary should remain vigilant with respect to any initiative that may have the effect of undermining its institutional or administrative independence. That said, not every proposed change in the administrative arrangements affecting the judiciary constitutes a threat to judicial independence.

1.D.2 Afin de préserver le principe de l'indépendance de la magistrature, les programmes de perfectionnement professionnel destinés aux juges sont organisés, élaborés et prodigués sous l'égide de la magistrature.

1.D.3 Au niveau institutionnel, les tribunaux ont besoin d'une autonomie suffisante pour garantir que l'administration de la justice est libre de toute influence indue, notamment politique.

1.D.4 La magistrature devrait rester à l'affût de toute tentative susceptible de miner son indépendance institutionnelle ou administrative. Cela dit, ce ne sont pas tous les changements qu'on propose d'apporter aux dispositions administratives affectant les juges qui constituent une menace pour l'indépendance judiciaire.

II. Integrity and Respect

Statement

Judges conduct themselves respectfully and with integrity so as to sustain and enhance public confidence in the judiciary.

Principles

A. Judges comply with the law and conduct themselves both inside and outside the courtroom in a manner that is above reproach in the view of reasonable and informed persons.

B. Judges are discreet and do not use or disclose confidential information acquired in their judicial capacity for any purpose not related to judicial duties.

C. Judges treat everyone with civility and respect in the performance of their judicial duties.

D. Judges foster access to justice for all. Judges carry out their duties with appropriate consideration for all the parties, whether or not they are represented, and ensure that they are treated fairly and respectfully, so as to provide them with reasonable access to court processes.

E. Judges avoid all forms of harassment and abuse of authority or status.

F. Judges do not allow their status or the prestige of judicial office to be used to advance a private interest.

G. Judges encourage and support the observance of *Ethical Principles* by their judicial colleagues.

II. Intégrité et respect

Énoncé

Les juges font preuve, dans leur conduite, de respect et d'intégrité de façon à soutenir et à renforcer la confiance du public à l'endroit de la magistrature.

Principes

A. Les juges se conforment au droit et adoptent, tant à l'intérieur qu'à l'extérieur de la salle d'audience, une conduite irréprochable aux yeux d'une personne raisonnable et bien renseignée.

B. Les juges font preuve de discrétion et n'utilisent ni ne divulguent les renseignements confidentiels acquis dans l'exercice de leurs fonctions judiciaires, si ce n'est pour une fin liée à ces fonctions.

C. Les juges traitent toutes les personnes avec courtoisie et respect dans l'exercice de leurs fonctions judiciaires.

D. Les juges favorisent l'accès à la justice. Dans l'exercice de leurs fonctions, les juges accordent la considération appropriée à toutes les parties, représentées et non représentées, et veillent à ce qu'elles soient traitées avec équité et respect, afin de leur assurer un accès raisonnable aux processus judiciaires.

E. Les juges évitent toute forme de harcèlement et d'abus d'autorité ou de statut.

F. Les juges ne permettent pas que leur statut ou le prestige de la fonction judiciaire soit utilisé au profit d'un intérêt privé.

G. Les juges encouragent et soutiennent le respect des *Principes de déontologie* par leurs collègues de la magistrature.

Commentary

General

2.A.1 Public confidence in the judiciary is essential to an effective judicial system and, ultimately, the rule of law. Within that system, judges hold positions of significant trust, confidence and responsibility. Conduct, in and out of court, that exhibits integrity ensures public respect for and confidence in the individual judge and, more significantly, contributes to public confidence in the judiciary and the judicial system as a whole. Judges should therefore act with a high degree of decorum, propriety and humanity.

2.A.2 Public expectations of the integrity of judges are understandably high. Behaviour considered acceptable if exhibited by some members of the public may not be appropriate for members of the judiciary. Judges should therefore be mindful of the ways in which their conduct would be perceived by reasonable and informed members of the community and whether that perception is likely to lessen respect for the judge or the judiciary as a whole. Behaviour that would diminish that respect in the minds of such persons should be avoided.

Behaviour in Private Life

2.A.3. Public expectations of judges are not limited to the actions of judges in their judicial capacities. Judges should exhibit respect for the law and act with integrity in their private lives and should avoid the appearance of impropriety.

Commentaires

Général

2.A.1 La confiance du public à l'endroit de la magistrature est essentielle au bon fonctionnement du système de justice et, en définitive, à la primauté du droit. Les juges occupent une position de grande confiance et de responsabilité au sein de ce système. Les juges qui adoptent, en salle d'audience ou ailleurs, une conduite empreinte d'intégrité s'assurent du respect et de la confiance du public et, surtout, contribuent à soutenir la confiance du public à l'endroit de la magistrature et du système de justice tout entier. Les juges devraient en conséquence se conduire avec décorum, décence et humanité.

2.A.2 Les attentes du public à l'égard de l'intégrité des juges sont bien entendu élevées. Les comportements qu'on jugerait acceptables pour un membre du public pourraient ne pas convenir à un membre de la magistrature. Les juges devraient donc être conscients de la perception que des personnes raisonnables et bien renseignées pourraient avoir de leur conduite et de la possibilité que cette perception diminue le respect dont jouissent les juges individuellement et la magistrature dans son ensemble. Tout comportement qui porterait atteinte à ce respect dans l'esprit de ces personnes est à proscrire.

Le comportement dans la vie privée

2.A.3 Les attentes du public à l'endroit des juges ne se limitent pas aux actes que ces derniers posent dans l'exercice de leur charge. Les juges devraient faire montre de leur respect pour la loi, agir avec intégrité dans leur vie personnelle et éviter toute apparence d'inconduite.

2.A.4 After appointment, judges are not required to withdraw from the world. They may lead a normal life in the community, while retaining a sense of the dignity of judicial office and realizing that the public expects virtually irreproachable conduct from judges.

2.A.5 A judge's conduct, in and out of court, may be the subject of public scrutiny and comment. At the same time, judges have private lives and are entitled to enjoy, as much as possible, the rights and freedoms generally available to all. Nevertheless, judges accept some restrictions on their activities — even activities that would not elicit adverse notice if carried out by other members of the community. For example, judges should exercise caution in their use of social media. Judges should strive to strike a balance between the expectations of judicial office and their personal lives. In finding this balance, judges should be guided by these *Ethical Principles*.

2.A.4 Les juges ne sont pas tenus de se tenir à l'écart du monde après leur nomination. Ils peuvent participer à la vie de leur collectivité, tout en gardant à l'esprit la dignité rattachée à leur charge et le fait que le public s'attend à une conduite quasi irréprochable de la part des juges.

2.A.5 La conduite des juges, en salle d'audience ou ailleurs, peut être soumise à l'examen attentif et à la critique du public. Par ailleurs, les juges ont aussi une vie privée et jouissent, dans toute la mesure du possible, des mêmes droits et libertés que ceux qui sont conférés aux autres personnes de manière générale. Néanmoins, les juges acceptent certaines restrictions à l'égard de leurs activités — même celles qui ne susciteraient aucune critique si elles étaient le fait d'autres membres de la collectivité. Par exemple, les juges devraient utiliser les médias sociaux avec prudence. Ils devraient s'efforcer de maintenir l'équilibre entre les attentes associées à leur charge et la conduite de leur vie personnelle. *Les Principes de déontologie* peuvent les guider à cet égard.

Confidentiality and Discretion[1]

2.B.1 Judges are entrusted with preserving confidentiality. The performance of judicial duties necessarily entails that judges receive or come into possession of confidential information. While justice is, in principle, transparent, open and public, some of the facts, documents, records and circumstances of a dispute may be subject to confidentiality orders, including the identity of one or more parties. Judges should not use or reveal confidential information except where, in the performance of their judicial duties, such disclosure is necessary, or done in accordance with relevant rules on archiving and disclosure. When judges work as a group, their internal discussions remain confidential.

2.B.2 Judges should be discreet when discussing their work, including in contexts in which what they say may be inadvertently overheard by others.

2.B.3 Confidentiality and discretion extend past a judge's departure from judicial office.

Civility and Respect

2.C.1 A hallmark of judicial proceedings is that all participants, including judges, will conduct themselves in a manner that preserves the honour and dignity of both the individual proceedings and the administration of justice more generally. Judges should endeavor to treat all participants in the judicial process with civility and respect.

1 *Canadian Judicial Council, Use of Personal Information in Judgments and Recommended Protocol (2005)*

Confidentialité et discrétion[1]

2.B.1 Les juges sont les gardiens de la confidentialité. L'exercice des fonctions judiciaires a pour conséquence que les juges, inévitablement, reçoivent des renseignements de nature confidentielle ou entrent en possession de tels renseignements. Même si, en principe, la justice est publique, ouverte et transparente, certains faits, documents, dossiers ou circonstances entourant un litige, y compris l'identité d'une ou de plusieurs parties, peuvent être assujettis à des ordonnances de confidentialité. Les juges ne devraient jamais utiliser ou révéler des renseignements de nature confidentielle, sauf lorsque cela est nécessaire dans l'exercice de leurs fonctions judiciaires, ou conformément aux règles applicables qui régissent l'archivage et la divulgation. Lorsqu'ils travaillent en groupe, leurs discussions demeurent confidentielles.

2.B.2 Les juges devraient faire preuve de discrétion lorsqu'ils discutent de leur travail, y compris dans des contextes où leurs propos peuvent être entendus par inadvertance.

2.B.3 La confidentialité et la discrétion demeurent importantes pour les juges même après leur départ de la magistrature.

Courtoisie et respect

2.C.1 L'une des caractéristiques du processus judiciaire est que toutes les personnes qui y participent, y compris les juges, se comportent de manière à préserver l'honneur et la dignité tant des instances individuelles que de l'administration de la justice en général. Les juges devraient s'efforcer de traiter chaque personne qui intervient dans le processus judiciaire avec courtoisie et respect.

1 *Conseil canadien de la magistrature, L'usage de renseignements personnels dans les jugements et protocole recommandé (2005)*

2.C.2 The commitment of judges to civility and respect is not limited to judicial proceedings. Judges should attempt, in all of their engagements with others, including their judicial colleagues, to act in accordance with these values. By showing dignified consideration for others, judges enhance public respect for and confidence in the judiciary as an institution.

2.C.3 The circumstances of some cases and the conduct of counsel and parties sometimes require judges to act with an appropriate measure of firmness and to emphasize decisiveness, promptness, the prevention of abuse of process or improper treatment of participants in the adjudicative process. Maintaining civility and respect requires judges to ensure a proper balance between upholding the right of parties to be heard and ensuring the efficiency of the process.

2.C.4 It is often necessary for judges in the adjudication process to make findings of credibility and to rule on the propriety of a person's conduct. That being said, in court proceedings or in their judgments, judges should not make inappropriate remarks about a person's conduct or motives. Furthermore, judges should not make comments about persons who are not before the court unless, in the judge's opinion, it is necessary for the proper disposition of the case.

2.C.5 Judges should be alert to the possibility that ill-considered, comical or facetious remarks, often made spontaneously and intended to be humorous, may give offence or diminish the dignity of the proceedings.

2.C.2 Cet engagement des juges envers la courtoisie et le respect ne se limite pas au processus judiciaire. Les juges devraient s'efforcer de respecter ces valeurs dans tous leurs rapports avec autrui, y compris les autres membres de la magistrature. Les juges contribuent au respect de la magistrature et à la confiance que le public lui accorde en tant qu'institution en se comportant de manière digne et respectueuse avec autrui.

2.C.3 Les aspects particuliers d'une affaire et la conduite des avocats et des parties peut parfois obliger les juges à utiliser une certaine fermeté et à privilégier l'efficacité dans la prise de décision, la célérité ainsi que la prévention des abus de procédure et des comportements répréhensibles envers les participants au processus judiciaire. Le maintien d'une attitude courtoise et respectueuse exige des juges qu'ils préservent un juste équilibre entre le droit des parties d'être entendues et l'efficacité du processus.

2.C.4 Il arrive souvent aux juges de devoir se prononcer sur la crédibilité ou la conduite de certaines personnes pour trancher un litige. Cela étant, les juges devraient s'abstenir, au cours du processus judiciaire ou dans leurs jugements, de formuler des commentaires inappropriés concernant la conduite d'une personne ou ses motivations. Les juges devraient aussi s'abstenir de formuler des commentaires concernant des personnes qui ne comparaissent pas devant le tribunal, à moins que cela ne soit nécessaire au règlement de l'affaire du point de vue du juge.

2.C.5 Les juges devraient être sensibles au fait que les commentaires inconsidérés, humoristiques ou facétieux, qui sont souvent formulés spontanément et se veulent drôles, peuvent être offensants et miner la dignité des procédures.

2.C.6 It is a delicate question whether and in what circumstances a judge should report, or cause to be reported, a lawyer's conduct to the lawyer's professional governing body. Taking such action may affect the ability of the judge to continue in the proceeding in which that lawyer is appearing, given that the judge's view of the lawyer's conduct may give rise to a reasonable apprehension of bias against the lawyer or the lawyer's client. On the other hand, a judge is in a special position to observe lawyers' conduct before the court. Judges should remain alert to the lawyer's legal and ethical duty of resolute advocacy on behalf of a client and commitment to the client's cause.
A judge should take, or cause to be taken, appropriate action where the judge becomes aware of misconduct by a lawyer or incompetence that seriously compromises the interests of justice. Where a judge intends to take action, the judge should follow court protocols and consider whether the interests of justice require that such action await the end of the proceeding or whether the circumstances require earlier action.

Access to Justice and Self-Represented Litigants[2]

2.D.1 Judges have a responsibility to promote and foster access to justice. In fulfilling their role, judges should be aware of the different ways in which disputes can be resolved fairly and efficiently.

2.C.6 La question de savoir si les juges devraient signaler ou faire signaler certains agissements d'un avocat à l'ordre professionnel de celui-ci, et dans quelles circonstances ils devraient le faire, est délicate. Les juges qui prennent ce genre de mesures risquent de ne plus être aptes à entendre la cause dans laquelle agit l'avocat dénoncé, puisque l'opinion exprimée sur la conduite de l'avocat peut susciter une crainte raisonnable quant à l'existence d'un parti pris contre l'avocat ou son client. Il reste que les juges occupent une position privilégiée pour observer la conduite des avocats devant le tribunal. Les juges devraient demeurer attentifs au fait que les avocats ont une obligation déontologique et légale de représenter leur client avec vigueur et de se dévouer à sa cause. Lorsque des juges sont témoins de l'inconduite d'un avocat ou d'une incompétence qui porte gravement atteinte à l'intérêt de la justice, ils devraient prendre ou faire prendre les mesures qui s'imposent conformément aux protocoles en vigueur dans leur cour s'il en est. Avant de prendre de telles mesures, les juges devraient déterminer si l'intérêt de la justice commande d'attendre la fin de l'audience ou si des circonstances spéciales justifient une action immédiate.

L'accès à la justice et les parties non représentées[2]

2.D.1 Les juges ont la responsabilité de promouvoir et de favoriser l'accès à la justice. Ce rôle impose aux juges d'être sensibles aux différents processus qui permettent une résolution juste et efficace des différends.

2 *Canadian Judicial Council Statement of Principles on Self-represented Litigants and Accused Persons (2006)*

2 *Conseil canadien de la magistrature, Énoncé de principes concernant les plaideurs et les accusés non représentés par un avocat (2006)*

2.D.2 Passive neutrality and treating everyone in the same manner may not always be appropriate. Parties often appear before the court as self-represented litigants. Judges should provide information and reasonable assistance, proactively where appropriate, on procedural and evidentiary rules, while being alert not to compromise judicial impartiality and the fairness of the proceeding.

Conduct Towards Others

2.E.1 The conduct of judges towards others is an important aspect of their commitment to integrity and respect. Judges should be attentive to the ways in which offensive remarks, or conduct, or inappropriate behaviour may adversely affect or intimidate others, particularly those in subordinate positions to the judge. A judge's conduct in this respect affects their individual reputation and that of the judiciary as a whole.

2.E.2 A common concern in the modern workplace is the possibility that authority may be used in inappropriate ways. The workplace of the judiciary is no exception. Judges refrain from any form of harassment in the workplace. It is also important for judges to avoid relationships with others with whom they work or associate that could be reasonably perceived as the judge taking advantage of their position or authority.

2.D.2 Il se pourrait que la neutralité passive et le traitement identique de toutes les parties ne soit pas toujours approprié. Il arrive souvent que des parties agissent devant les tribunaux sans être représentées. Les juges devraient informer les parties non représentées et leur fournir une aide raisonnable, de manière proactive lorsque les circonstances s'y prêtent, en ce qui concerne les règles de preuve et de procédure, tout en se gardant de compromettre leur impartialité et l'équité des procédures.

