

# Setting Judicial Compensation

Multidisciplinary Perspectives



LAW COMMISSION OF CANADA  
COMMISSION DU DROIT DU CANADA

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## Foreword

On March 7, 1998 the Law Commission of Canada hosted a Round Table in Victoria, B.C. to explore the implications of the decision of the Supreme Court of Canada in the *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* case. The Round Table brought together federally-appointed judges (including members of the Canadian Judicial Council), judges of provincial courts, Deputy Attorneys-General and representatives of central agencies from all provinces and territories.

As part of the day's proceedings the Law Commission of Canada requested a number of scholars to produce studies for distribution to invitees. These studies, prepared by experts in law, philosophy, political science and public administration, were designed to offer participants a multidisciplinary perspective on various issues raised by the decision. At the Round Table itself, oral presentations by these experts stimulated wide-ranging discussions about the relationship between executive and judiciary in Canada today.

Following the Round Table a number of invitees expressed interest in having the final versions of these studies made available in a more permanent format. The Law Commission of Canada was also asked to prepare a brief summary of the discussions at the Round Table for general distribution.

This collection is the result of these requests. The papers presented here are the work of their respective authors writing as scholarly commentators. They do not, therefore, necessarily represent the position of the Law Commission of Canada.

We are most grateful to the experts invited to the session for revising their papers for publication in this format. We trust that this document will prove to be an important resource for governments, judges and Canadians generally as public officials engage in the process of putting into effect the Supreme Court judgement. We also hope that it may contribute to further reflection about the constitutional position of the



judiciary in Canada, and perhaps even to a reassessment of the manner in which the compensation of all senior public officials—the executive, Parliamentarians and heads of agencies, as well as the judiciary—is set.

A complete version of this publication is available in electronic format on the website of the Law Commission of Canada—[www.lcc.gc.ca](http://www.lcc.gc.ca)—under the heading Reports – Round Table on the Provincial Court Judges Case.

Should you have any comments about the case or about the ideas expressed in the papers collected here, we would be pleased to hear from you, either by regular mail at:

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# Setting Judicial Compensation

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## Introduction

One of the key constitutional values of modern liberal-democracies is the independence of the judiciary. Traditionally, this independence has been cast in terms of four features: a credible process for nominating and appointing judges; security of judicial tenure; judicial control of the administration of the courts; and fixed conditions of judicial remuneration, including pensions.<sup>1</sup> In one or another form, all of these features find echo in the Canadian constitution. Some are mentioned in the Judicature provisions (sections 96-101) of the *Constitution Act, 1867*. Others are believed to be part of the unwritten constitutional law that Canada inherited from the Common law of the United Kingdom.<sup>2</sup>

Over the past century the Supreme Court of Canada has rendered several decisions that touch on aspects of the independence of the judiciary. Until 1997, however, it had never been called upon to expound the historical and constitutional foundations of the Judicature provisions of Canada's constitution in great detail. All this changed on September 18, 1997, when the Supreme Court of Canada released its judgement in the *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*.<sup>3</sup>

This decision set a basic framework to govern the manner in which judicial compensation would thereafter have to be fixed. It has far-reaching implications for Canadians, and for all governments in Canada. In giving judgement, the Supreme Court set out various constitutional principles not previously announced in any case. Putting these principles into practice has required the establishment or amendment of judicial compensation and other processes in virtually all Canadian provinces and territories.

While the decision addressed a range of important questions about the relationship between the executive and the judiciary it is, despite its length, not altogether clear on a number of points. At the time it was rendered, further litigation was a distinct possibility, and indeed, in January 1998 the Supreme Court was asked to clarify certain aspects of





its decision and certain of the consequences that the decision would produce.<sup>4</sup>

### Purposes of the Round Table

The Law Commission of Canada believed that it could help judges, Attorneys-General, officials in central agencies of government, and the Canadian public to understand the ramifications of the decision by hosting a one-day Round Table bringing together those officials who would be most directly involved in working through the institutional reforms mandated by the Supreme Court.

The main object of the Round Table was to facilitate a wide-ranging, exploratory and constructive exchange of ideas about the implications of the decision for future action by the executive and Parliament. The discussion among invited participants was meant to be forward-looking, and to focus on imagining the range and character of processes that might meet the requirements announced by the Supreme Court of Canada.

The Law Commission of Canada hoped that the Round Table would also assist parties in exploring various other dimensions of the relationship between executive and judiciary in a liberal-democracy. It sought to provide a forum in which the issues raised in the *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* case could be discussed in the light of the state of that relationship as it now exists. Such a discussion, it felt, would provide a solid basis for a continuing dialogue about the appropriate character of the relationship between executive and judiciary in Canada.

### Rationale for the Involvement of the Law Commission of Canada

The *Law Commission of Canada Act* directs the Law Commission to undertake initiatives that will stimulate constructive discussion about issues of law and justice from a broad social and economic perspective. The Law Commission saw the Round Table as an opportunity to further this multidisciplinary aspect of its statutory mandate.

Moreover, the topic of judicial compensation itself is closely related to the general programme of research being pursued by the Law Com-



mission. One of the research themes adopted for the period 1997–2000 is: Governance Relationships. Hosting the Round Table was an opportunity for the Law Commission to learn first-hand what are the key issues in the ongoing management of the constitutional relationship between executive and judiciary, and how issues of compensation are being handled.

It also gave the Law Commission an occasion to ask scholars, judges, lawyers, Attorneys-General and members of central agencies about specific programmes of investigation and research that could be undertaken under its Governance Relationships theme. Together with broader public consultations the dialogue at the Round Table contributed to defining the detail of some of the studies now being undertaken by the Law Commission.

### Framework of the Round Table

To assist participants in addressing the constitutional and practical issues raised by the judgement of the Supreme Court in a spirit of open exchange, the Law Commission of Canada organized the day into four sessions under the following headings:

- (i) What could the judgement mean? The history and context of the executive-judicial relationship;
- (ii) What did the judgement actually say? What now seems to be constitutionally required?
- (iii) What are the options? Implications of the judgement for questions of institutional design;
- (iv) Where do we go from here? Laying the foundations of the executive-judicial relationship.

The Law Commission invited leading scholars in law, philosophy, political science and public administration, drawn from across Canada, to prepare short papers discussing key aspects of the judgement under each of these headings.

These papers were intended to offer participants a multidisciplinary perspective on the issues raised by the case and to stimulate discussion



about how the relationship between executive and judiciary had come to its present state. It was believed that such a perspective would also generate dialogue about what would now be required, in addition to a strict respect for the procedures set out in the *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* case, to nurture a constructive and productive relationship between executive and judiciary.

The invited experts each spoke for about 15–20 minutes, addressing the main themes of their papers. These presentations were followed by informal, and largely free-flowing discussions moderated by members of the Law Commission of Canada and its Advisory Council. The discussions were not intended to lead to specific proposals or even to settled policy outcomes. They were, rather, structured to permit a frank airing of issues of concern to members of the judiciary and to representatives of government.

### Setting *Judicial Compensation* as a Governance Issue

Since the time the Round Table was held in March 1998, the executive and judiciary have continued to work through the implications of the Supreme Court judgement. Most jurisdictions have now established Compensation Commissions or revised their existing Commissions. Some of these Commissions have even completed their first reports. The Law Commission nonetheless believes that the papers presented at the Round Table should be made available to Canadians as a record of the Round Table. Each Essay speaks to issues that are timeless and that need to be revisited continually in a liberal-democracy.

The Law Commission hopes that the different disciplinary perspectives contained in this collection will enrich understanding of the strengths and weaknesses of the Supreme Court decision as a contribution to public governance in Canada. It also hopes that the collection can serve as a resource for further reflection about the constitutional position of the judiciary, more generally, and about related issues such as processes for the appointment and remuneration of judges, and for the administration of courts.



Finally, because these papers speak to broader questions of governance in a liberal democracy, the Law Commission trusts that they will stimulate reflection about how we should go about setting compensation for all senior public officials—Parliamentarians, the Cabinet, the Governor-General, members of government agencies and senior public servants. Like questions relating to the remuneration of judges, this too, is a governance issue central to ensuring that all processes of public decision-making are free of bribery and corruption.

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<sup>1</sup> See notably, W. Lederman, “The Independence of the Judiciary” (1956) 34 *Canadian Bar Review* 769, 1139.

<sup>2</sup> See P. W. Hogg, *Constitutional Law of Canada* (4th ed) (Toronto: Thomson, 1998) ch. 7 and sources cited; G-A. Beaudoin, *La constitution du Canada* (Montreal: Wilson and Lafleur, 1990) ch. IV.