Comportement à l'égard d'autrui

2.E.1 La conduite des juges à l'égard d'autrui est un aspect important de leur engagement envers l'intégrité et le respect. Les juges devraient se montrer sensibles aux propos désobligeants et aux comportements offensants ou inappropriés qui pourraient atteindre ou intimider les personnes qu'ils côtoient, en particulier celles sur lesquelles s'exerce leur autorité. La conduite des juges à cet égard est susceptible d'affecter tant leur réputation individuelle que celle de la magistrature dans son ensemble.

2.E.2 La possibilité que l'autorité soit utilisée à des fins inappropriées est souvent source de préoccupation dans les milieux de travail contemporains. Le milieu de travail où exercent les juges ne fait pas exception. Les juges s'abstiennent de toute forme de harcèlement au travail. Il est également important que les juges évitent les relations avec les personnes avec lesquelles ils travaillent ou qu'ils côtoient, lorsqu'une telle relation pourrait être raisonnablement perçue comme un abus de fonction ou d'autorité.

Use of Status or Authority

2.F.1 Judges should not use their status or authority, or the status of their office, to seek, for themselves or others, an advantage or benefit to which they would not otherwise be entitled.

Fundraising

2.F.2 Judges should not allow the prestige of judicial office to be used in aid of fundraising for particular causes, however worthy. They should not solicit funds (except from judicial colleagues or from family members) or lend the prestige of their judicial office to such solicitations.

Letters of Reference

2.F.3 Judges may be called upon to provide letters of reference. It is important that the prestige of judicial office not be used to advance another person's private interests or create an impression that certain persons stand in a particular position of influence or favour with the judge. Factors for the judge to consider include whether: (i) providing the reference will not compromise the integrity of judicial office; (ii) it is the judge's personal knowledge of the individual that is called for; and (iii) the judge has an important perspective about the individual to contribute such that it would be unfair to the individual were the judge to refuse. Judges should keep in mind that letters of reference may be made public. Such letters may also be rendered inappropriate or inaccurate by a subsequent change in circumstances, thereby having the potential to reflect adversely on the judge or the judiciary. Judges may assist judicial appointment advisory committees on a confidential basis.

Statut et pouvoir judiciaire

2.F.1 Les juges ne devraient pas utiliser leur statut ou leur pouvoir, ou le prestige de leur fonction, pour rechercher un avantage ou un bénéfice, pour eux-mêmes ou pour autrui, qui ne pourrait être obtenu autrement.

Collecte de fonds

2.F.2 Les juges ne devraient pas permettre que le prestige de la fonction judiciaire contribue à la collecte de fonds pour des causes particulières, si méritoires soient-elles. Ils ne devraient pas recueillir de dons (sauf auprès de collègues juges ou auprès de membres de leur famille), ni associer le prestige de leur fonction à de telles collectes.

Lettres de recommandation

2.F.3 On demande parfois aux juges de fournir des lettres de recommandation. Il est important que le prestige de la fonction judiciaire ne serve pas à promouvoir les intérêts privés d'un tiers ou à donner l'impression que certaines personnes jouissent auprès d'eux d'une influence ou de faveurs particulières. Les facteurs que les juges devraient prendre en considération comprennent, notamment, les suivants : (i) le fait de fournir la recommandation ne mettra pas en péril l'intégrité de la fonction judiciaire; (ii) c'est à leur connaissance de la personne concernée que l'on fait appel; et (iii) lorsqu'ils ont un point de vue important à exprimer sur la personne concernée, un refus de leur part ne serait pas équitable envers cette personne. Les juges devraient garder à l'esprit que les lettres de recommandation peuvent être rendues publiques, que leur contenu peut devenir mal adapté ou inexact par suite d'un changement de circonstances et qu'elles sont donc susceptibles de nuire à leur image ou à celle de la magistrature. Les juges peuvent aider les comités consultatifs sur la nomination des juges de manière confidentielle.

Collegial Support

2.G.1 Judges should encourage and support their judicial colleagues' observance of ethical principles. Judges may become aware of circumstances that indicate a strong likelihood of unethical conduct by a judicial colleague. In such instances, judges should act in a manner that best ensures that action is taken to preserve public confidence in the administration of justice. Depending on the circumstances, such action may include communication with the Chief Justice of the court.

Soutien collégial

2.G.1 Les juges devraient encourager leurs collègues de la magistrature à respecter les principes de déontologie et les appuyer dans cette démarche. Il peut arriver que des juges soient informés de circonstances signalant une forte probabilité que la conduite d'un juge comporte des lacunes d'ordre déontologique. Dans ces cas, les juges devraient agir de manière à s'assurer que des mesures sont prises pour préserver la confiance du public dans l'administration de la justice. Selon la situation, de telles mesures pourraient inclure la divulgation du problème au juge en chef de la cour.

III. Diligence and Competence

Statement

Judges perform their duties with diligence and competence.

Principles

A. Judges devote themselves to their judicial duties, broadly defined, which include presiding in court and making decisions, as well as those duties essential to court operations and to the administration of justice. Judges do not engage in activities incompatible with the diligent discharge of judicial duties.

B. Judges perform all judicial duties, including the delivery of reserved judgments, with punctuality and reasonable promptness, having due regard to the urgency of the matter and other special circumstances.

C. Judges maintain and enhance their knowledge, skills, sensitivity to social context and the personal qualities necessary to perform their judicial duties.

D. Judges strive to maintain their wellness to optimize the performance of judicial duties.

III. Diligence et compétence

Énoncé

Les juges exercent leurs fonctions avec diligence et compétence.

Principes

A. Les juges se consacrent à leurs fonctions judiciaires, entendues au sens large, lesquelles englobent le fait de présider les audiences et de rendre des décisions, ainsi que celles qui sont essentielles au bon fonctionnement de leur tribunal et de l'administration de la justice. Les juges s'abstiennent de toute activité incompatible avec l'exercice diligent de leurs fonctions judiciaires.

B. Les juges exercent toutes leurs fonctions judiciaires, et rendent les jugements mis en délibéré, de façon ponctuelle et avec une célérité raisonnable, compte tenu des circonstances propres à chaque affaire, y compris leur caractère urgent.

C. Les juges maintiennent et améliorent les connaissances, les compétences, la sensibilité au contexte social et les qualités personnelles qui sont nécessaires à l'exercice de leurs fonctions judiciaires.

D. Les juges s'efforcent de se maintenir en bonne santé afin d'exercer leurs fonctions judiciaires de manière optimale.

Commentary

General

3.A.1 Diligence is concerned with the performance of judicial duties in a skillful, careful, attentive and timely way.

3.A.2 Judges should exhibit diligence and competence in the performance of all their judicial duties, including adjudication, case management, pre-trial or settlement conferences and participation in court administration.

3.A.3 Section 55 of the *Judges Act*[3] provides that: "No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties". Subject to the limitations imposed by the *Judges Act* and guided by these *Ethical Principles*, judges may participate in other activities that do not detract from the performance of judicial duties or compromise their independence or impartiality.

3.A.4 Upon appointment, judges should withdraw expeditiously from professional, commercial and business activities.

3.A.5 Generally speaking, a judge is entitled to have 'passive' investments that do not constitute 'carrying on business', provided that little active management is required and there is no interference with the diligent performance of judicial duties. For these reasons, judges should undertake a careful examination of their investments.

3 *Judges Act*, RSC 1985, c J-1

Commentaires

Général

3.A.1 On entend par diligence le fait d'exercer ses fonctions judiciaires de manière compétente, prudente et attentive, de même qu'avec une célérité raisonnable.

3.A.2 Les juges devraient faire preuve de diligence et de compétence dans l'exercice de toutes leurs fonctions judiciaires, y compris les fonctions décisionnelles, la gestion d'instance, les conférences préparatoires ou de règlement et la participation à l'administration de la justice.

3.A.3 L'article 55 de la *Loi sur les juges*[3] prévoit que « Les juges se consacrent à leurs fonctions judiciaires à l'exclusion de toute autre activité, qu'elle soit exercée directement ou indirectement, pour leur compte ou celui d'autrui ». Sous réserve des restrictions imposées par la *Loi sur les juges* et des recommandations formulées dans les *Principes de déontologie*, les juges peuvent participer à d'autres activités qui ne nuisent pas à l'exercice de leurs fonctions judiciaires ou mettent en péril leur indépendance ou impartialité.

3.A.4 Après leur nomination, les juges devraient se retirer rapidement de leurs activités commerciales et professionnelles, ainsi que de leur intérêts d'affaires.

3.A.5 De manière générale, les juges peuvent avoir des placements « passifs » qui ne constituent pas la « poursuite d'une entreprise », exigent peu de gestion active et ne les empêchent pas d'exercer leurs fonctions judiciaires avec diligence. Pour cette raison, les juges devraient effectuer une analyse serrée de leurs placements.

3 *Loi sur les juges*, L.R.C. (1985), ch. J-1

3.A.6 On occasion, judges are asked by governments to serve on commissions, inquiries or in other public roles. In considering such a request, in addition to the limitations imposed by the *Judges Act* and the guidance provided by *Ethical Principles*, judges should consider all implications and discuss the matter with their Chief Justice to ensure that acceptance of an appointment will not unduly interfere with the effective functioning of the court. The terms of reference and other conditions such as time and resources should be examined carefully so as to assess their compatibility with the judicial function.[4]

3.A.7 Judges are uniquely placed to make a variety of contributions to the administration of justice. Subject to the limitations imposed by judicial office, judges are encouraged, for example, to take part in legal education programs for students, lawyers and judges, and in activities to make the law and the legal process more understandable and accessible to the public, such as giving lectures, participating in moot courts or through legal writing.

Timeliness

3.B.1 Judges should perform all assigned judicial duties in a timely manner.

3.A.6 Il arrive que les gouvernements demandent à des juges d'exercer des fonctions publiques, notamment au sein d'une commission ou à l'occasion d'une enquête. Avant de répondre à une telle demande, outre les restrictions imposées par la *Loi sur les juges* et les recommandations formulées dans les *Principes de déontologie*, les juges devraient prendre en considération l'ensemble des conséquences et en discuter avec leur juge en chef afin de s'assurer que l'acceptation de la charge proposée ne nuira pas indûment au bon fonctionnement du tribunal. Le mandat et d'autres facteurs tels que la durée et les ressources devraient entrer en ligne de compte lorsqu'il s'agit d'évaluer la compatibilité de la charge proposée avec les fonctions judiciaires.[4]

3.A.7 Les juges sont particulièrement bien placés pour contribuer de diverses manières à l'administration de la justice. Sous réserve des restrictions qui leur sont imposées par leur charge, les juges sont encouragés, par exemple, à prendre part à des programmes de formation juridique à l'intention des étudiants, des avocats et des juges, et à participer à des activités destinées à mieux faire comprendre le droit et la procédure judiciaire au grand public, notamment en donnant des conférences, en participant à un tribunal-école ou en rédigeant des articles ou des livres de droit.

Célérité

3.B.1 Les juges devraient exercer toutes les fonctions judiciaires qui leur sont assignées avec une célérité raisonnable.

4 Canadian Judicial Council Protocol on the Appointment of Judges to Commissions of Inquiry (2010)

4 *Conseil canadien de la magistrature, Protocole sur la nomination de juges à des commissions d'enquête (2010)*

3.B.2 The preparation of judgments is frequently difficult and time consuming. Judges are expected to produce their decisions and reasons for judgment as soon as reasonably possible, having regard to the urgency of the matter and the length or complexity of the case. In this respect, the CJC has resolved that reserved judgments should be delivered within a maximum of six months after hearings, except in special circumstances.[5] Judges must also comply with legal requirements associated with timeliness of judgments applicable in their jurisdiction.

3.B.3 While judges strive to be diligent in the performance of their judicial duties, their ability to do so may be affected by various factors, including illness, exceptionally heavy burdens of work or the inadequacy of resources supporting their work.

Professional Development[6]

3.C.1 A well-educated and informed judiciary that adheres to high standards of competence is essential to preserving public confidence.

3.C.2 Judges should have and maintain knowledge of the law. Knowledge extends not only to substantive and procedural law but also to an understanding of the impact of the law on those it affects.

3.B.2 L'élaboration d'un jugement est souvent longue et ardue. Les juges sont censés prononcer leurs jugements et les motifs qui les accompagnent dès qu'il est raisonnablement possible de le faire, compte tenu de l'urgence de l'affaire, de sa longueur ou de sa complexité. En cette matière, le Conseil a, par voie de résolution, exprimé l'avis que, sauf s'il existe des circonstances particulières, les juges qui ont mis une affaire en délibéré devraient rendre leur jugement dans les six mois qui suivent l'audience.[5] Les juges doivent aussi respecter les délais imposés par la loi dans leur juridiction, le cas échéant.

3.B.3 Bien que les juges s'efforcent d'agir avec diligence dans l'exercice de leurs fonctions judiciaires, il peut leur être difficile de le faire en raison de différents facteurs, comme la maladie, une charge de travail exceptionnellement lourde ou l'insuffisance des ressources qui appuient leur travail.

Perfectionnement professionnel[6]

3.C.1 Afin de préserver la confiance du public à l'endroit de la magistrature, il est essentiel que les juges adhèrent à des normes élevées en matière de formation et de compétence.

3.C.2 Les juges devraient connaître le droit et se tenir à jour à cet égard. Cette connaissance s'étend non seulement aux règles de fond et de procédure, mais également à leur compréhension de l'impact qu'elles ont sur les personnes touchées.

5 *Canadian Judicial Council Resolution on Reserved Judgments (1985)*
6 *Canadian Judicial Council Professional Development Policies and Guidelines (2018)*

5 *Résolution du Conseil canadien de la magistrature sur les jugements pris en délibéré (1985)*
6 *Conseil canadien de la magistrature, Politiques et lignes directrices sur le perfectionnement professionnel (2018)*

3.C.3 Judges are responsible for maintaining and enhancing their knowledge, skills and personal qualities necessary for effective judging. This important element of judicial diligence and competence involves participation in continuing professional development.

3.C.4 Professional development describes formal and informal learning activities that include education, training and private study. It also covers education on social context issues affecting the administration of justice. Social context encompasses knowledge and understanding of the realities of the lives of those who appear in court. This includes the history, heritage and laws related to Indigenous peoples, as well as matters of gender, race, ethnicity, religion, culture, sexual orientation, gender identity or expression, differing mental or physical abilities, age and socio-economic background.

3.C.5 Judges should develop and maintain proficiency with technology relevant to the nature and performance of their judicial duties.

3.C.6 As part of a judge's commitment to continuing professional development, judges should engage in self-assessment and self-development, taking responsibility for their standard of knowledge, skill and the development of personal qualities related to judicial duties.

3.C.3 Il incombe aux juges de maintenir et d'accroître les connaissances, les compétences et les qualités personnelles qui leur sont nécessaires pour bien juger. Cet important volet de la diligence et de la compétence des juges implique la participation à des programmes de perfectionnement professionnel continu.

3.C.4 Le perfectionnement professionnel s'entend des activités d'apprentissage, formelles ou informelles, qui visent l'amélioration des connaissances et des compétences et les études personnelles. Il s'étend aussi à la formation touchant le contexte social pertinent à l'administration de la justice, ce qui comprend la connaissance et la compréhension de la réalité vécue par les personnes qui comparaissent devant le tribunal, y compris l'histoire et le patrimoine des peuples autochtones, le droit relatif aux peuples autochtones, ainsi que les questions liées au genre, à la race, à l'origine ethnique, à la religion, à la culture, à l'orientation sexuelle, à l'identité ou à l'expression de genre, aux différences de capacités physiques ou mentales, à l'âge et à l'origine socio-économique.

3.C.5 Les juges devraient développer et maintenir les habiletés technologiques qui ont rapport à la nature et à l'exercice de leurs fonctions judiciaires.

3.C.6 En lien avec leur engagement envers le perfectionnement professionnel continu, les juges devraient évaluer leur niveau de connaissances et de compétences et les qualités individuelles qui leur permettent de s'acquitter de leurs fonctions judiciaires et s'engager dans un processus continu de perfectionnement professionnel.

3.C.7 To support judges' commitments to their continuing professional development, the CJC and National Judicial Institute, as well as other organizations, have developed relevant, comprehensive, quality educational programs. Judges should participate in these programs in their continuing commitment to acquire, maintain and strengthen their judicial knowledge and skills.

3.C.8 Consistent with their judicial duties, judges are encouraged to take advantage of opportunities to engage with and learn from the wider public, including communities with which the judge has little or no life experience.

Wellness

3.D.1 While judges should exhibit diligence in the performance of their judicial duties, the importance of judges' responsibilities to their families is also recognized.

3.D.2 Judges should set aside sufficient time and make a commitment to the maintenance of physical and mental wellness, and take advantage of judicial assistance programs as appropriate.[7]

3.C.7 Pour soutenir les juges dans cette démarche de perfectionnement professionnel continu, le Conseil et l'Institut national de la magistrature, de même que d'autres organismes, ont élaboré des programmes de formation pertinents, exhaustifs et de qualité. Les juges devraient participer à ces programmes afin de maintenir et d'améliorer leurs connaissances et leurs compétences judiciaires et d'en acquérir de nouvelles.

3.C.8 Lorsque cela est compatible avec leurs fonctions judiciaires, les juges sont encouragés à profiter des occasions de s'intéresser à la collectivité, notamment d'apprendre à mieux connaître les personnes issues de communautés dont l'expérience diffère de la leur.

Bien-être

3.D.1 Bien que les juges soient tenus de faire preuve de diligence dans l'exercice de leurs fonctions judiciaires, l'on reconnaît par ailleurs l'importance des responsabilités familiales des membres de la magistrature.

3.D.2 Les juges devraient réserver suffisamment de temps au maintien de leur bonne santé physique et mentale et se prévaloir, au besoin, des programmes d'aide qui leur sont offerts.[7]

7 *Judges Counselling Program – Confidential Assistance for Judges and their Families*

7 *Programme de counselling destiné aux juges – Soutien confidentiel aux juges et à leurs familles*

IV. Equality

Statement

Judges conduct themselves and the proceedings before them to ensure equality according to law.

Principles

A. Judges carry out their duties with respect for all persons, including parties, counsel, witnesses, court personnel and judicial colleagues, without discrimination or prejudice.

B. Judges refrain from discriminatory behaviour. They disassociate themselves from and disapprove of offensive or discriminatory comments or conduct by court staff, counsel or any other person involved in judicial proceedings.

C. Judges are sensitive to and are not influenced by attitudes based on stereotype, myth or prejudice. They make meaningful efforts to recognize and dissociate themselves from such attitudes.

D. Judges do not belong to any organization that engages in or countenances any form of discrimination that contravenes the law.

IV. Égalité

Énoncé

Les juges adoptent une conduite propre à assurer à tous un traitement égal conformément à la loi et ils conduisent les instances dont ils sont saisis dans ce même esprit.

Principes

A. Les juges exercent leurs fonctions en faisant preuve de respect à l'endroit de toutes les personnes, sans discrimination ni préjugés, qu'il s'agisse des parties, des avocats, des témoins, de membres du personnel de la cour ou d'autres juges.

B. Les juges s'abstiennent de comportements discriminatoires. Ils se dissocient de la conduite ou des propos offensants ou discriminatoires que pourraient avoir les membres du personnel de la cour, les avocats ou les autres personnes participant à une instance judiciaire et expriment leur désapprobation à cet égard.

C. Les juges sont sensibles aux attitudes fondées sur des stéréotypes, des mythes ou des préjugés et ne se laissent pas influencer par celles-ci. Les juges font des efforts concrets pour reconnaître ces attitudes et s'en dissocier.

D. Les juges n'adhérent à aucun organisme qui pratique ou approuve une forme quelconque de discrimination prohibée par la loi.

Commentary

General

4.A.1 The Constitution and a variety of statutes guarantee equality before and under the law and equal protection and benefit of the law without discrimination. The law's commitment to substantive equality seeks to protect members of the community from both direct discrimination and from the impact of laws and policies that, though neutral on their face, produce adverse effects, or adverse impact, discrimination. This approach to equality seeks to acknowledge the equal worth and dignity of all persons and to ensure that discrimination is prevented and rectified as it affects individuals or groups experiencing disadvantage in our society, often on a systemic or structural basis. The law's strong societal commitment places concern for equality at the core of justice according to law.

4.A.2 Equality, according to law, is fundamental to justice and is strongly linked to judicial impartiality and to public confidence in the administration of justice. Accordingly, judges should ensure that their commitment to equality is unwavering and that their conduct is such that any reasonable and informed member of the public would have confidence in the judge's respect for and commitment to equality.

Commentaires

Général

4.A.1 La Constitution et de nombreuses lois garantissent l'égalité devant la loi et sous le régime de la loi, de même que l'égalité en matière de protection et de bénéfice de la loi, sans discrimination. Cet engagement du législateur envers l'égalité réelle vise à protéger les membres de la collectivité contre la discrimination directe et contre les lois et les politiques qui, en apparence neutres, entraînent de la discrimination par suite d'un effet préjudiciable. Cette approche vise à reconnaître une même valeur à tous les êtres humains et la dignité de toutes les personnes, de manière à prévenir la discrimination, souvent systémique ou structurelle, dont sont victimes les personnes ou les groupes défavorisés de notre société et à y remédier. Cet engagement ferme pris par le législateur au nom de la société place l'égalité au cœur de la justice sous le régime de la loi.

4.A.2 Fondamentale pour la justice, l'égalité sous le régime de la loi est aussi étroitement liée à l'impartialité judiciaire et à la confiance du public dans l'administration de la justice. Par conséquent, les juges devraient être inébranlables dans leur engagement envers l'égalité et s'assurer que leur conduite est telle qu'une personne raisonnable et bien renseignée y verrait la manifestation de leur respect pour le principe d'égalité et leur engagement à l'égard de celui-ci.

Equality in Proceedings

4.B.1 Judges should avoid comments, expressions, gestures or behaviour that may reasonably be interpreted as showing insensitivity to or disrespect for anyone. Examples include inappropriate comments based on stereotypes linked to gender, race, ethnicity, religion, culture, sexual orientation, gender identity or expression, differing mental or physical abilities, age and socio-economic background, or other conduct that may create the impression that persons before the court will not be afforded equal consideration and respect. Inappropriate statements by judges, in or out of court, have the potential to call into question their commitment to equality and their ability to be impartial.

4.B.2 Judges should avoid engaging in activities on social media that could reasonably reflect negatively on their commitment to equality.

4.B.3 In proceedings before them, judges should intervene when confronted with discriminatory comments or behaviour. The principle of equality does not, however, require that proper advocacy or admissible testimony be curtailed where, for example, matters of gender, race or other similar factors are properly before the court. The adversarial system gives the parties and their counsel considerable leeway, and the relevance and importance of evidence may be difficult to assess accurately as it is being presented. Judges are expected to listen impartially, but, when necessary, should assert control over the proceeding and act with appropriate firmness to maintain an atmosphere of dignity, equality and order in the courtroom. Judges should be alive to the issues before the court and, where appropriate, seek clarification and provide balanced rulings on the relevance of a given line of questioning.

L'égalité dans le processus judiciaire

4.B.1 Les juges devraient éviter les observations, les expressions, les gestes ou les comportements qui pourraient être raisonnablement interprétés comme un manque de sensibilité ou de respect à l'égard d'une autre personne. En sont des exemples les remarques inappropriées fondées sur des stéréotypes liés au genre, à la race, à l'origine ethnique, à la religion, à la culture, à l'orientation sexuelle, à l'identité ou à l'expression de genre, aux différences de capacités physiques ou mentales, à l'âge, et à l'origine socio-économique, et toute autre conduite qui pourrait laisser entendre que des personnes comparaissant devant le tribunal ne seront pas traitées de façon égale et respectueuse. Les commentaires inappropriés formulés par les juges, en salle d'audience ou ailleurs, peuvent soulever un doute quant à leur engagement envers l'égalité, ou quant à leur impartialité.

4.B.2 Les juges devraient éviter d'avoir, sur les réseaux sociaux, des activités qui sont raisonnablement susceptibles de discréditer leur engagement envers le principe d'égalité.

4.B.3 Dans le cadre des affaires dont ils sont saisis, les juges devraient intervenir lorsqu'ils font face à des propos ou à une conduite discriminatoires. Le principe d'égalité n'implique pas, cependant, que l'on doive interdire la défense légitime d'idées, ou empêcher la présentation de témoignages par ailleurs admissibles, lorsque, par exemple, des questions de genre, de race ou d'autres facteurs semblables sont légitimement soulevés devant la cour. Le système contradictoire donne beaucoup de latitude aux parties et à leurs avocats, et il peut être difficile d'évaluer avec justesse la pertinence et l'importance de la preuve au moment de sa présentation. Les juges sont censés écouter le débat en toute impartialité, mais devraient, si nécessaire, le contrôler fermement et faire preuve de toute la rigueur voulue pour maintenir un climat de dignité, d'égalité et d'ordre dans la salle d'audience. Les juges devraient être sensibles aux questions qui sont devant le tribunal et, lorsque cela est utile, obtenir des précisions sur la pertinence des questions posées par les avocats et rendre des décisions équilibrées sur celles-ci.

4.B.4 Judges should not permit court staff or others subject to their authority or control to engage in conduct that may: show disrespect toward others; constitute discrimination; or reasonably reflect negatively on their commitment to equality.

Avoidance of Stereotypes

4.C.1 Judges do not make assumptions based on general characterizations or attach labels to people that invite stereotypical assumptions about their behaviour or characteristics. Stereotypes are simplistic mental short cuts that generate misleading perceptions and cause mistakes and errors in fact and in law.

4.C.2 Reliance on stereotypes may arise for different reasons, often unintentionally. Judges may not properly appreciate that their reasoning is linked to stereotypical thinking. A judge may be unfamiliar with cultural traditions that would, if known, provide a greater understanding of a party's or a witness's appearance, mannerisms or behaviour.

4.C.3 Judges should educate themselves on the extent to which assumptions rest on stereotypical thinking and should become and remain informed about changing attitudes and values. They should take up opportunities to engage with cultures and communities that are different from their own life experiences to expand their knowledge and understanding. In doing this, judges should take care that these efforts enhance and do not detract from their independence and impartiality. In addition, judges should take advantage of educational opportunities and self-study that will assist them in this regard.

4.B.4 Les juges ne devraient pas laisser le personnel de la cour ou d'autres personnes agissant sous leur autorité ou leur contrôle manquer de respect à autrui, ou adopter des comportements qui peuvent constituer de la discrimination ou qui sont raisonnablement susceptibles de discréditer leur engagement envers le principe d'égalité.

La prévention des stéréotypes

4.C.1 Les juges s'abstiennent de formuler des hypothèses fondées sur des caractérisations générales et d'accoler des étiquettes susceptibles d'encourager la formulation d'hypothèses stéréotypées au sujet du comportement ou des caractéristiques de certaines personnes. Les stéréotypes sont des raccourcis dans le raisonnement qui nourrissent des perceptions trompeuses et conduisent à des erreurs de fait ou de droit.

4.C.2 Le recours aux stéréotypes peut résulter d'un ensemble de causes et n'est souvent pas intentionnel. Il est possible que des juges ne soient pas conscients que leur raisonnement est relié à un stéréotype. Il peut aussi arriver que des juges ne connaissent pas certaines traditions culturelles qui, s'ils les connaissaient, leur permettraient de mieux comprendre la façon de se présenter, d'agir et de se comporter d'une partie ou d'un témoin.

4.C.3 Les juges devraient être sensibilisés au fait que les hypothèses peuvent reposer sur des stéréotypes et prendre les moyens appropriés pour demeurer au fait des changements d'attitudes et de valeurs. Ils devraient s'intéresser aux cultures et aux communautés qui diffèrent de celles qu'ils côtoient de par leur expérience de vie, afin d'élargir leurs connaissances et leur compréhension. Toutefois, les juges devraient s'assurer que les efforts déployés en ce sens renforcent leur indépendance et leur impartialité plutôt que de leur nuire. De plus, les juges devraient profiter des activités de formation et des lectures qui permettent d'en apprendre plus sur ces questions.

Association with Discriminatory Organizations

4.D.1 Judges should conduct their personal lives honourably and in ways that would not reasonably be perceived as an endorsement of any invidious form of discrimination. Judges should avoid associations with organizations that engage in or countenance discrimination contrary to law. A judge's membership in such an organization has the potential to call into question the judge's commitment to equality and may erode public confidence in the judiciary. Judges should also be sensitive to the fact that some organizations' activities, policies and public positions, though not unlawful, may still be offensive to legitimate expectations of equality.

4.D.2 Neither the practice of religion nor membership in a religious organization is inconsistent with *Ethical Principles*.

Association avec des organismes ayant des pratiques discriminatoires

4.D.1 Les juges devraient se conduire de manière honorable dans leur vie personnelle et faire en sorte que leur comportement ne puisse donner à raisonnablement penser qu'ils appuient une quelconque forme de discrimination préjudiciable. Par conséquent, les juges devraient éviter toute association avec un organisme qui pratique ou approuve une forme de discrimination prohibée par la loi. L'adhésion à un tel organisme est susceptible de remettre en cause l'engagement des juges envers le principe d'égalité et de miner la confiance du public à l'endroit de la magistrature. Les juges devraient aussi être sensibles au fait que l'activité et les politiques de certains organismes ainsi que les opinions qu'ils expriment, quoique licites, peuvent porter atteinte aux attentes légitimes en matière d'égalité.

4.D.2 Ni la pratique d'une religion, ni l'appartenance à un organisme religieux ne sont incompatibles avec les *Principes de déontologie*.

V. Impartiality

Statement

Judges are impartial and appear to be impartial in the performance of their judicial duties.

Principles

A. Judges ensure that their conduct at all times maintains and enhances confidence in their impartiality and that of the judiciary.

B. Judges avoid conduct which could reasonably cause others to question their impartiality.

C. Judges conduct their affairs so as to avoid real or apparent conflicts of interest between their private interests and their judicial duties.

D. While preserving their impartiality, judges make meaningful efforts to inform and educate the public and the legal profession regarding the law, judicial independence, and the role of judges and the courts in the administration of justice.

E. Judges contemplating retirement and former judges avoid conduct that is likely to bring the judicial office into disrepute or put at risk public expectations of judicial independence, integrity and impartiality.

V. Impartialité

Énoncé

Les juges sont impartiaux et donnent l'apparence d'impartialité dans l'exercice de leurs fonctions judiciaires.

Principes

A. Les juges veillent en toutes circonstances à ce que leur conduite entretienne et accroisse la confiance dans leur impartialité et celle de la magistrature en général.

B. Les juges évitent les comportements pouvant raisonnablement amener autrui à mettre en doute leur impartialité.

C. Les juges mènent leurs affaires de manière à éviter tout conflit réel ou apparent entre leurs intérêts personnels et leurs fonctions judiciaires.

D. Tout en veillant à préserver leur impartialité, les juges s'efforcent d'éduquer le public et la profession juridique et de les informer sur le droit, l'indépendance judiciaire et le rôle des juges et des tribunaux dans l'administration de la justice.

E. Les juges qui songent à quitter ou qui ont quitté la magistrature évitent toute conduite susceptible de jeter le discrédit sur la fonction judiciaire ou de miner les attentes du public quant à l'indépendance, à l'intégrité et à l'impartialité de la magistrature.

Commentary

General

5.A.1 For centuries, adjudication by impartial and independent judges has been recognized as fundamental to the rule of law. Impartiality is a fundamental qualification of a judge and a core attribute of the judiciary.

5.A.2 Impartiality requires not only the absence of bias and prejudgment, but also the absence of any appearance of partiality. This dual aspect of impartiality is captured in the oft-repeated words that justice must not only be done, but manifestly be seen to be done. The test is whether a reasonable and informed person with knowledge of all relevant circumstances, viewing the matter realistically and practically, would apprehend a lack of impartiality in the judge.

5.A.3 While there is a close association between the judge's ethical and legal duties of impartiality, *Ethical Principles* is not intended to deal with the law relating to judicial disqualification or recusal.

Judicial Duties

5.A.4 Judges have a fundamental obligation to be and to appear to be impartial. This obligation of impartiality does not presuppose that judges are free of life experiences, sympathies or opinions. Rather, it requires judges to be sensitive to their own biases and to consider different points of view with an open mind. Judges should interact with all parties fairly and even-handedly.

Commentaires

Général

5.A.1 Depuis des siècles, on reconnaît que la décision des litiges par des juges impartiaux et indépendants est essentielle à la primauté du droit. L'impartialité est l'une des qualités fondamentales des juges et un attribut central de la fonction judiciaire.

5.A.2 L'impartialité requiert non seulement l'absence de préjugés et de partis pris, mais également l'absence d'apparence de partialité. Ces deux volets de l'impartialité sont bien résumés dans la maxime selon laquelle non seulement justice doit être rendue, mais encore elle doit paraître avoir été rendue. Le critère applicable consiste à se demander si une personne raisonnable et bien renseignée, qui serait au courant de toutes les circonstances pertinentes et étudierait la question de façon réaliste et pratique, craindrait que le juge ne soit pas impartial.

5.A.3 Bien qu'il existe des liens étroits entre les devoirs éthiques et juridiques des juges en matière d'impartialité, les *Principes de déontologie* ne sont pas destinés à traiter du droit relatif à la récusation des juges.