<sup>3</sup> [1997] 3 S.C.R. 3; also reported as *Reference re: Public Sector Pay Reduction Act (P.E.I.)*, s. 10 (1997), 150 D.L.R. (4th) 577 (S.C.C.).

<sup>4</sup> *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3; also reported as *Reference re: Public Sector Pay Reduction Act (P.E.I.)*, s. 10 (1998), 155 D.L.R. (4th) 1 (S.C.C.).



# The Integrity of Institutions: Role and Relationship in Constitutional Design

**Roderick A. Macdonald**

## Introduction

There is a wonderful painting in the Louvre which evokes God's final judgement on humanity. The canvass is terrifying in its physical imagery. It is even more terrifying as allegory. For here at the gates of heaven, where the lion is to lie down with the lamb, stands the Almighty—who knows all, sees all, understands all—separating the elect from the damned.

The prospect of a failure in the application of the standards of justice, of an incomplete accounting of lives lived, or of an error in judgement in assessing these lives is remote. Because God is the embodiment of truth, of justice, of mercy and of grace, no uncertain evaluations of acts or motives destabilize heavenly decision-making. No messy moral dilemmas compromise the rigour of God's commandments. No mere human frailty such as partiality of perspective or improper influence colours eternal judgement. Complete knowledge and clarity of purpose characterize the divine.

Now contrast the mechanisms of a computer game. Can there be a logic more frighteningly inexorable than that of a machine programmed with finite factual knowledge, with a defined set of decision rules in a closed normative framework and with a fully predetermined evaluation process? In these circumstances on the margins of ordinary human intercourse—in the ethereal realm of the microchip—one is again confronted with the all-knowing, all-seeing and all-understanding



decision-maker. Neither personality nor physique, neither nature nor nurture, play in the assessment of action.

The prospect of a failure in the discovery of the appropriate standard, of an incomplete accounting of facts, or of an error in judgement in evaluating their meaning is remote. Because the computer is the embodiment of correctness, of exactitude, of impartiality, and of hermetic, syllogistic logic, here also no uncertain evaluations of acts or motives destabilize decision-making. No messy moral dilemmas compromise the rigour of exhaustive, programmed data. And no mere human frailty such as partiality of perspective or improper influence colours electronic judgement. Complete knowledge and clarity of purpose characterize the computational.

Moses, Maimonides and Martin Luther each anticipated the paradox suggested in the juxtaposition of these two examples of third-party decision-making: the antithesis of the divine is merely its obverse—the technical. Hell is less the reign of inhuman evil than the application of non-human calculation to human affairs. Here on earth, being condemned to a mortal existence, decision-makers have neither the omniscience of the heavenly nor the refuge of the hermetic to sustain their judgements. They must judge knowing that they too will be judged. Nonetheless, the need for humility in the exercise of secular authority which this realization ought to call forth has not always been, and is not even now, universally acknowledged.

In this Essay I use these competing perceptions of third-party decision-making to highlight four main themes that are the deep background of any discussion about judicial compensation.<sup>1</sup>

First, I want to situate the Supreme Court judgements in the *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* cases<sup>2</sup> (hereinafter, the *Provincial Court Judges* cases) in their broader historical context: namely, the struggle, in a Parliamentary tradition, to develop the institutions of liberal-democratic governance. I note in passing that neither the *Act of Settlement of 1701* nor the Judicature sections of the *Constitution Act 1867* actually speak to the notion of judicial independence as now understood.



Second, I hope to show that some of our current perspectives on judicial independence are driven by reactions to newer legal artifacts that we are only beginning to comprehend. Central among these is, of course, the *Canadian Charter of Rights and Freedoms*. But the expanded role of the regulatory and welfare state is another.

My third goal is to show that the institutions through which various governmental functions are elaborated are not fungible. In modern democracies, public functions must be differentiated and cannot be substituted one for the other: each institution of governance requires particular structures, particular processes and particular personnel. This is why we assign particular tasks to particular offices, and why we choose particular persons with particular abilities as office-holders.

Fourth, not all human relationships can be reduced to the cold logic of transactions between independent rational actors. Not all institutional roles can be mediated only in terms of the reciprocity of the market. The relationship between judiciary and executive is not like the exchange relationship of employer and employee; it is both much more complex and more interdependent than that.

Let me now address each of these four themes in turn.