Fonctions judiciaires

5.A.4 Les juges ont l'obligation fondamentale d'être et de paraître impartiaux. L'obligation d'impartialité ne présuppose pas que les juges n'ont aucune expérience personnelle, sympathie ou opinion. Elle exige plutôt que les juges soient conscients de leurs propres préjugés et accueillent différents points de vue en gardant un esprit ouvert. Les juges devraient traiter toutes les parties avec équité et sur un pied d'égalité.

5.A.5 Judges should avoid using words or conduct, in and out of court, that might give rise to a reasonable perception of bias. The expectations of litigants are high. Disappointed litigants will sometimes perceive bias when neither actual bias nor a reasonable apprehension of bias exists. A judge's remarks or tone may diminish the judge's perceived impartiality. An unjustified reprimand of counsel, an improper remark about a litigant or a witness or a statement evidencing prejudgment or intemperate and impatient behaviour may undermine the appearance of impartiality. Casual conversations or familiarity with counsel or participants in the proceedings may be perceived by others as a form of exclusion. Therefore, judges should ensure that their comments or conduct do not provide reasonable grounds for a perception of bias.

5.A.6 While judges may wish to signal support for causes or viewpoints through words or in the wearing or display of symbols of support, even if they seem innocuous, such communications may be interpreted as reflecting a lack of impartiality or the use of the position of the judge to make a political or other statement. For these reasons, judges should avoid statements or visible symbols of support, particularly in the context of court proceedings.

5.A.7 Judges should ensure that proceedings are conducted in an orderly and efficient manner and that the court process is not abused. An appropriate measure of firmness may be necessary to achieve this end. In the presence of challenging or vexatious litigants, judges should be firm, decisive and at the same time respectful to ensure that litigants' rights are protected.

5.A.5 Les juges devraient éviter de s'exprimer ou de se comporter, en salle d'audience ou ailleurs, de manière à susciter une perception raisonnable de partialité. Les attentes des parties sont élevées. Il peut arriver qu'une partie déçue perçoive l'existence d'un préjugé malgré l'absence de partialité réelle ou de crainte raisonnable de partialité. Des remarques formulées par les juges ou le ton employé pour exprimer celles-ci peuvent miner la perception d'impartialité des juges. Les remontrances injustifiées faites aux avocats, les remarques déplacées au sujet des parties ou des témoins, les déclarations manifestant un parti pris et les comportements immodérés et impatients peuvent saper l'apparence d'impartialité. Les conversations ou comportements empreints de familiarité avec les avocats ou les participants à l'instance peuvent être perçus par d'autres comme une forme d'exclusion. Par conséquent, les juges devraient s'assurer que leurs commentaires ou leur conduite ne donnent pas prise à une perception raisonnable de partialité.

5.A.6 Bien que des juges puissent vouloir exprimer leur appui pour certaines causes ou points de vue, les paroles ou le port d'insignes marquant cet appui, même lorsqu'ils semblent inoffensifs, peuvent être interprétés comme un manque d'impartialité ou être vus comme un moyen d'utiliser la fonction judiciaire pour faire une déclaration politique ou autre. Pour cette raison, les juges devraient éviter de tenir des propos ou de porter des insignes visibles marquant leur appui, en particulier dans le cadre du processus judiciaire.

5.A.7 Les juges devraient veiller à ce que l'instance se déroule de manière ordonnée et efficace, tout en prévenant les abus de procédure. Une certaine fermeté peut s'imposer selon les circonstances. En présence d'une partie difficile ou quérulente, les juges devraient se comporter de manière ferme et décisive, sans renoncer au respect requis pour assurer la protection des droits des parties.

5.A.8 Judges have a responsibility to promote opportunities for all persons to understand the judicial process and to meaningfully present their case, whether or not they have legal representation. Self-represented persons may sometime be uninformed about their rights and about the consequences of the options they choose. Judges should take appropriate and reasonable measures to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.[8] Such measures are consistent with impartiality provided that they are fair to other parties.

5.A.9 Judges should be particularly attuned to the perception of bias that might arise in circumstances where one or more parties are self-represented. Appropriate assistance to a self-represented litigant may be perceived by the opposing, represented party as manifesting bias. Accommodations extended to self-represented litigants should not extend to the point where they become unfair to the other party. Clear and transparent communication with all parties is necessary to avoid unwarranted apprehension of bias.

5.A.8 Les juges ont la responsabilité de s'assurer que toute personne, qu'elle soit représentée ou non représentée, ait la possibilité de comprendre le processus judiciaire et de faire valoir sa position. Les personnes non représentées peuvent parfois être mal informées de leurs droits et des conséquences de leurs choix. Les juges devraient prendre des moyens appropriés et raisonnables afin d'établir un processus équitable et impartial et d'empêcher que les personnes non représentées ne soient pas injustement désavantagées.[8] De tels moyens se concilient avec l'impartialité pour autant qu'ils soient équitables envers toutes les parties.

5.A.9 Les juges devraient être particulièrement sensibles à la possibilité d'une perception de partialité dans les situations où l'une des parties ou plusieurs d'entre elles ne sont pas représentées. L'assistance congruente que les juges apportent à une partie non représentée peut être perçue par la partie adverse représentée par avocat comme la manifestation d'un parti pris. Les accommodements accordés aux parties non représentées ne devraient pas rendre le processus injuste pour les parties représentées. Il est nécessaire de communiquer de façon claire et transparente avec toutes les parties afin de dissiper les craintes injustifiées de partialité.

8 *Canadian Judicial Council Statement of Principles on Self-represented Litigants and Accused Persons (2006)*

8 *Conseil canadien de la magistrature, Énoncé de principes concernant les plaideurs et les accusés non représentés par un avocat (2006)*

5.A.10 An expanding aspect of judicial responsibility for judges is their work in settlement conferences and the judicial mediation of disputes. Direct engagement with litigants and counsel in these non-adjudicative settings often takes judges outside the confines of their traditional roles and presents additional challenges in relation to impartiality. Given the variety of settings in which this work takes place, it is not possible to articulate bright line rules to provide guidance in every situation. However, there are values and boundaries which judges should respect in these settings. When engaging in non-adjudicative dispute resolution, judges should ensure that: (i) the process and outcomes are acceptable to the parties themselves; (ii) the outcomes are the subject of informed decision-making by the parties; (iii) the process is transparent to the parties; (iv) the outcomes are not coercive, unconscionable, or illegal; and (v) the legitimate interests of known non-involved third parties are considered. Transparency in this context means openness in the broadest sense and is not intended to discourage caucusing in appropriate circumstances.

Restraints

5.B.1 On appointment, judges do not surrender all of the rights and freedoms enjoyed by everyone else in Canada. Nevertheless, the office of the judge imposes restraints that are necessary to maintain public confidence in the impartiality and independence of the judiciary. In defining the appropriate degree of public involvement by a judge there are two fundamental considerations. The first is whether the involvement could reasonably undermine confidence in the judge's impartiality. The second is whether such involvement may expose the judge to criticism or be inconsistent with the dignity and integrity of judicial office.

5.A.10 Les responsabilités des juges s'étendent de plus en plus aux modes alternatifs de règlement des litiges et à la médiation judiciaire. Les interactions directes entre juges, parties et avocats inhérentes à ces processus non juridictionnels s'inscrivent souvent en dehors des cadres traditionnels de l'activité judiciaire et soulèvent des enjeux additionnels en matière d'impartialité. Comme ces cadres de travail varient grandement, il n'est pas possible d'établir des règles claires et précises susceptibles d'apporter des solutions à toutes les éventualités. Néanmoins, les juges devraient respecter certaines valeurs et limites dans ces situations et notamment s'assurer de ce qui suit : (i) le processus et les résultats qui en découleront sont acceptables pour les parties elles-mêmes; (ii) les parties ont consenti en toute connaissance de cause aux résultats; (iii) le processus est transparent pour les parties; (iv) les résultats ne sont pas coercitifs, iniques ou contraires à la loi; et (v) les intérêts légitimes des tiers connus qui ne sont pas parties au litige sont pris en compte. Dans ce contexte, la transparence s'entend d'une ouverture, au sens large, et n'est pas incompatible avec la possibilité de rencontres individuelles, le cas échéant.

Restrictions

5.B.1 Les juges ne renoncent pas, du fait de leur nomination, à l'ensemble des droits et libertés dont jouit chaque personne au Canada. Cependant, la charge de juge impose des contraintes qui sont nécessaires au maintien de la confiance du public dans l'impartialité et l'indépendance de la magistrature. Deux questions fondamentales entrent en ligne de compte lorsqu'il s'agit de déterminer le niveau d'intervention publique qui convient à un membre de la magistrature. La première consiste à savoir si l'intervention pourrait raisonnablement saper la confiance dans l'impartialité du juge et la deuxième, si cette intervention est susceptible d'exposer le juge aux critiques ou est par ailleurs incompatible avec la dignité et l'intégrité de la fonction judiciaire.

Political Activity

5.B.2 Judges must cease all partisan political activity upon the assumption of judicial office. Moreover, judges refrain from conduct that, in the mind of a reasonable and informed person, could give rise to the appearance that the judge is engaged in political activity. For this reason, judges must refrain from: (i) membership in political parties and political fundraising; (ii) attendance at political gatherings and political fundraising events; (iii) contributing financially or otherwise to political parties or campaigns; (iv) signing petitions to influence a political decision; and (v) taking part publicly in controversial political discussions, except in respect of matters directly affecting the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice.

5.B.3 Like partisan political activity, out of court statements by a judge concerning issues of public controversy may undermine impartiality. They are also likely to lead to public confusion about the nature of the relationship between the judiciary on the one hand and the executive and legislative branches of government on the other. Partisan actions and political statements by definition involve publicly choosing one side of a debate over another. In order to preserve their impartiality, judges should refrain from any political action or involvement. The perception of partiality will be reinforced if the judge's activities attract criticism and/or rebuttal. This in turn tends to undermine public confidence in the judiciary. Judges should not use the privileged platform of judicial office to enter the public arena because it puts at risk public confidence in the impartiality and the independence of the judiciary.

Activités politiques

5.B.2 Les juges doivent se retirer de toute activité politique de nature partisane dès leur entrée en fonction. De plus, les juges évitent toute conduite susceptible de donner à une personne raisonnable et bien renseignée l'impression qu'ils s'adonnent à une activité politique. Pour cette raison, les juges doivent éviter de faire ce qui suit : (i) adhérer à des partis politiques et à des campagnes de financement politique; (ii) participer à des rassemblements politiques ou à des activités de financement politique; (iii) verser des contributions financières à des partis ou à des campagnes politiques ou y contribuer d'autres manières; (iv) signer des pétitions visant à influencer une décision politique; et (v) intervenir publiquement dans des débats politiques, sauf sur des questions concernant directement le fonctionnement des tribunaux, l'indépendance de la magistrature ou des éléments fondamentaux de l'administration de la justice.

5.B.3 Tout comme les activités politiques de nature partisane, les propos hors du cadre judiciaire sur des questions soulevant une controverse publique peuvent miner l'image d'impartialité du juge. En outre, ils risquent de créer de la confusion auprès du public en ce qui concerne les rapports entre le pouvoir judiciaire, d'une part, et les pouvoirs exécutif et législatif, d'autre part. Par définition, les activités partisanes et les déclarations politiques impliquent une prise de position publique à l'égard d'une question particulière. Afin de préserver leur impartialité, les juges devraient éviter toute activité ou participation politique. La perception de partialité sera plus aiguë si les activités auxquelles s'adonnent les juges font l'objet de critiques ou de contestations. Ces réactions, à leur tour, tendront à miner la confiance du public à l'endroit de la magistrature. Les juges ne devraient pas utiliser le prestige associé à la fonction judiciaire comme levier dans l'arène publique, car, ce faisant, ils mettent en péril la confiance du public dans l'impartialité et l'indépendance de la magistrature.

5.B.4 Chief Justices and other judges with administrative responsibilities will necessarily have contact and interaction with the executive branch of government, including attorneys general, deputy attorneys general and court services officials. These engagements are appropriate provided that the interactions are not partisan in nature.

5.B.5 If a member of a judge's family is politically active, the judge should recognize that such activities of close family members may adversely affect the public perception of the judge's impartiality. In cases where such public perceptions may arise, a judge should consider whether recusal is the appropriate remedy in a given case.

Public Statements

5.B.6 There are limited circumstances in which judges may properly speak out, though with restraint, about a matter that is publicly controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice. Chief Justices have particular responsibilities in this regard. Judges should follow any protocol established by their Court on these matters.

5.B.7 If their personal integrity has been called into question in a public context, judges should seek guidance from their Chief Justice and, if appropriate, other trusted advisors.

5.B.4 Les juges en chef et les autres juges qui exercent des responsabilités administratives sont appelés à communiquer et à interagir avec des membres du pouvoir exécutif, dont les procureurs généraux, les sous-ministres ou sous-procureurs généraux et les administrateurs des tribunaux. Ces interactions sont appropriées, en autant qu'elles n'ont pas de dimension partisane.

5.B.5 Les juges devraient être conscients que les activités politiques d'un membre de leur famille immédiate peuvent compromettre leur image d'impartialité auprès du public. Dans les cas où la perception du public pourrait être compromise dans une affaire particulière dont ils sont saisis, les juges devraient considérer s'il y a lieu de se récuser.

Déclarations publiques

5.B.6 Il existe des circonstances où les juges, quoique avec retenue, peuvent exprimer publiquement leur avis sur un sujet controversé, notamment lorsque ce dernier concerne directement le fonctionnement des tribunaux, l'indépendance de la magistrature ou des aspects fondamentaux de l'administration de la justice. Les juges en chef ont une responsabilité particulière à cet égard. Les juges devraient se conformer aux protocoles établis par leur propre cour, le cas échéant.

5.B.7 Dans le cas où leur intégrité personnelle serait publiquement mise en doute, les juges devraient obtenir l'avis de leur juge en chef et, au besoin, d'autres conseillers dignes de confiance.

Judicial Promotion and Opportunities

5.B.8 Leadership positions in courts, opportunities for elevation to a higher court and other opportunities for judges arise from time to time. These decisions are ultimately made by the executive branch of government. Judges are entitled to seek these positions and advance their qualifications, but should exercise reserve in their communication of interest, or the communication of interest by others on their behalf, so as to avoid any conduct that would compromise their impartiality or undermine the integrity of the appointment process.

Public Engagement, Civic and Charitable Activity

5.B.9 Many judges wish to become or continue to be active in various forms of public service to their communities. This involvement benefits the community and judges but also carries risks.

5.B.10 On one hand, there are likely to be beneficial aspects of the judge being active in appropriate forms of public service. Judges administer the law on behalf of the community and are appointed to serve the public. Therefore, unnecessary isolation from the community does not promote wise or just judgments. In order to undertake their work with competence and diligence, and in ways that are consistent with judicial duties, judges are encouraged to take up opportunities to engage with and learn from the wider public, including communities with which they have little or no life experience.

Promotion et autres opportunités pour les juges

5.B.8 Il arrive que des juges soient pressentis pour des fonctions de leadership au sein d'une cour ou en vue de leur accession à une cour de juridiction supérieure, ou que d'autres occasions se présentent à eux. Les décisions finales en cette matière relèvent du pouvoir exécutif. Les juges sont en droit de soumettre leur candidature à ces postes et de faire valoir leurs compétences, mais devraient faire preuve de réserve lorsqu'il s'agit d'exprimer leur intérêt soit directement, soit par l'entremise d'une autre personne, afin d'éviter toute conduite qui mettrait en péril leur impartialité ou minerait l'intégrité du processus de nomination.

Participation à la vie publique et activités sociales ou communautaires

5.B.9 Nombre de juges souhaitent s'impliquer dans des activités sociales ou communautaires ou maintenir leur engagement à cet égard. Cet engagement est bénéfique tant pour la société que pour les juges, mais comporte également des risques.

5.B.10 D'une part, la participation des juges à diverses activités sociales ou communautaires appropriées est sans doute avantageuse. Les juges appliquent la loi au nom de la société et sont nommés pour servir la population. Par conséquent, leur isolement excessif du reste de la collectivité est peu propice à des décisions justes et judicieuses. Afin qu'ils exercent leurs fonctions avec compétence et diligence, dans le respect des devoirs de leur charge, les juges sont encouragés à saisir les occasions qui leur permettent d'interagir avec le public et de mieux comprendre leur société, y compris les groupes qu'ils connaissent peu ou pas de par leur expérience personnelle.

5.B.11 On the other hand, the judge's civic involvement may, in some cases, jeopardize the perception of impartiality. Judges should exercise caution when considering their involvement in community activities and be attentive to the limits that judicial appointment places upon their freedom to undertake these activities. Community involvement on the part of the judge should be assessed in light of the form of public service under consideration, the activities and goals of the organization, the role to be played by the judge within it, the risk that the organization may become engaged in litigation and any other relevant factor.