## I. The Act of Settlement and the Judicial Function

Concern about the role and duties of the senior judiciary in the Common law tradition is not new. The Stuart monarchs of England and their legal advisers believed in the mid-17th century that the King was the physical embodiment of divine will. He was, for his subjects, the sole authorized dispenser of God's temporal justice. The Stuarts saw that God had no need of the alternative perspectives provided by Parliament or a judiciary to achieve perfect justice in heaven. Why then, they reasoned, should his earthly delegate—the Monarch? Royal judges were not to be independent fonts of justice, but were simply to be instruments of the Sovereign's will.

Contrary to popular belief, the Stuart perspective did not altogether disappear with the Stuarts. It lives on explicitly both in theocratic States and in Peoples' Democracies driven by an ideology of revolutionary



legality. More troubling, it is implicitly present even in secular liberal democracies, although dressed up in the garb of scientific rationality. Today, we confront a legion of jurists who see courts as being as ineffable as machines. These jurists are all too ready to recreate, in the domain of everyday human interaction, the methods and proofs of virtuous scientific decision-making. For them, the enhanced access to information brought about through digitalized data and by software search engines approximates the resources of the divine; and jurimetrics promises a methodology grounded in the rigour of Boolean logic and pure deduction.

It is between the conflated subjectivity of Stuart jurisprudence (where human agency is substantively subordinate to divine grace) and the inflated objectivity of the judge-cipher (where human agency is procedurally subordinate to binary decision-trees) that we should seek our model of law and politics: here ought to lie the practices of contemporary liberal constitutionalism. These practices would acknowledge the necessary politics of judging and the necessary legal frame of politics even as they preserve the distinctiveness of the two modes of human decision-making.<sup>3</sup>

Unfortunately, in the late 20th century, we are reluctant to admit to our humanity and to the human dimensions of our constitutional order. We have rewritten our constitutional history as a tale of judicial independence rather than as one of judicial and Parliamentary interdependence. Along the way we have also grossly overestimated our capacities to carry through with the exercise of constitutional design that strict institutional independence requires.

From the perspective of 1998 in Canada, the political struggles between Monarch and Parliament that led up to the English *Act of Settlement of 1701* are being reinvented as a conflict between the Executive (acting through Parliament) and the courts about the independence of the judiciary. This, at least, seems to be the gravamen of the Supreme Court decisions in the *Provincial Court Judges* cases.<sup>4</sup> Nonetheless, the century-long Jacobite and Carolingian controversy was both much more and much less than a conflict about judicial independence as the idea is now conceived.<sup>5</sup>





That high controversy was much more than a conflict about judicial independence in that it brought to the fore a number of deep issues about who embodied justice and who owned the common law. The 1701 *Act of Settlement* must be read alongside such other legal milestones as the *Case of Proclamations* in 1615 and the *Bill of Rights* of 1689. Epigrammatically, one can characterize the struggles of the 17th century as reflecting a gradual progression in constitutional theory from a conception of political authority in which “law was derived from the State”, to a notion of governance in which “the State was derived from law”.

The Stuart controversy was also much less than a conflict about judicial independence as the idea is understood in the late 20th century. Parliament rightly assumed that the central feature of a liberal constitution was the dissociation of the judiciary from the executive, not the independence of the judiciary from Parliament. The thought that judges would claim for themselves a status and legitimacy grounded otherwise than in the will of Parliament was not then present in anyone’s mind.

In the 17th and 18th centuries, lawyers developed the concept of a professional judiciary and propounded the “artificial reason of the law” as means to control the Monarch, and to enforce a separation of divine and secular. Today, for most liberal democracies, the chances of a theocratic renaissance are remote. The threat is elsewhere. Science (or expertise—*techné*) has become secular religion. We are constantly tempted by our presumed scientific mastery over our world into thinking that our legal concepts and institutions are equally powerful. But we lack the means to control our legal-political temptations: the artificial reason of the law is not self-limiting; there are no inherent bounds to the projection of legal rationality into human activity; and constitutional rights guarantees practically promise judicial redress for all manner of hurt. No transcendent myth of “the Fall” provides a moderating counterpoint to judicial science, as it did for divine justice through the tempering effect of mercy. The point, of course, is that however legal TRUTH is grounded—whether in religion or in science—its elevation to unchecked supremacy is devastating for liberal constitutionalism.<sup>6</sup>



## II. Differentiating the Tasks of Governance

And so we arrive directly at the theme of this panel. Post-enlightenment constitutions, whatever their form—liberal or communitarian, democratic or oligarchic, unitary or federal, monarchical or republican, oracular or discursive—result from the realization that complex, dispersed societies are fundamentally different from the neighbourhood, the community or the tribe. Normative frameworks necessarily must transcend the personal authority of local, face-to-face, intersubjective negotiation. Diversity in geography, gender, class, religion and ethnicity is an ongoing challenge to the very possibility of personal authority. No contemporary society can long hold together solely around the personal authority of even a highly charismatic leader.<sup>7</sup>

Just as the emergence of industrial capitalism demanded and responded to a division of manual labour, the emergence of constitutional democracies demanded and responded to a division of intellectual labour. For the past three centuries, the political challenge has been: (1) to deduce, on the basis of experience and reason, the central co-ordinating tasks of human society; (2) to determine when it is profitable to differentiate these tasks; and (3) to think through how it is possible to regroup them meaningfully in coherent and recognizable patterns.

The central concerns of 17th-century Parliamentarians were the first two of these considerations; today it is the third that is the primary pre-occupation. Given the contemporary diversity of human political achievements, there can be no universal formula for managing the regroupment of governance tasks. Different societies imagine their possibilities differently, and hence draw their institutional boundaries differently. But the very idea of distinguishing and regrouping tasks inescapably raises two pragmatic issues of institutional design to which modern constitutions typically attempt to respond.

First, to what degree does effective performance of these differentiated and regrouped tasks require that they be given a more or less stable and protected institutional location? In relation to judging, the question is whether (and if yes, to what extent and in what connection) the judiciary as an institution of government must be afforded an



impregnable status and an inviolate jurisdiction. These, of course, are the structural questions that lie at the heart of most litigation in Canada under section 96 of the *Constitution Act, 1867*.

Second, once any such institutional location has been imagined and elaborated, how can the people who are called upon to fill the designated institutional role be protected from the temptations of office? In relation to judging, the question is how to ensure that those holding office both respect the limits of their institutional role and exercise that role free from inappropriate external influence.

Over the past fifteen years, Canadian jurists have come to worry deeply about how to line up the demands of office, the processes by which the office is performed and the mechanisms established for choosing and protecting office holders. For it is the conjunction of office and role that enables us to seize the criteria for differentiating the tasks of governance in a manner than respects our fundamental political values.<sup>8</sup>

To focus only on the office or only on the office-holder radically understates why and how we choose those to whom we assign the role of judge. Actual office-holders are not the abstract individuals cherished by proponents of Chicago-school economics. They are human beings who have various roles in life: as child, as parent, as friend, as neighbour, as co-religionist, as professional, to take only a few examples. We choose people not just to occupy an office; we choose them to fulfil a role, and to do so with integrity and fidelity to that role.

Those who are called upon to serve as legislators are selected for their own special virtues. We do a disservice to our legislators to attack them on the basis of criteria appropriate to the selection of candidates for medical school or members of the Olympic hockey team. There is an identifiable role morality to being a legislator. We hope that our processes of selection—election by the voting public—work to produce people having these virtues and committed to that role morality. The institutions and processes of Parliament itself are designed to match these abilities with the tasks to be performed.

Those who are called upon to serve as judges are also selected for their own special virtues. We do a disservice to our judges if we disregard or denigrate these virtues, or if we attempt to substitute alternative virtues



not necessarily coherent with the demands of the office. There is also an identifiable role morality to being a judge. We hope that our processes of selection—executive nomination by the Governor-in-council—work to produce people having these virtues and committed to that role morality. Again, judicial institutions and the judicial process are specifically designed to match these abilities with the tasks to be performed.

### III. The Provincial Court Judges case

In the *Provincial Court Judges* cases, the Supreme Court of Canada signalled that there is something amiss in the way the courts are perceived as an institution of democratic governance. Various consultations and opinion-research surveys have revealed a deep lack of public confidence in the rules and processes of formal law. This is part of society's general scepticism towards all authority. Having contested successively religion, social class, professional expertise, and Parliament as *loci* of social and political authority, Canadians are now visiting their discontent upon the courts.

The judgement of the Supreme Court in the initial *Provincial Court Judges* case stated that judicial independence was the foundation of public confidence in the courts; that without neutral salary determination mechanisms, judges could not be independent; and that adequate salaries were a necessary precondition to judicial impartiality.