5.B.12 Generally speaking, judges should refrain from membership in or association with groups or organizations or participation in public discussion which, in the mind of a reasonable and informed person, would undermine confidence in a judge's impartiality with respect to issues that could come before the courts. In service to their communities, judges must not give legal or investment advice, and should avoid involvement in causes or organizations that are likely to be engaged in litigation. Judges should use even greater caution in considering whether to become officers or directors of community organizations.

5.B.13 While, in the past, Canadian judges have served in leadership positions with organizations such as universities and religious bodies, this service is potentially problematic. The risk that such organizations will become involved in litigation or be the subject of public controversy creates the possibility that the judge will be placed in an awkward position, both in relation to public confidence in the judge's impartiality and in the judiciary as a whole. While judges may consider accepting such positions, they should reflect on issues of perceived or actual conflict before doing so, all with a view to determining whether the role can be structured in such a way so as to avoid conflicts and appearances of conflict.

5.B.11 D'autre part, l'engagement social et communautaire des juges peut parfois compromettre leur image d'impartialité. Les juges devraient faire preuve de prudence lorsqu'ils envisagent de participer à des activités sociales ou communautaires et être sensibles au fait que l'accession à la magistrature leur impose des limites à cet égard. L'opportunité d'une participation devrait être appréciée en fonction du type de service public envisagé, des activités et objectifs de l'organisme, du rôle que le juge serait appelé à y jouer, du risque que l'organisme soit partie à un litige et de tout autre facteur pertinent.

5.B.12 En général, les juges devraient s'abstenir d'adhérer ou de s'associer à un groupement ou à un organisme, ou de participer à un débat public, lorsque, du point de vue d'une personne raisonnable et bien renseignée, cette adhésion ou cette participation serait susceptible de miner la confiance dans l'impartialité des juges relativement à des questions susceptibles d'être soumises aux tribunaux. Dans le cadre de leurs activités sociales ou communautaires, les juges doivent s'abstenir de donner des conseils juridiques ou des conseils en matière de placements et devraient éviter de participer à des causes ou à des organisations susceptibles d'être impliquées dans un litige. Les juges ne devraient envisager d'occuper des postes de dirigeant ou d'administrateur d'un organisme social ou communautaire qu'avec la plus grande prudence.

5.B.13 Bien que certains juges du Canada aient dans le passé occupé des fonctions de leadership au sein d'entités telles que des universités ou des organisations religieuses, l'exercice de telles fonctions peut soulever des difficultés. Il existe un risque que ces entités soient parties à un litige, ou qu'elles fassent l'objet d'une controverse publique, ce qui pourrait placer le juge dans une situation délicate du point de vue de la confiance du public, tant à l'égard de son impartialité qu'à l'endroit de la magistrature dans son ensemble. Avant d'accepter de telles fonctions, les juges devraient considérer les risques de conflit réel ou perçu et s'il est possible d'établir une structure permettant d'éviter les conflits et les apparences de conflit.

5.B.14 Involvement with a community organization that at one time was appropriate may become inappropriate. Judges should re-evaluate these associations in light of changing circumstances.

Social Media

5.B.15 Social media activities are subject to the overarching principles that guide judicial behaviour. Judges should be aware of how their activities on social media may reflect on themselves and upon the judiciary and should be attentive to the potential implications for their ability to perform their judicial role. Judges should also be attentive to and may wish to inform family members of the ways in which their social media activities could reflect adversely on the judge.

5.B.16 Communication by social media is more public and more permanent than many other forms of communication. It enables messages to be re-transmitted beyond the originators' control and without their consent. Comments or images intended for a limited audience can be shared, almost instantaneously, with a vast audience and may create an adverse reaction far beyond what one may have considered possible. Social media can also create greater opportunities for inappropriate communications to judges from others.

5.B.14 La participation à un organisme social ou communautaire qui est jugée appropriée à un moment donné peut cesser de l'être par la suite. Les juges devraient réévaluer leurs associations en fonction des changements de circonstances.

Médias sociaux

5.B.15 Les communications dans les médias sociaux sont assujetties aux principes fondamentaux qui guident la conduite des juges. Les juges devraient être conscients du fait que ces communications peuvent ternir leur réputation et celle de la magistrature et se répercuter sur leur capacité d'exercer leurs fonctions judiciaires. Par ailleurs, les juges devraient être conscients que les communications des membres de leur famille pourraient également se répercuter défavorablement sur eux; il pourrait y avoir lieu de les en informer.

5.B.16 Les communications affichées dans les médias sociaux peuvent rarement être effacées et n'ont pas vraiment de caractère privé. Elles peuvent facilement être disséminées sans le consentement de leur auteur et échapper à son contrôle. Les commentaires et les images destinés à être partagés dans un cercle fermé peuvent être rediffusés, parfois instantanément, à un vaste auditoire et provoquer une réaction défavorable qui dépasse largement ce qu'on aurait imaginé. Les médias sociaux ouvrent aussi des avenues additionnelles permettant à un membre du public de transmettre des communications inappropriées à un membre de la magistrature.

5.B.17 Judges' communications and associations with others are commonly used as a basis for claims of lack of impartiality. Judges should be vigilant in minimizing reasonable apprehensions of bias arising from these communications and associations. This is all the more important, and difficult, in the age of social media. Judges who choose to use social media should exercise great caution in their communications and associations within these networks, including expressions of support or disapproval. This includes judges informing themselves about the functioning, and the application, of security and privacy settings appropriate to their use of social media.

5.B.18 In a digital world, out-of-court information is much more accessible and the acquisition of such information by a judge is more readily discoverable. Accordingly, judges should be vigilant to avoid inappropriately acquiring or receiving out-of-court information related to the parties, witnesses or issues under consideration in matters before them. Fairness issues may need to be considered by the judge should this happen.

Gifts and Remuneration

5.B.19 Judges must not accept gifts from litigants, lawyers, law firms or any other person in contexts that give rise to a reasonable apprehension of bias. This does not prevent judges from accepting gifts of nominal value in appreciation for having spoken at or contributed to events or conferences, or have their reasonable expenses reimbursed. Such gifts are acceptable, provided that they do not represent remuneration and their acceptance would not create, in the mind of a reasonable and informed person, a perception of partiality.

5.B.17 Les allégations touchant le manque d'impartialité sont souvent fondées sur des propos des juges ou sur le fait qu'ils entretiennent des rapports avec certaines personnes. Les juges devraient éviter que de telles communications ou de tels rapports donnent prise à une crainte raisonnable quant à leur impartialité. Les médias sociaux compliquent les choses à cet égard. Les juges qui choisissent d'y être présents devraient faire preuve d'une grande prudence dans leurs communications, y compris en ce qui concerne l'usage de symboles d'approbation ou de désaccord. Ils devraient également se renseigner sur le fonctionnement et l'application des paramètres de sécurité et de protection de la vie privée convenant à leur utilisation des médias sociaux.

5.B.18 À l'ère numérique, il est beaucoup plus facile d'accéder à des renseignements extrajudiciaires et de laisser des traces en le faisant. Par conséquent, les juges devraient veiller à éviter d'obtenir ou de recevoir de façon inappropriée des renseignements extrajudiciaires relatifs aux parties, aux témoins ou aux questions dont ils sont saisis. Une telle situation, si elle survenait, pourrait soulever des questions d'équité que le juge pourrait devoir prendre en considération.

Cadeaux et rémunération

5.B.19 Les juges ne doivent pas accepter de cadeaux de la part des parties à un litige, d'avocats ou de leur cabinet ou de toute autre personne lorsque cela est susceptible de susciter une crainte raisonnable de partialité. Cela ne signifie pas qu'il est interdit aux juges d'accepter des cadeaux de valeur symbolique pour leur contribution à la tenue d'événements ou de conférences ou d'obtenir le remboursement de frais raisonnables. De tels cadeaux sont acceptables, en autant qu'ils ne constituent pas une rémunération et que le fait de les accepter ne susciterait pas chez une personne raisonnable et bien renseignée une perception de partialité.

Speeches and Conferences

5.B.20 It is common for judges to be asked to speak in public. Judges' public engagement aimed at educating others is a benefit to the judiciary and the public they serve. Judges are encouraged to attend events as speakers, both to contribute their knowledge and to undertake their own professional development. However, speaking in public carries risks to the public perception of the judge's impartiality and must be approached with care. Judges should give careful consideration to a range of factors when deciding whether to accept a speaking invitation and, if so, what the judge may properly address in a speech. These include: (i) the organization inviting the judge to speak; (ii) the anticipated audience; (iii) the topic or general theme to be addressed in the speech; (iv) the degree to which the topic relates to matters concerning the judiciary or the courts; (v) whether the topic or the judge's remarks relates to a matter of public policy or public controversy; vi) the likelihood that the speech will be reported on, recorded or made available to a broader public; and (vii) the value of the judge's remarks in informing or educating the intended audience. If judges have any doubts regarding the appropriateness of accepting a speaking engagement they should seek the advice of their Chief Justice.

Attendance at Events

5.B.21 Judges may attend social or public events, or conferences provided that such attendance does not compromise their impartiality and the nature of the event, or host, does not raise other concerns related to *Ethical Principles*.

Discours et participation à des conférences

5.B.20 Il est fréquent que des juges soient invités à prendre la parole en public. La participation des juges à des programmes éducatifs est bénéfique, tant pour la magistrature que pour le public qu'elle sert. Il est souhaitable que les juges donnent des conférences et contribuent par ce moyen à l'avancement des connaissances et à leur propre perfectionnement professionnel. Cependant, la prise de parole en public peut nuire à la perception d'impartialité des juges et devrait être abordée prudemment. Avant d'accepter une invitation à prononcer une conférence, et d'en déterminer le contenu, les juges devraient analyser avec soin un certain nombre d'éléments, dont les suivants : (i) la provenance de l'invitation, (ii) l'auditoire envisagé, (iii) le sujet ou le thème à aborder, (iv) le rapport plus ou moins étroit entre le sujet à aborder et les questions qui touchent la magistrature ou les tribunaux, (v) le rapport entre le sujet à aborder ou l'allocution du juge et des questions de politique publique ou des enjeux controversés, (vi) la probabilité que le discours soit cité dans les médias, enregistré ou autrement mis à la disposition du public et (vii) l'intérêt des propos du juge du point de vue de l'information ou de l'éducation du public. En cas de doute quant à l'opportunité d'accepter une invitation, les juges devraient consulter leur juge en chef.

Présence à des événements

5.B.21 Les juges peuvent participer à des événements sociaux ou publics ou à des congrès ou colloques, pourvu que leur présence ne mette pas en péril leur impartialité, ou que la nature de l'événement ou l'identité de l'hôte ne soulève pas de crainte au regard des *Principes de déontologie*.

5.B.22 Judges may participate in social programs at conferences provided that they are generally available to attendees or speakers and the sponsorship, nature and extent of social programs would not create, in the view of a reasonable and informed person, a perception of lack of impartiality.

5.B.23 Attendance by a judge at conferences and social events sponsored by businesses or organizations is potentially problematic. Where invited, the judge should consider the organization hosting the event, whether the invitation has also been extended to community leaders, the purpose for which the judge was invited and the potential for adverse public perception as a result of the attendance.

5.B.24 When judges are invited to attend social events associated with the law or the legal profession, or hosted by law firms, they should consider the nature of the social event, its sponsorship, the other invitees and attendees at the event, the purpose for which the judge has been invited, the existence of a previous personal relationship with the host and attendees, as well as the benefit to the judge, the judiciary and the legal profession as a result of the judge's attendance. Judges should avoid attendance at such events if a purpose of the event is to advance a commercial interest, to showcase the host's relationship with the judge, or if clients are in attendance.

5.B.22 Les juges peuvent participer au volet social de congrès ou de colloques, en autant que ces activités soient normalement accessibles aux participants ou aux conférenciers et que le commanditaire, la nature et l'étendue de ces activités sociales soient tels qu'ils ne puissent susciter chez une personne raisonnable et bien renseignée la perception d'un manque d'impartialité.

5.B.23 La participation des juges à des congrès ou colloques ou à des activités sociales qui sont commandités par des entreprises ou des organismes peut soulever des difficultés. Lorsqu'ils sont invités, les juges devraient prendre en compte la nature de l'organisme hôte, le fait que d'autres personnes en vue au sein de la collectivité ont aussi été invitées, l'intention derrière l'invitation faite aux juges et la possibilité que le public perçoive défavorablement la présence de juges à un tel événement.

5.B.24 La participation des juges à des activités sociales liées au droit ou à la profession juridique ou organisées par un cabinet d'avocats devrait aussi être évaluée en fonction de la nature de l'événement, de l'identité des commanditaires, de l'identité des autres participants ou invités, de l'intention derrière l'invitation faite aux juges, de l'existence de liens personnels antérieurs entre le juge et les hôtes ou autres invités, et du bénéfice qui résulterait de la présence du juge d'un point de vue personnel, du point de vue de la magistrature ou de celui de la profession juridique. Les juges devraient s'abstenir de participer à de telles activités si leur objet est lié à des fins commerciales, si l'événement vise à souligner l'existence d'une relation entre le juge et l'hôte ou si des clients de l'hôte sont présents.

Conflicts of Interest

5.C.1 The discussion of conflicts of interest in *Ethical Principles* is not intended to state the law relating to judicial disqualification or recusal. It is intended to provide guidance to judges as they identify and assess the circumstances in which their personal interests may be reasonably viewed by others as conflicting with their judicial duties. In assessing their ethical duties in this context, judges should remain conscious of the demands of the sound administration of justice and their duty to hear the cases assigned to them.

5.C.2 The potential for a conflict of interest arises when the personal interest of the judge (or of those close to the judge) conflicts with the judge's duty to adjudicate impartially. Judicial impartiality is concerned with impartiality in fact and in the perception of a reasonable and informed person. As a result, judges should be attentive to both actual conflicts between their self-interest and their duty of impartial adjudication, and to circumstances in which a reasonable and informed person would reasonably apprehend a conflict.

5.C.3 Conflicts of interest may arise from: a pecuniary or non-pecuniary interest in the outcome; a close family, personal or professional relationship with a litigant, counsel or witness; or the judge having expressed views evidencing bias regarding a litigant or an issue that is before the court.

Conflits d'intérêts

5.C.1 Les *Principes de déontologie* n'ont pas pour objet de traiter du droit relatif à la récusation des juges. Dans le présent document, la discussion des conflits d'intérêts vise à offrir aux juges des pistes de réflexion qui leur permettent d'identifier et d'évaluer les circonstances où leurs intérêts personnels pourraient raisonnablement être vus par d'autres comme entrant en conflit avec leurs fonctions judiciaires. Lorsqu'ils évaluent leurs obligations déontologiques dans ce cadre, les juges devraient garder à l'esprit les exigences d'une saine administration de la justice et leur devoir d'entendre les affaires qui leur sont confiées.

5.C.2 Il y a risque de conflit d'intérêts lorsque l'intérêt personnel du juge (ou de ses proches) s'oppose à son devoir de rendre la justice avec impartialité. L'impartialité judiciaire s'entend à la fois de l'impartialité réelle et de l'impartialité apparente, selon la perception d'une personne raisonnable et bien renseignée. Par conséquent, les juges doivent être sensibles non seulement aux conflits réels entre leur intérêt personnel et leur devoir de rendre la justice de manière impartiale, mais également aux situations dans lesquelles une personne raisonnable et bien renseignée éprouverait une crainte raisonnable de conflit d'intérêts.

5.C.3 Un conflit d'intérêts peut survenir lorsque les juges ont un intérêt patrimonial ou extrapatrimonial dans l'issue d'un procès; une relation de parenté, une amitié proche ou une relation professionnelle avec une partie, un avocat ou un témoin; ou lorsque les juges expriment des opinions manifestant de la partialité à l'égard d'une partie ou d'un enjeu débattu devant le tribunal.

5.C.4 Upon appointment, judges must immediately cease practicing law, and should divest themselves and remain divested of their interests in commercial and business activities. Severance of all association with the judge's legal practice should be done as quickly as possible, ideally in an immediate and final way.

5.C.5 Generally speaking, judges are entitled to manage 'passive' investments that do not constitute 'carrying on business', provided that the investment is truly passive with little active management required. Nevertheless, judges should not participate in a case in which they have a financial, property or other interest that could be affected by its outcome or in which their interest would give rise to a potential apprehension of lack of impartiality by a reasonable and informed person. This is true whether the interest is itself the subject matter of the controversy or where the outcome of the case could materially affect the value of any interest or property owned by the judge, the judge's family or close associates. There is no conflict where the judge's financial or property interest is limited to one shared by citizens generally. Owning an insurance policy, having a bank account, using a credit card or owning securities in a widely held enterprise would not, in normal circumstances, constitute a conflict of interest, unless the outcome of the proceedings before the judge could substantially affect such holdings.