There is, however, not a lot of empirical evidence on the question. Public confidence in judges appears to correlate more with individual impartiality and integrity than with institutional independence. In this respect, suspicion that individual judges are just “political” appointments more closely captures public concern than the notion that the judiciary as a whole is “politicized”. Institutional independence is, no doubt, important; but its importance seems to be directly proportional to public perceptions of judges being political appointees.

The empirical evidence also does not appear to show that Canadians are concerned that “uncompetitive” judicial salaries and benefits will compromise the country's capacity to attract and retain good judges. Indeed, many fine candidates wait for a chance to serve their country



as judges, fully aware that public service will impose significant costs upon them. Investments may have to be disgorged; friends may have to be disavowed; personal lifestyles may have to be curtailed (at least in public); privacy may have to be sacrificed; and financial recompense may well be adjusted downwards.

Finally, threats or inducements about financial compensation or offers of preferment in the advancement of one's career do not seem to have an impact on the capacity of judges in Canada to maintain the highest standards of integrity and impartiality. Of course, it is possible to imagine some countries where financial blackmail by governments is routinely used to influence judicial opinion. In Canada, however, the question is not whether there are explicit constitutional guarantees and procedures designed to prevent such occurrences, but rather, what are the elements of our constitutional tradition that make them unthinkable.

What then explains the declining confidence of Canadians in the law and the courts that the Supreme Court rightly notes? Is there something fundamental in the relationship among Parliament, the executive and the courts that constitutional norms clustering around the notion of independence signal to the public? In my view there is. It is this.

Legislation and adjudication are distinct and identifiable processes of social ordering that are responsive to distinct and identifiable sets of values and goals. This is not to say that there will never be occasions when both legislatures and courts step beyond the frontiers of their traditional roles. But when the public senses an inappropriate conflation of the legislative and judicial functions, it feels disempowered and unable to evaluate outcomes and to attribute accountability. For many, apprehension that such a conflation is becoming too frequent—an apprehension fuelled by an inadequate understanding of the deeper lessons of the Stuart conflict—is what underpins their loss of confidence in the law and the courts.

#### IV. Contemporary Adjudication

Over the years the distinctive features of norms defining legislation and adjudication have been cast in many ways. One unhelpful way of doing



so is to decry the politicization of the courts and the legalization of politics as if the two processes could be sharply differentiated. A better question, recurring to the struggle between Stuart monarchs and Parliament, is to ask “what are the institutional design factors that permit a constitutional division of labour to work successfully in a liberal democracy?” Here the focus is on two features that define the integrity of any institutional process: the procedural morality of the office and the role morality of the office-holder.

Consider adjudication. The classic statement of what distinguishes Common law adjudication from the legislative enterprise is that given by Lon Fuller in his essays “The Forms and Limits of Adjudication”<sup>9</sup> and “The Implicit Laws of Lawmaking”<sup>10</sup>. Fuller held that the characteristic feature of adjudication as a process of social ordering was the mode of participation in decision-making afforded to the affected parties. For him, adjudication involved the presentation of stylized and constrained proofs about cold facts, and the advancing of reasoned arguments about pre-existing norms. Adjudicative reasoning was bounded, and was rule-based, not consequentialist.

If there is a present public concern about the independence of the judiciary it would seem to flow from the perception of a slippage between law and politics—that is, about what appears to be the re-emergence in modern garb of the undifferentiated political authority asserted by the Stuarts. This, in turn, can be traced to a number of fundamental shifts in the rationality of adjudication and in our expectations of legislation since World War II. Unfortunately, Canadian constitutional theorists have devoted inadequate attention to exploring them. This is tragic. For until we understand the changed character of the judicial and Parliamentary roles in contemporary society, we shall not be in a good position to determine if we are continuing to achieve an optimal match of personal virtue and governance task.

How is the judicial role different now than previously? First, even the private law is moving away from the Aristotelian logic of corrective justice.<sup>11</sup> Judges are now being asked by Parliament, even in private law matters, to make quasi-legislative allocative decisions of enormous consequence: for example, they must decide family property entitlements



and dependant's relief claims by reference to *ex post* standards, and mass tort compensation by reference to principles of market share liability. In addition, equitable doctrines such as abuse of rights, unjust enrichment, the constructive trust and unconscionability are moving everyday adjudication into the realm of distributive justice. By definition, these allocative and redistributive decisions require courts to make “small-p” political decisions that previously fell within the purview of Parliamentary discretion.

Legislatures are also displaying an inability to make policy decisions. Parliament is succumbing to the temptation to duck responsibility for deciding difficult issues. In consequence, judges are being asked by litigants to solve complex social problems by judicial fiat. The invention of novel entitlements and new injunctive remedies that require the ongoing supervision of courts, and the transformation of adjudication into some form of Solomonian or Cadi justice has reframed the judicial role. Of course, judges need not have accepted, nor need they continue to accept, this abdicatorial remit by Parliament. Rather than attempt to solve the unsolvable through adjudication, they could simply return the political serve to the legislature.

A better understanding of what it is that judges actually do, and of the inter-relationship of formal adjudication and other social-ordering and dispute-resolution processes, compels the conclusion that the skills required of judges are rapidly changing. A large part of the judicial function today is to manage or to supervise other decision-makers—administrative, political, legislative, or private. The trends to A.D.R., consensual arbitration, mediation, settlement conferences, and judicial *med-arb* have accelerated to the point that the predominant characterization of federal judges in the United States is that, in civil cases, they are “managerial judges”.<sup>12</sup>

There is another feature of late 20th century public life that bears on the judicial role. The inevitable conflicts between the constitutional values of a liberal democracy and the will of those who want the State to promote a rather deeper social homogeneity, have thrust judges into the public domain where they are increasingly being perceived as political figures. By explicitly casting the judiciary as the censor of Parliament,



the *Charter of Rights and Freedoms* exacerbates the suspicion of those who have only imperfectly internalized the legal framework of a liberal democracy. And because judges themselves are still learning how to exercise their powers to leave pieces of legislation on the cutting room floor and how to resist the reviewer's temptation to write the book that Parliament did not, sceptics can relatively easily find examples of judicial over-reaching.

It is against the background of a changing judicial role, and especially of a changing configuration of the judicial role morality, that contemporary concerns about the institutional design features that permit a constitutional division of labour to work successfully in a liberal democracy must be read. In other words, distinguishing and regrouping the tasks of governance as between courts and Parliament first requires that we decide what it is that we want judges to do. This is not, to repeat, a decision that is self-evident; nor is it a decision that will be made the same way in all times and for all places.

## V. Thinking About the Judicial Task Today

The *Provincial Court Judges* cases are a fascinating study of the way in which judges now perceive their constitutional role. After all, regardless of how the initial allocation of governance tasks is configured, the ongoing processes of Parliamentary and especially judicial decision-making will give a different shape to that allocation. A well-drawn constitution provides a framework that distinguishes between types of governance activities, and that establishes the different institutional processes, different levels of difficulty and different degrees of social consensus necessary to explicitly modify the framework.

In the final analysis, and short of explicit constitutional amendment, it is for Parliament and the Supreme Court implicitly to negotiate the appropriate degree of legal supervision of political decision-making and the appropriate scope for courts to make political judgements. For this reason, it is useful to consider briefly some of the assumptions about the judicial role that are reflected in the majority judgement of the Supreme Court in the initial *Provincial Court Judges* case.





Most importantly, this judgement rests on the view that a liberal-democratic constitution not only demands the strict separation of the judicial from the legislative and executive function, but also that it demands an absolute independence of the judicial office. The Supreme Court ascribes to judges a position outside the very political system that gives them whatever authority and legitimacy they have. The judgement implies that the interdependence of governments and courts can only arise at the moment a first constitution is established. The framers of the constitution—having textually established the perfect institutional structure—can like Descartes' God, thereafter leave things alone. Neither the framers nor the mere mortals living through the evolving relationship need worry thereafter about its ongoing management. The rules, having once been set down, need only to be strictly followed in a non-political manner.

Imagine any other type of ongoing relationship where the relationship, once established, then marches smoothly to its initial beat along the channels originally announced for it? More than this, it is hard to believe that anyone would seriously think that the relationship works best if people in the relationship thereafter never talk directly to each other about it. Quite the reverse, the true independence of parties to a relationship—their true capacity to maintain their individuality within the relationship—is entirely tributary to the fact that they mutually recognize their interdependence. Similarly, the true independence of the judiciary—its true capacity to maintain its separation from the other branches of government—is entirely tributary to the mutual recognition by judges and Parliament of their interdependence.

There is also a paradox in the Supreme Court's use of the Preamble of the *Constitution Act, 1867* as a vehicle to identify the *Act of Settlement* of 1701 as the source for the new constitutional norm it proclaims. This is not to suggest that there can be no law in a Preamble: of course it is the case that constitutions involve a complex amalgam of made and implicit law; and of course it is the case that one can only read a text against a background of implicit law. That is precisely the point. The political resolution of the Stuart controversy was as much a part of the *Act of Settlement* as were the precise words of the enactment.