5.C.4 Dès leur nomination, les juges doivent immédiatement cesser de pratiquer le droit et devraient se départir, de façon définitive, de leurs intérêts dans toute activité commerciale ou d'affaires. Les liens existant avec leur cabinet devraient être rompus aussi rapidement que possible, idéalement de manière immédiate et définitive.

5.C.5 De manière générale, les juges peuvent détenir des placements « passifs » qui ne constituent pas « la poursuite d'une entreprise », en autant qu'il s'agisse de placements véritablement passifs exigeant peu ou pas de gestion active. Néanmoins, les juges ne devraient pas présider de procès qui mettent en jeu leur propre intérêt pécuniaire ou autre ou leur patrimoine ou dans lesquels leur intérêt pourrait susciter chez une personne raisonnable et bien renseignée la crainte qu'ils pourraient ne pas juger de façon impartiale. Ce principe s'applique aussi bien dans le cas où l'intérêt lui-même est l'objet du litige que dans celui où l'issue du procès pourrait avoir une incidence importante sur la valeur de tout intérêt ou bien appartenant au juge, à sa famille ou à des proches. Il n'y a généralement pas de conflit d'intérêts lorsque l'intérêt financier ou patrimonial du juge est équivalent à celui de la population en général. Ainsi, dans des circonstances normales, ne constituerait pas un conflit d'intérêts le fait de détenir une police d'assurance, d'avoir un compte bancaire, d'utiliser une carte de crédit ou de détenir des titres d'une société inscrite en bourse, à moins que le résultat du litige devant le juge ne puisse affecter substantiellement la valeur de ces intérêts.

Acting as Executors

5.C.6 Judges should not normally act as an executor or fiduciary, unless it concerns the affairs of a close friend or relative and is unlikely to become contentious. Even in that case, judges should not be remunerated for that role and should not act if the executorship may interfere with the performance of judicial duties.

Judges' Former Legal Practice

5.C.7 Judges should be sensitive to the existence of relationships which, to a reasonable and informed person, would give rise to reasonable apprehension of lack of impartiality. In particular, judges will face this issue in relation to cases involving former clients, members of the judge's former law firm or lawyers from the government department or legal aid office in which the judge practiced before appointment. Each case is unique and the apprehension of bias should be assessed in light of all the circumstances. The following general guidelines may be helpful: (i) judges who were involved in private practice should not sit on any case in which the judge or, to their knowledge, the judge's former firm was directly involved in any capacity before the judge was appointed to office; (ii) judges who practised law in government service or legal aid should not sit on cases in which they had any involvement prior to their appointment; (iii) judges should not sit on a matter in which the judge's former law firm is involved until after a 'cooling off period', often established by local law or tradition, of between two and five years; and, (iv) judges should not sit on a matter in which the judge's former law firm is involved for at least as long as there continues to be a financial relationship between the judge and the law firm.

Agir comme liquidateur

5.C.6 De manière générale, les juges ne devraient pas agir comme liquidateur d'une succession ou comme fiduciaire ou fondé de pouvoir, si ce n'est pour le bénéfice d'un ami proche ou d'un membre de leur famille, et à la condition qu'il soit peu probable que la situation devienne litigieuse. Même dans ce cas, les juges ne devraient pas être rémunérés pour cette tâche, laquelle ne devrait pas être acceptée si elle est susceptible de nuire à l'exercice des fonctions judiciaires.

Activités professionnelles antérieures

5.C.7 Les juges devraient être sensibles à l'existence de relations susceptibles de susciter, chez une personne raisonnable et bien renseignée, une crainte raisonnable quant à leur impartialité. Les juges devront parfois se demander s'il convient d'entendre des affaires qui impliquent d'anciens clients, des membres de leur ancien cabinet ou des avocats du ministère ou du bureau d'aide juridique dans lequel ils ont exercé avant leur accession à la magistrature. Chaque cas est unique et la crainte de partialité devrait être appréciée en fonction de toutes les circonstances. Les recommandations suivantes pourraient s'avérer utiles : (i) les juges qui exerçaient en pratique privée ne devraient pas entendre les litiges dans lesquels ils agissaient ou, à leur connaissance, leur ancien cabinet agissait à quelque titre que ce soit, avant leur accession à la magistrature; (ii) les juges qui exerçaient au sein de la fonction publique ou à l'aide juridique ne devraient pas entendre les litiges dans lesquels ils agissaient à quelque titre que ce soit avant leur accession à la magistrature; (iii) les juges ne devraient pas entendre les autres dossiers menés par leur ancien cabinet avant l'expiration d'une certaine période, souvent établie par la loi ou les usages locaux, de deux à cinq ans à compter de leur nomination, et (iv) les juges ne devraient pas entendre les dossiers menés par leur ancien cabinet au moins aussi longtemps que perdurent leurs relations financières avec celui-ci.

Personal Relationships

5.C.8 Frequently judges are faced with situations where the lawyer appearing before the judge is from a law firm where a close friend or member of the judge's immediate family is a partner, associate or employee. It would be inappropriate for a judge to hear a case involving a close friend or family member. Generally speaking, it would not be problematic for a judge to sit on a case involving a lawyer from a firm in which the close friend or family member is a member or employee, provided that the friend or family member has not been involved in the matter. However, there may be circumstances where it would be inappropriate for a judge to hear such a case. For example, where the law firm is very small (such that there is a greater risk of the perception of lack of impartiality) or where the law firm stands to gain or lose significantly by the outcome, such that the judge's decision would result in a monetary or reputational gain or loss to the close family member or friend or former colleague.

Judges in Financial Difficulty

5.C.9 Judges who are in financial difficulty should be particularly vigilant for conflicts of interest, both actual and perceived. Problems arise where judges in these circumstances preside over matters involving their creditors. Serious questions arise if any aspect of the judge's financial difficulties becomes contentious and the possibility of the judge appearing before a judicial colleague as a party or a witness could arise. The actual day-to-day impact of the financial difficulties on the judge's ability to perform the job will obviously vary considerably depending on the circumstances.

Relations personnelles

5.C.8 Il arrive fréquemment que les juges entendent des affaires où l'une des parties est représentée par un cabinet au sein duquel un ami proche ou un membre de leur famille immédiate pratique le droit ou est employé. Il serait inapproprié que des juges entendent des affaires impliquant des membres de leur famille immédiate ou des amis proches. De manière générale, il n'est pas inapproprié qu'un juge entende une affaire où l'une des parties est représentée par un avocat appartenant au même cabinet qu'un ami proche ou un membre de leur famille, pour autant que cette personne n'ait pas participé au dossier. Néanmoins, cette situation pourrait devenir problématique dans certaines circonstances, comme lorsque le cabinet est très petit (accroissant le risque que le juge soit perçu comme manquant d'impartialité) ou lorsque l'enjeu du litige est susceptible de profiter ou de nuire grandement au cabinet, de telle sorte que la décision du juge puisse entraîner un gain ou une perte pécuniaire pour le membre de la famille immédiate, l'ami ou l'ancien collègue ou être favorable ou défavorable à sa réputation.

Les juges en difficulté financière

5.C.9 Les juges qui éprouvent des difficultés financières devraient prendre particulièrement garde aux conflits d'intérêts, tant réels qu'apparents. Des problèmes surviennent lorsque des juges, dans de telles circonstances, président des procès dont l'objet concerne un de leurs créanciers. De graves questions se poseront si un aspect ou un autre des difficultés financières du juge devient litigieux et qu'il est possible que le juge soit forcé de comparaître devant un collègue à titre de partie ou de témoin. Il est difficile de systématiser les conséquences réelles des difficultés financières des juges sur leur capacité d'accomplir quotidiennement leur tâche; ces conséquences varieront selon les circonstances.

Disclosure and Consent

5.C.10 In certain situations, it may be appropriate for a judge to make disclosure of a potential conflict and invite submissions from the parties. However, judges, not the parties or their counsel, bear the burden of ensuring respect for the principle of judicial impartiality. Neither disclosure of a conflict of interest nor the consent of the parties necessarily justifies judges ignoring circumstances which reasonably call into question their ability to hear a case and decide impartially.

Extraordinary Circumstances: Interests of Justice

5.C.11 Extraordinary or urgent circumstances may require judges to weigh the requirements of judicial impartiality against the risk of injustice.

5.C.12 Circumstances which might cause only minor inconvenience to a large court might nonetheless have a significant practical impact on a smaller court. Judges should organize their private affairs to minimize the potential for such conflicts.

Divulgation et consentement

5.C.10 Il peut être approprié pour un juge de divulguer l'existence d'une situation de conflit d'intérêts potentiel et d'inviter les parties à faire des représentations à ce sujet. C'est effectivement aux juges, plutôt qu'aux parties ou à leurs avocats, qu'il incombe de faire respecter le principe d'impartialité. Ni la divulgation du conflit d'intérêts ni le consentement des parties ne permettent forcément aux juges d'ignorer les circonstances dans lesquelles une personne raisonnable pourrait craindre que l'affaire ne puisse être entendue ou jugée de manière impartiale.

Circonstances extraordinaires : intérêt de la justice

5.C.11 Des circonstances extraordinaires ou urgentes peuvent exiger que les juges cherchent un équilibre entre le principe l'impartialité judiciaire et la nécessité d'éviter une injustice.

5.C.12 Les circonstances qui pourraient n'entraîner que de légers inconvénients pour une juridiction de grande taille pourraient avoir de graves répercussions pour un tribunal de moindre envergure. Les juges devraient organiser leurs affaires personnelles de manière à atténuer le risque que surviennent de tels conflits.

Public Education Activities

5.D.1 Judges possess significant knowledge of the law and the legal system. For this reason, they should make reasonable efforts to become engaged in informing and educating the public regarding the rule of law and the role of judges and courts in the administration of justice. Chief Justices have particular responsibilities and opportunities in relation to such public engagement, including public communications on behalf of their courts.

5.D.2 Subject to the limitations imposed by s. 55 of the *Judges Act* and these *Ethical Principles*, judicial participation in law reform or other scholarly or educational activities are not discouraged, provided that such involvement does not include participation in campaigns in support of, or the championing of, law reform initiatives.

Éducation du public

5.D.1 Les juges connaissent à fond le droit et le système de justice. Pour cette raison, ils devraient s'efforcer dans la mesure du possible d'informer et de renseigner le public sur la primauté du droit et le rôle des juges et des tribunaux dans l'administration de la justice. À cet égard, les juges en chef ont une responsabilité accrue, y compris pour ce qui concerne les communications qui émanent de leur cour.

5.D.2 Sous réserve des restrictions imposées par l'article 55 de la *Loi sur les juges* et par les *Principes de déontologie*, la participation des juges à des travaux de réforme du droit et à d'autres activités de recherche ou d'éducation n'est pas découragée, pour autant qu'elle n'inclue pas la contribution à des campagnes de soutien à des initiatives de réforme du droit ou la promotion de telles initiatives.

Post-Judicial Careers[9]

5.E.1 Judges may choose to move on to another career after leaving the bench. This raises several ethical considerations. One issue relates to the situation of judges prior to departure from judicial office. There may well be circumstances in which planning for one's post-judicial career undermines the perception of impartiality a judge should maintain. Discussions, negotiations or proposals of employment with a law firm, a prospective employer who is a litigant before the judge or a party in a case where the judge has delivered a judgment, may create the impression of a conflict of interest. The same concern exists where a judge is soliciting such opportunities. Whether the overture comes from the judge or the prospective employer, there is a risk that the judge's self-interest and duty would appear to conflict in the eyes of a reasonable and informed person. Accordingly, judges should refrain from engaging in such conversations before their judicial term has come to an end.

9 *Canadian Judicial Council Position on Former Judges Returning to Practice (2017)*

Carrière post-judiciaire[9]

5.E.1 Il est possible que des juges amorcent une nouvelle carrière après avoir quitté la magistrature. Cette situation soulève plusieurs enjeux éthiques. Un premier type de préoccupation concerne la situation des juges pendant la période qui précède leur départ de la magistrature. Les gestes posés par les juges dans la planification de leur carrière post-judiciaire peuvent, dans certaines circonstances, porter atteinte à l'apparence d'impartialité qu'ils devraient maintenir. Les discussions ou négociations relatives à un emploi avec un cabinet d'avocats ou un autre employeur éventuel qui est partie à une affaire en cours ou à un litige tranché par le juge pourraient susciter une apparence de conflit d'intérêts. La même inquiétude s'attache aux expressions d'intérêt ou propositions qui pourraient être faites par les juges auprès d'employeurs éventuels. Que les invitations discrètes émanent des juges ou de l'employeur éventuel, une personne raisonnable et bien renseignée pourrait y voir un conflit entre l'intérêt personnel du juge et son devoir. Par conséquent, les juges devraient éviter de participer à de telles conversations avant que leurs fonctions judiciaires n'aient pris fin.

9 *Conseil canadien de la magistrature, Position sur les anciens juges qui reprennent l'exercice du droit après avoir quitté la magistrature (2017)*

5.E.2 The situation of the judge upon leaving judicial office also introduces ethical considerations. Where former judges are professionally active, their conduct can have an impact on the public's perception of the judiciary as a whole. Accordingly, former judges should be attentive to the ways in which their post-judicial actions or activities could undermine public confidence in the judiciary. Former judges are able to return to the legal profession, but there are limits to the types of activities in which they can engage, consistent with the preservation of the principle of impartiality. A former judge could act as an arbitrator, mediator or commissioner. However, former judges should not appear as counsel before a court or tribunal in Canada. Appearance as counsel is broader than physical appearance. While it is appropriate for former judges to review or draft legal arguments and pleadings, to provide advice to counsel and parties, a former judge should not stand, speak or appear as counsel in court or before a tribunal or sign legal documents that are or may be the subject of proceedings before a court or tribunal. This constraint may be subject to exceptions where a judge has left the judiciary after a very short time.

5.E.3 Former judges should exercise appropriate caution in accepting retainers and providing legal advice in high profile or politically contentious matters where it can be anticipated that a client may make use of the judge's former status to advance the client's interests.

5.E.4 Former judges should not disclose the confidential discussions among judges – for example, the deliberations of an appellate court – or discuss anything that gives the appearance of relying on confidential information or judicial confidences.

5.E.2 La situation des juges qui quittent la magistrature soulève également des considérations éthiques. La conduite des juges qui retournent à la vie professionnelle peut affecter la perception qu'a le public de la magistrature dans son ensemble. Les anciens juges devraient être sensibles au fait que leurs activités ou actions pourraient miner la confiance du public à l'endroit de la magistrature. Les juges peuvent réintégrer la profession juridique à l'issue de leur carrière judiciaire, mais certaines restrictions s'appliquent aux types d'activités qui s'ouvrent à eux afin que soit préservé le principe d'impartialité. Les anciens juges peuvent exercer des fonctions d'arbitre, de médiateur ou de commissaire. Néanmoins, ils ne devraient pas comparaître en tant qu'avocat devant une cour ou un tribunal au Canada. La comparution en tant qu'avocat va au-delà de la comparution en personne. Bien qu'il soit approprié pour un ancien juge de rédiger ou de réviser des documents juridiques ou des actes de procédure, ou de donner des conseils aux avocats et aux parties, ils ne devraient pas plaider devant une cour de justice ou un tribunal, ni apposer leur signature sur un document juridique dont l'objet est ou pourrait être lié à une instance. Il est possible que des exceptions à ce principe soient admises à l'égard de juges qui ont quitté la magistrature très peu de temps après leur nomination.

5.E.3 Les anciens juges devraient faire preuve de la prudence requise avant d'accepter un mandat et de donner des conseils juridiques lorsque le client est susceptible d'utiliser l'ancien statut du juge comme levier pour faire avancer ses intérêts dans un dossier controversé sur le terrain politique ou une affaire qui attire beaucoup d'attention sur la scène publique.

5.E.4 D'autre part, les anciens juges ne devraient pas révéler la teneur des discussions confidentielles auxquelles ils ont participé – en tant que membre d'une formation d'une cour d'appel, par exemple – ou révéler quoi que ce soit qui puisse donner à croire qu'ils s'appuient sur des informations confidentielles ou liées au secret judiciaire.

INDEX

B

C

INDEX

A

B

C

I

December 12, 2022

VIA EMAIL

The Honourable David Lametti, P.C., M.P.
Minister of Justice and Attorney General of Canada
House of Commons
Ottawa, Ontario K1A 0A6

Dear Minister:

RE: Judicial Vacancies and Access to Justice in Canada

Established in 1963, The Advocates' Society is a not-for-profit organization representing approximately 5,500 diverse lawyers and students across the country—unified in their calling as advocates. As the leading national association of litigation counsel in Canada, The Advocates' Society and its members are dedicated to promoting a fair and accessible system of justice, excellence in advocacy, and a strong, independent, and courageous bar. A core part of our mission is to provide policymakers with the views of legal advocates on matters that affect access to justice, the administration of justice, the independence of the bar and the judiciary, the practice of law by advocates, and equity, diversity, inclusion, and reconciliation with Indigenous peoples in the justice system and legal profession.

As courtroom advocates, The Advocates' Society's members have a particular interest in the effective and timely judicial resolution of legal disputes, to ensure matters are resolved justly and to maintain public confidence in the administration of justice. Having a sufficient number of judges available to adjudicate cases in reasonable timeframes is essential to these ends.

Delays in scheduling and hearing matters before the courts have been an issue for many years, with recent delays having reached critical proportions in many jurisdictions. While a number of factors contribute to these delays, they are most certainly caused in part by judicial vacancies. As recently as September 2022, there were 91 vacancies on superior courts across Canada, which represented an approximately 10% vacancy rate. These vacancies severely impair the ability of our courts to function properly and dispense justice to Canadians without undue delay.

The failure to fill judicial vacancies on superior courts and courts of appeal in a timely manner has been a recurring issue of serious concern to The Advocates' Society. We previously raised this issue with the federal government in 2018, specifically in connection with the high rate of judicial vacancies in Alberta.

The Advocates' Society believes that access to justice would be considerably improved by filling the judicial vacancies that currently exist in the superior courts in Canada.[1] We recognize and appreciate the number of judicial appointments your Government has made in recent weeks and months, including

[1] Office of the Commissioner for Federal Judicial Affairs Canada, "Number of Federally Appointed Judges as of December 1, 2022", online: <https://www.fja.gc.ca/appointments-nominations/judges-juges-eng.aspx>.

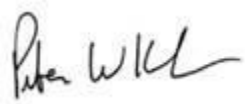
appointments to fill new judicial positions authorized in your Government's 2021 and 2022 budgets. That said, The Advocates' Society strongly recommends filling the current vacancies on an urgent basis.

In addition, The Advocates' Society recommends that the Government establish a policy mandating that judicial vacancies be consistently filled within a reasonably brief period of time after they arise. To that end, we recommend that the Government plan in advance for upcoming mandatory retirements to be ready to appoint a replacement when the vacancy takes effect. We further recommend that the Government take immediate steps to be ready to fill upcoming vacancies upon being notified of supernumerary elections or early retirements, rather than waiting for the vacancy to occur. Greater coordination efforts between your office, the Office of the Commissioner for Federal Judicial Affairs, and the Judicial Advisory Committees should aim to factor judges' retirements, resignations, and supernumerary elections into the appointments process at an earlier stage.

We encourage the Government to make a meaningful commitment to making timely judicial appointments as an important aspect of the Government's role in ensuring the healthy functioning of the Canadian justice system.

The Advocates' Society strongly urges the Government to prioritize access to justice and restore public confidence in the justice system by filling the current vacancies in Canada's superior courts, and making judicial appointments on a prompt and timely basis in the future. We thank you for your attention to this important issue and would be pleased to discuss this with you or your officials at your convenience.

Yours sincerely,



Peter W. Kryworuk
President

CC: Marc A. Giroux, Commissioner for Federal Judicial Affairs
François Giroux, Judicial Affairs Advisor, Office of the Minister of Justice and Attorney General of Canada
Vicki White, Chief Executive Officer, The Advocates' Society

The Advocates Society's Task Force on Judicial Vacancies

Daniel Baum*, Langlois Avocats, S.E.N.C.R.L.* (Montreal)
Eric Blay, *Pallett Valo LLP* (Toronto)
Craig A.B. Ferris, K.C., *Lawson Lundell LLP* (Vancouver)
Tamara Prince, chair, *Cassels Brock & Blackwell LLP* (Calgary)
Michael G. Robb, *Siskinds LLP* (London)

Federation of Ontario Law Associations
Fédération des associations de barreau de l'Ontario

February 13, 2023

"The Voice of the Practising Lawyer in Ontario"

Corporate Mailing Address:
731 9 th Street West,
Owen Sound, ON
N4K 3P5

Phone:
(519) 270-4001

Website:
www.fola.ca

Social Media:
@ont_law_assoc

The Right Honourable Justin Trudeau, P.C., M.P.
Prime Minister
Office of the Prime Minister
80 Wellington Street
Ottawa, ON K1A 0A2

Via Email (pm@pm.gc.ca; justin.trudeau@parl.gc.ca)

The Honourable Chrystia Freeland, P.C., M.P.
Minister of Finance
90 Elgin Street
Ottawa, ON K1A 0G5

Via Email (chrystia.freeland@fin.gc.ca; chrystia.freeland@parl.gc.ca)

The Honourable David Lametti, P.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Via Email (david.lametti@parl.gc.ca)

Dear Prime Minister Trudeau, Minister Freeland, and Minister Lametti:

Re: 2023 Budget Consultations

We write in respect of your consultation for the 2023 federal budget.

The Federation of Ontario Law Associations (FOLA) represents Ontario's 46 county and district law associations and, through them, their members. Most of these members are lawyers in private practice, in small and medium-size firms across the province. These lawyers are on the front lines of the justice system and see its triumphs and shortcomings every day.

The justice sector is often overlooked in the budget process, and we would like to draw your attention to two priority areas for all Ontarians: funding for legal aid and resources to increase the capacity of the Ontario Superior Court of Justice.

Legal Aid Funding

As a member of the Alliance for Sustainable Legal Aid (ASLA), FOLA echoes the comments made in ASLA's letter to you, dated December 23, 2022 (which, for convenience, you can download at https://bit.ly/3IgcRKT).

ASLA notes that at one time, the federal government contributed half of the funds needed to run Ontario's Legal Aid system. Its share has since diminished over time, and over that period, our legal aid system has fallen into decline and is not meeting the needs of Ontarians – particularly those who find themselves before criminal and family courts. Many of these individuals are from vulnerable communities or find themselves in precarious circumstances that they cannot navigate without the assistance of a legal aid lawyer.

While FOLA adopts as its submission the balance of ASLA's letter on this subject, we underscore the foundational problem of funding. We stress the need for the Government of Canada to commit to working with the provinces to establish a long-term, sustainable funding model for legal aid across Canada that includes a proportional increase and significant legal investment from the federal government in legal aid programs. Without these necessary investments, vulnerable Canadians will simply not have access to legal services in their time of need.

Resources for the Superior Court of Justice

We also want to use this opportunity to encourage the federal budget to account for necessary investments in the Ontario Superior Court of Justice.

First, we want to flag the need to fill judicial vacancies in Ontario. These vacancies are straining the system by increasing pressure on already-scarce judicial resources. This has created challenges for court scheduling, making it difficult for courts to deal with matters in a timely fashion. It also drives up costs to litigants when counsel have to appear only to have their matter not reached because a court sitting is overburdened with an unrealistic list.

Relatedly, it is crucial that federal budgets set aside resources to assist the provincial Attorneys General in their efforts to modernize and invest in courthouse infrastructure and technology. One way that the strain on judicial resources could be alleviated is by better resource allocation across the province, not only among court staff but on the bench. It is unacceptable that the same litigation matter in one region of Ontario might take a year or longer more to get before a judge simply because of the postal code where it originates. Improved technological capabilities and scheduling tools could assist in providing improved equality of access to superior courts so that matters can be disposed of or resolved in a more timely manner.

In considering these comments, we remind you of the Supreme Court of Canada's decision in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, in which Chief Justice McLachlin concluded that access to

justice is fundamental to the rule of law, and rule of law is fostered by the continued existence and availability of the superior courts. On this basis, section 96 of the *Constitution Act, 1867*, was found to confer a degree of constitutional protection for access to justice, particularly for civil matters. The courts have also repeatedly concluded (most notably in *Hyrniak v. Mauldin,* 2014 SCC 7), that timely access to justice is a challenge to the rule of law in Canada. These constitutional requirements cannot be fulfilled without more expedient federal action to fill vacancies and improve efficiency.

Conclusion

We trust that these comments are helpful in your budget deliberations for 2023. We remain available for further discussion or to provide further input or information to your offices. Please feel free to contact me directly at 807-861-3684 or info@douglasjudson.ca, or to email our executive director, Katie Robinette, at katie.robinette@fola.ca.

Thank you for considering our input.

Sincerely,

Douglas W. Judson
Chair

C. Jim Kapches, Senior Policy Advisor, Office of the Prime Minister, *Via Email (jim.kapches@pmo-cpm.gc.ca)*;

County and District Law Association Presidents, *Via Email (various)*;

FOLA Board, *Via Email (various)*;

Lenny Abramowicz, Chair, ASLA, *Via Email (lenny.abramowicz@aclco.clcj.ca)*

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

May 24, 2023

Via email: Justin.trudeau@parl.gc.ca

The Right Honourable Justin Trudeau, P.C., M.P.
Prime Minister of Canada
Office of the Prime Minister and Privy Council
80 Wellington Street
Ottawa, ON K1A 0A2

Dear Prime Minister,

Re: Canadian Bar Association concerns regarding Judicial Vacancies

We write on behalf of the Canadian Bar Association and its Judicial Issues Subcommittee (CBA Subcommittee) to reiterate our serious concerns about judicial vacancies amongst federally appointed courts in our country. The CBA wholeheartedly agrees with the concerns expressed by Chief Justice Wagner.

THE ISSUE

Some courts in Canada are operating with as much as 10 to 15 percent of their judicial positions vacant. The latest report of the Commissioner for Federal Judicial Affairs shows 88 unfilled vacancies affecting all provinces and one territory. The CBA has frequently stated that the shortage of judges seriously undermined public confidence in our justice system. As early as 2016, Chief Justice McLachlin expressed concerns that civil justice delays drive users with means to private dispute resolution, while adding further strain and indignity to those who have no option but to suffer unnecessarily prolonged proceedings.[1] The CBA president wrote to the Minister of Justice in December 2016, recommending urgent action to deal with judicial vacancies. He described the situation as "an acute access to justice problem" and stated "(w)e remain deeply concerned that current efforts are insufficient to address urgent needs across the country."[2] He offered a variety of measures to address the critical need for judicial vacancies to be filled. Sadly, we have seen little progress in remedying this situation.

1 Remarks to the Council of the Canadian Bar Association at the Canadian Legal Conference (SCC Ottawa, 2016): online

2 Shortage of Judges (CBA Ottawa, 2016): online

The Chief Justice points out that criminal trials are at particular risk due to unfilled judicial positions. The problem goes much further. Family matters cannot be adjudicated with speed. Plaintiffs and defendants wait years to have their day in court in a civil case. Business disputes remain unresolved. Public interest issues, which may affect many Canadians, are not decided in a timely way. According to former Chief Justice Bauman from British Columbia: "The fallout from so many vacancies includes last-minute trial cancellations, consequent wasted time, energy and expense for litigants, long delays for court hearings and increased pressure on the short-staffed benches."[3]

CBA RECOMMENDATIONS

We acknowledge and applaud that more than 600 judges have been appointed to federal office since 2015. However, this has not solved the gap in judicial complements. Not only are judicial positions left vacant, but the Judicial Advisory Committees (JAC) that screen and recommend candidates for office are not operating at full capacity. Six JACs are not filled at present. The JAC for Yukon expired more than a year ago (April 2022), while the JACs for Nova Scotia and P.E.I expired more than seven months ago (September 2022). On April 30, 2023, the JACs for the Greater Toronto Area and for British Columbia — which screen applicants for two of Canada's biggest, busiest and backlogged superior trial courts — became defunct, as did the specialized JAC for the Tax Court of Canada.

There is no shortage of well qualified candidates for judicial office. This deep pool of talent should allow the gap in judicial vacancies to be remedied in a timely fashion.

The CBA remains available to discuss with you or the Minister of Justice some practical solutions, including changes to the appointment process and various pieces of legislation, which would allow the justice system to function more smoothly, and judicial appointments made more quickly, while maintaining the quality of our Bench.

We look forward to a meeting at your earliest convenience to discuss these practical solutions.

Sincerely,

(original letter signed by Julie Terrien for Jacqueline King)

Jacqueline King
Chair, Judicial Issues Subcommittee

cc. The Honourable David Lametti
Minister of Justice and Attorney General of Canada: mcu@justice.gc.ca

[3] Top judges decry Ottawa's appointment delays; application vetting defunct in B.C., Toronto, N.S. (Law 360 Canada, Toronto): online.

Appendix A – Detailed Work Description

Schedule A: Description of work

The Economic Analysis Division (EAD) of Statistics Canada will examine firm and individual income tax data in the legal industry (Offices of lawyers) to calculate the level and type of professional income reported through professional law corporations (PLCs) for the purpose of the Seventh Quadrennial Commission.

The primary interest for this data request are professional law corporations (PLCs). This project requires manual compilation and merging of data from T1, T2 and T5013 income tax fillings and associated schedules. The work will focus only on corporations and partnerships under NAICS code 541110 - Offices of lawyers. No other NAICS code will be considered. The work will use tax data for four years, 2018-2021.

In its Report and Recommendations, the previous Commission, Quadrennial Commission 2020, identified gaps in data and recommended that preparatory work be done to provide Quadrennial Commission 2024 with "adequate and appropriate additional data from which to work" (Recommendation 8). Recommendations 8(1)-(3) concern data on professional law corporations. Recommendation 8(1) in the Report and Recommendations of the Quadrennial Commission 2020 outlined the data work needed to better understand the "levels of professional income reported through professional corporations." This work aims to produce data that could assist the Quadrennial Commission 2024 in better understanding:

- How much income do self-employed lawyers practising through professional law corporations derive from the practice of law?
- What is the extent to which professional law corporations are used to retain professional income as opposed to pay out or dividend it to the professional?

This request is primarily concerned with PLCs, the income that comes into PLCs, and the income that is paid out of PLCs to the lawyer. In terms of Recommendation 8(1), for PLCs where the lawyer is a partner in a law partnership, the relevant measure of income is the partnership income going *into* the PLC, not what comes out as salary or dividends (although the latter may inform the second listed point, namely what is the extent to which professional law corporations are used to retain professional income as opposed to pay out or dividend it to the professional. Total personal income of lawyers reported on their T1s is outside the scope of this request.

This project will not analyze or report "on the use of individual pension plans within a lawyer professional corporation" (Recommendation 8(3)) due to data availability issues.

Data sources

The Economic Analysis Division has developed the Canadian Employer-Employee Dynamics Database (CEEDD) and the National Account Longitudinal Microdata File (NALMF). These are sets of linkable microdata files (individual-level and firm-level) maintained by EAD to provide matched data between employees and employers in Canada. The CEEDD provides workers' and owners' information using their T1 tax forms, T2 corporate tax returns and owners Schedule 50 files. It provides job-level information using T4 filings and Record of Employment (ROE) data. Firm-level variables are compiled in the NALMF. These income tax files would still need to be linked to T5013 Statement of Partnership Income and appropriate record linkage approval obtained before the final results tables are released to the Commission. Using CEEDD and Schedule 50, the EAD has developed the Business Owners Module (BOM) which provides an estimate for business ownership share by gender and age.

Some initial data exploration has already been done, but most of the work is expected to be in preparing the data for tabulation of specific variables on lawyers' PLC income.

This Letter of Agreement identifies hereafter the deliverables to be generated, conditional on data feasibility.

Deliverables

EAD will generate tables on:

- Descriptive statistics on professional law corporations (PLCs) (number, mean, median, standard deviation, and 75th percentile values) by age of owner at the end of the tax year according to the following age groups: 35-46 (inclusive), 47-54 (inclusive), 55-69 (inclusive) and 44-56 (inclusive) and by CMA groups and by the low income cut-offs of $80,000 and $90,000.
- Incomes generated by PLCs for 2018-2021 years.
- Conditional on data feasibility, the extent to which income generated by PLCs is retained as opposed to distributed as a salary or as dividends. Only for professional law corporations, not for partnerships.
- Descriptive statistics on legal partnerships (number, size, count of partner types), and the income generated and distributed to partners.
- Conditional on data feasibility, statistics on how much income PLCs that are members of law partnerships derive from the partnership.

All results and table output must conform with confidentiality rules set by Statistics Canada before they are released to the client.

Statistics regarding Judicial Applicants and Appointees

October 29, 2019 – October 28, 2020

On October 20, 2016, the Government of Canada announced reforms to the superior courts judicial appointments process. As part of these changes and in order to increase transparency and rigour, the Government mandated the Office of the Commissioner for Judicial Affairs to collect and publish statistics and demographic information on judicial applicants and appointees. Based on voluntary disclosure by candidates through self-identification in the **Questionnaire** for judicial appointment, these statistics relate to diversity (see p. 3 of the candidates' Questionnaire) and language proficiency (see p. 6 of the Questionnaire).

	Total	Gender			Diversity						Language Proficiency in both Official Languages						
		Male	Female	Other	Indigenous	Visible Minority	Ethnic/Cultural Group or other	Person with Disability	LGBTQ2	Woman	Read court materials	Discuss legal matters	Converse with counsel	Understand oral submissions	Write decisions[2]	Conduct hearings[2]	All 6 abilities[2]
Applications Received	397	190	207	0	12	34	67	9	22	207	161	142	136	147	105	109	104
Candidates Assessed	374	193	181	0	12	51	74	7	23	181	159	125	125	131	84	95	82
Candidates Highly Rec.[1]	76	38	38	0	2	11	10	0	10	38	34	25	26	25	16	18	16
Candidates Recommended[1]	94	48	46	0	2	16	20	1	5	46	43	35	35	37	22	26	21

	Total	Gender			Diversity						Language Proficiency in both Official Languages						
		Male	Female	Other	Indigenous	Visible Minority	Ethnic/Cultural Group or other	Person with Disability	LGBTQ2	Woman	Read court materials	Discuss legal matters	Converse with counsel	Understand oral submissions	Write decisions[2]	Conduct hearings[2]	All 6 abilities[2]
Candidates Unable to Rec.[1]	204	107	97	0	8	24	44	6	8	97	82	65	64	69	46	51	45
Judges Appointed	60	21	39	0	2	10	8	0	6	39	22	19	21	21	7	10	7

Please note that in addition to the 60 candidates appointed, 22 other judges were appointed or elevated to other courts during the same period; 12 men and 10 women. For example, this would include judges appointed to courts of appeal from the trial level courts. There were therefore 82 appointments during this period.

---

1. Please note that in their application, candidates may apply to more than one court. A candidate can therefore obtain a rating of "highly recommended" for one court, "recommended" for another and "unable to recommend" for yet another court. For ease of reference, the above statistics reflect the highest rating candidates may have received from the Judicial Advisory Committees.

2. Please note that two questions regarding language proficiency in both official languages were added to the **Questionnaire (p. 6)** in November 2017. However, some of the candidates were assessed and appointed during this period based on the previous Questionnaire. In fact, of the 60 judges appointed during this period, 30 used the old Questionnaire while 30 used the new one. Of these 60 judges, 15 answered "yes" to all questions related to language proficiency in both official languages in the Questionnaire they completed.

Periods:

- **October 28, 2023 – October 28, 2024**
- **October 29, 2022 – October 27, 2023**
- **October 29, 2021 – October 28, 2022**
- **October 28, 2020 – October 29, 2021**
- **October 28, 2019 – October 29, 2020**
- **October 28, 2018 – October 28, 2019**
- **October 28, 2017 – October 27, 2018**
- **October 21, 2016 – October 27, 2017**

Date modified: 2020-10-28

Statistics regarding Judicial Applicants and Appointees

October 29, 2020 – October 28, 2021

On October 20, 2016, the Government of Canada announced reforms to the superior courts judicial appointments process. As part of these changes and in order to increase transparency and rigour, the Government mandated the Office of the Commissioner for Judicial Affairs to collect and publish statistics and demographic information on judicial applicants and appointees. Based on voluntary disclosure by candidates through self-identification in the **Questionnaire** for judicial appointment, these statistics relate to diversity (see p. 3 of the candidates' Questionnaire) and language proficiency (see p. 6 of the Questionnaire).

	Total	Gender			Diversity						Language Proficiency in both Official Languages						
		Male	Female	Other	Indigenous	Visible Minority	Ethnic/Cultural Group or other	Person with Disability	LGBTQ2	Woman	Read court materials	Discuss legal matters	Converse with counsel	Understand oral submissions	Write decisions[2]	Conduct hearings[2]	All 6 abilities[2]
Applications Received	227	113	114	0	6	40	54	6	10	114	95	76	79	81	58	62	58
Candidates Assessed	360	182	178	0	14	36	61	10	23	178	136	118	116	121	86	92	86
Candidates Highly Rec.[1]	85	44	41	0	4	10	8	3	7	41	34	30	28	32	21	21	21
Candidates Recommended[1]	93	42	51	0	4	10	12	0	4	51	35	28	31	30	24	24	24

	Total	Gender			Diversity						Language Proficiency in both Official Languages						
		Male	Female	Other	Indigenous	Visible Minority	Ethnic/Cultural Group or other	Person with Disability	LGBTQ2	Woman	Read court materials	Discuss legal matters	Converse with counsel	Understand oral submissions	Write decisions[2]	Conduct hearings[2]	All 6 abilities[2]
Candidates Unable to Rec.[1]	181	95	86	0	6	16	41	7	12	86	67	60	57	59	41	47	41
Judges Appointed	71	31	40	0	4	7	7	0	9	40	28	22	21	24	16	16	16

Please note that in addition to the 71 candidates appointed, 13 other judges were appointed or elevated to other courts during the same period; 8 men and 5 women. For example, this would include judges appointed to courts of appeal from the trial level courts. There were therefore 84 appointments during this period.

---

1. Please note that in their application, candidates may apply to more than one court. A candidate can therefore obtain a rating of "highly recommended" for one court, "recommended" for another and "unable to recommend" for yet another court. For ease of reference, the above statistics reflect the highest rating candidates may have received from the Judicial Advisory Committees.

2. Please note that two questions regarding language proficiency in both official languages were added to the **Questionnaire (p. 6)** in November 2017. However, some of the candidates were assessed and appointed during this period based on the previous Questionnaire. In fact, of the 71 judges appointed during this period, 14 used the old Questionnaire while 57 used the new one. Of these 71 judges, 20 answered "yes" to all questions related to language proficiency in both official languages in the Questionnaire they completed.

Periods:

- **October 28, 2023 – October 28, 2024**
- **October 29, 2022 – October 27, 2023**
- **October 29, 2021 – October 28, 2022**
- **October 28, 2020 – October 29, 2021**
- **October 28, 2019 – October 29, 2020**
- **October 28, 2018 – October 28, 2019**
- **October 28, 2017 – October 27, 2018**
- **October 21, 2016 – October 27, 2017**

Date modified: 2021-10-29

Statistics regarding Judicial Applicants and Appointees

October 29, 2021 – October 28, 2022

On October 20, 2016, the Government of Canada announced reforms to the superior courts judicial appointments process. As part of these changes and in order to increase transparency and rigour, the Government mandated the Office of the Commissioner for Judicial Affairs to collect and publish statistics and demographic information on judicial applicants and appointees. Based on voluntary disclosure by candidates through self-identification in the **Questionnaire** for judicial appointment, these statistics relate to diversity (see p. 3 of the candidates' Questionnaire) and language proficiency (see p. 6 of the Questionnaire).

	Total	Gender			Diversity						Language Proficiency in both Official Languages						
		Male	Female	Other	Indigenous individual	Racialized individual	Ethnic/Cultural Group or other	Individual with disability	2SLGBTQI+ individual	Woman	Read court materials	Discuss legal matters	Converse with counsel	Understand oral submissions	Write decisions	Conduct hearings	All 6 abilities
Applications Received	318	152	166	0	10	48	72	5	10	166	140	108	106	113	87	93	86
Candidates Assessed	227	100	127	0	7	44	58	5	11	127	115	96	95	101	75	82	75
Candidates Highly Rec.[1]	45	23	22	0	1	6	10	2	2	22	25	20	20	22	17	18	17
Candidates Recommended[1]	53	17	36	0	2	9	15	1	1	36	32	29	28	29	24	26	24

	Total	Gender			Diversity						Language Proficiency in both Official Languages						
		Male	Female	Other	Indigenous individual	Racialized individual	Ethnic/Cultural Group or other	Individual with disability	2SLGBTQI+ individual	Woman	Read court materials	Discuss legal matters	Converse with counsel	Understand oral submissions	Write decisions	Conduct hearings	All 6 abilities
Candidates Unable to Rec.[1]	129	60	69	0	4	29	33	2	8	69	58	47	47	50	34	38	34
Judges Appointed	58	30	28	0	2	13	6	1	2	28	19	18	20	18	15	15	15

Please note that in addition to the 58 candidates appointed, 13 other judges were appointed or elevated to other courts during the same period; 4 men and 9 women. For example, this would include judges appointed to courts of appeal from the trial level courts. There were therefore 71 appointments during this period.

---

1. Please note that in their application, candidates may apply to more than one court. A candidate can therefore obtain a rating of "highly recommended" for one court, "recommended" for another and "unable to recommend" for yet another court. For ease of reference, the above statistics reflect the highest rating candidates may have received from the Judicial Advisory Committees.

Periods:

- **October 28, 2023 – October 28, 2024**
- **October 29, 2022 – October 27, 2023**
- **October 29, 2021 – October 28, 2022**
- **October 28, 2020 – October 29, 2021**
- **October 28, 2019 – October 29, 2020**
- **October 28, 2018 – October 28, 2019**
- **October 28, 2017 – October 27, 2018**
- **October 21, 2016 – October 27, 2017**

Date modified: 2022-10-29

Demographic statistics on diversity in the judiciary

Judicial Applicants and Appointees

On October 20, 2016, the Government of Canada announced reforms to the superior courts judicial appointments process. As part of these changes and in order to increase transparency and rigour, the Government mandated the Office of the Commissioner for Judicial Affairs to collect and publish statistics and demographic information on judicial applicants and appointees. Based on voluntary disclosure by candidates through self-identification in the **Questionnaire** for judicial appointment, these statistics relate to diversity (see p. 3 of the candidates' Questionnaire) and language proficiency (see p. 6 of the Questionnaire).

October 29, 2022 – October 27, 2023

	Total	Gender			Diversity						Language Proficiency in both Official Languages						
		Male	Female	Other	Indigenous individual	Racialized individual	Ethnic/Cultural Group or other	Individual with disability	2SLGBTQI+ individual	Woman	Read court materials	Discuss legal matters	Converse with counsel	Understand oral submissions	Write decisions	Conduct hearings	All 6 abilities
Applications Received	410	207	203	0	15	53	84	8	27	203	187	156	150	161	126	131	125
Candidates Assessed	315	160	155	0	9	37	64	6	12	155	149	120	123	126	99	104	98
Candidates Highly Rec.[1]	73	41	32	0	3	8	12	1	3	32	31	23	23	24	20	20	20
Candidates Recommended[1]	68	29	39	0	3	10	12	2	2	39	30	23	24	23	19	19	18

	Total	Gender			Diversity						Language Proficiency in both Official Languages						
		Male	Female	Other	Indigenous individual	Racialized individual	Ethnic/Cultural Group or other	Individual with disability	2SLGBTQI+ individual	Woman	Read court materials	Discuss legal matters	Converse with counsel	Understand oral submissions	Write decisions	Conduct hearings	All 6 abilities
Candidates Unable to Rec.[1]	174	90	84	0	3	19	40	3	7	84	88	74	76	79	60	65	60
Newly Appointed Judges	68	31	37	0	1	9	17	0	4	37	32	28	29	30	27	28	27

Please note that in addition to the 68 newly appointed judges, 19 other judges were appointed or elevated to other courts during the same period; 11 men and 8 women. For example, this would include judges appointed to courts of appeal from the trial level courts. There were therefore 87 appointments during this period.

---

1. Please note that in their application, candidates may apply to more than one court. A candidate can therefore obtain a rating of "highly recommended" for one court, "recommended" for another and "unable to recommend" for yet another court. For ease of reference, the above statistics reflect the highest rating candidates may have received from the Judicial Advisory Committees.

Periods:

- **October 28, 2023 – October 28, 2024**
- **October 29, 2022 – October 27, 2023**
- **October 29, 2021 – October 28, 2022**
- **October 28, 2020 – October 29, 2021**
- **October 28, 2019 – October 29, 2020**
- **October 28, 2018 – October 28, 2019**
- **October 28, 2017 – October 27, 2018**
- **October 21, 2016 – October 27, 2017**

Judges currently on the bench

The Government of Canada has committed to tracking data on the diversity of judicial appointees. The Office of the Commissioner for Federal Judicial Affairs therefore publishes annual demographic statistics, not only regarding newly appointed judicial candidates and judges, but also, below, regarding all federally appointed judges. These statistics include judges appointed after 2016, who completed a questionnaire following reforms brought to the appointment process which included specific questions relating to diversity, and also those appointed before 2016, who completed a questionnaire which included a more general question regarding diversity. Following a detailed analysis carried out by the Office of the Commissioner of the responses from each of those judges appointed before 2016, the information has been classified according to the categories established in the current questionnaire.

As of February 1, 2024

	Number of Judges	Indigenous individual	Racialized individual	Ethnic/Cultural Group or other	Individual with Disability	2SLGBTQI+ individual	Woman
Judges appointed before 2016	647	5	16	44	2	1	271
Judges appointed after 2016	533	17	60	80	4	31	281
TOTAL:	**1180**	**22**	**76**	**124**	**6**	**32**	**552**

Date modified: 2024-03-06

Demographic statistics on diversity in the judiciary

Judicial Applicants and Appointees

On October 20, 2016, the Government of Canada announced reforms to the superior courts judicial appointments process. As part of these changes and in order to increase transparency and rigour, the Government mandated the Office of the Commissioner for Judicial Affairs to collect and publish statistics and demographic information on judicial applicants and appointees. Based on voluntary disclosure by candidates through self-identification in the **Questionnaire** for judicial appointment, these statistics relate to diversity (see p. 3 of the candidates' Questionnaire) and language proficiency (see p. 6 of the Questionnaire).

October 28, 2023 – October 28, 2024

	Total	Gender			Diversity						Language Proficiency in both Official Languages						
		Male	Female	Other	Indigenous individual	Racialized individual	Ethnic/Cultural Group or other	Individual with disability	2SLGBTQI+ individual	Woman	Read court materials	Discuss legal matters	Converse with counsel	Understand oral submissions	Write decisions	Conduct hearings	All 6 abilities
Applications Received	379	169	210	0	15	74	85	7	18	210	150	126	122	132	99	110	98
Candidates Assessed	540	260	280	0	18	88	118	11	35	280	228	192	181	200	153	165	152
Candidates Highly Rec.[1]	95	43	52	0	1	9	18	1	7	52	40	34	30	34	27	29	27
Candidates Recommended[1]	106	45	61	0	4	12	11	0	3	61	49	42	42	46	39	40	39
Candidates Unable to Rec.[1]	339	172	167	0	13	67	89	10	25	167	139	116	109	120	87	96	86

	Total	Gender			Diversity						Language Proficiency in both Official Languages						
		Male	Female	Other	Indigenous individual	Racialized individual	Ethnic/Cultural Group or other	Individual with disability	2SLGBTQI+ individual	Woman	Read court materials	Discuss legal matters	Converse with counsel	Understand oral submissions	Write decisions	Conduct hearings	All 6 abilities
Newly Appointed Judges	88	38	50	0	4	11	12	2	4	50	35	26	24	27	20	20	19

Please note that in addition to the 88 newly appointed judges, 36 other judges were appointed or elevated to other courts during the same period; 16 men and 20 women. For example, this would include judges appointed to courts of appeal from the trial level courts. There were therefore 124 appointments during this period.

---

1. Please note that in their application, candidates may apply to more than one court. A candidate can therefore obtain a rating of "highly recommended" for one court, "recommended" for another and "unable to recommend" for yet another court. For ease of reference, the above statistics reflect the highest rating candidates may have received from the Judicial Advisory Committees.

Periods:

- **October 28, 2023 – October 28, 2024**
- **October 29, 2022 – October 27, 2023**
- **October 29, 2021 – October 28, 2022**
- **October 28, 2020 – October 29, 2021**
- **October 28, 2019 – October 29, 2020**
- **October 28, 2018 – October 28, 2019**
- **October 28, 2017 – October 27, 2018**
- **October 21, 2016 – October 27, 2017**

Judges currently on the bench

The Government of Canada has committed to tracking data on the diversity of judicial appointees. The Office of the Commissioner for Federal Judicial Affairs therefore publishes annual demographic statistics, not only regarding newly appointed judicial candidates and judges, but also, below, regarding all federally appointed judges. These statistics include judges appointed after 2016, who completed a questionnaire following reforms brought to the appointment process which included specific questions relating to diversity, and also those appointed before 2016, who completed a questionnaire which included a more general question regarding diversity. Following a detailed analysis carried out by the Office of the Commissioner of the responses from each of those judges appointed before 2016, the information has been classified according to the categories established in the current questionnaire.

As of February 1, 2024

	Number of Judges	Indigenous individual	Racialized individual	Ethnic/Cultural Group or other	Individual with Disability	2SLGBTQI+ individual	Woman
Judges appointed before 2016	647	5	16	44	2	1	271
Judges appointed after 2016	533	17	60	80	4	31	281
TOTAL:	**1180**	**22**	**76**	**124**	**6**	**32**	**552**

Date modified: 2024-10-25