Courts will read texts against their background implicit law. But courts must remain faithful to texts. One does not assert implicit law as a pretext (note the etymology of the word pre-text) for making new written law. If there is a set of implicit norms about judicial independence, these implicit norms only make sense when read as against specific historical and contemporary texts—either constitutional texts such as, in Canada, section 96 of the *Constitution Act, 1867*, sections 7 and 11(d) of the *Charter of Rights and Freedoms*, or quasi-constitutional norms such as the common law rules of natural justice, *delegatus non potest delegare*, or other elements of Canada’s implicit Bill of Rights.<sup>13</sup>

A third feature of the judgement is its curious conception of how public offices and public roles are fulfilled. The court operates two fundamental dissociations. It dissociates the concept of office from the concept of organization; and it dissociates the concept of role from the concept of relationship. If as members of a complex, diverse and differentiated society we have learned one thing over the past half-century it is this. There can be no individuals who are not socially located. There can be no self without the other. Who one is depends on how one understands a rich web of interpersonal affects—for example, to parents, to children, to a religion, to an ethnicity, to a neighbourhood, to a language, and to a culture.

This lesson is universal. Who one is depends on how one understands the rich web of offices that one fulfils. There can be no specialized offices that are not located within a network of other specialized offices. The meaning of the judicial office in any society is dependent on the meaning of other governance offices. The role morality of the judge in any society depends on the relationship of that role morality to other role moralities.

To recognize one’s own office in a complex of offices and to adopt a role in a drama where one has just one part, are pre-conditions to establishing, nurturing, negotiating and maintaining fidelity to a relationship. An elected official who transcends politics we label as a statesman: this is the person who can rise above partisan passions and serve a higher rationality. Those who do not we stigmatize as politicians. Is it



surprising that judges who abandon the rationality of law are looked upon as politicians?

The Supreme Court does not appear to believe that judicial independence is tied to the fidelity with which judges perform the roles assigned to them under the constitution. Designing the detail of their own conditions of employment is, in principle, not one of these. The Supreme Court also appears to believe that the interposition of a permanent mediator in the form of a judicial Compensation Commission is an inescapable component of the process of mutual recognition between judiciary and executive. This is, at best, a dubious proposition in a liberal democracy.

### Conclusion

Let me now conclude—not on a pessimistic note, however. Those—and by the word “those” I mean both Deputy Attorneys-General and members of the judiciary—who have asked the Law Commission of Canada to host this Round Table, know that the Supreme Court judgement itself will do little to generate the mutual recognition and mutual respect necessary to ensure true judicial independence. It may, perhaps, and perhaps only temporarily, give one or other party an additional argument. But the truth is, continuing recalcitrance by the government could well generate an excessive politicization of the process, and continuing litigation by judges will bring the entire judiciary into disrepute.

The relationship between judges and executive is not like a marriage. There are no divorces. This is a relationship that, however fluid it may be over the years, is inherent in our constitutional arrangements. The other party is not going to go away. And there are no final victories. Helping those who must negotiate, manage and live this fundamental constitutional relationship find the voice to do so is, in the last analysis, what this Round Table is all about.

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<sup>1</sup> Parts of this text have already been published in R.A. Macdonald and A. Lajoie, “Auctioneers, Fence-viewers, Popes—and Judges” (1998) 9 Constitutional Forum 95.



- <sup>2</sup> [1997] 3 S.C.R. 3; [1998] 1 S.C.R. 3.
- <sup>3</sup> See the thoughtful discussion of this issue in J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1996).
- <sup>4</sup> In this connection it is worth noting the evolution in the thinking of the Supreme Court between the decision in *R. v. Valente*, [1985] 2 S.C.R. 673 and the decisions in the *Provincial Court Judges* cases, *supra* note 2.
- <sup>5</sup> For comments on the *Provincial Court Judges* cases reflecting these modern perspectives see J. Ziegel, “The Supreme Court Radicalizes Judicial Compensation” (1998) 9 *Constitutional Forum* 31, and C. Baar, “Judicial Independence and Judicial Administration: The Case of Provincial Court Judges” (1998) 9 *Constitutional Forum* 114.
- <sup>6</sup> To my knowledge, the best (perhaps the only) discussion of this point is found in B. Polka, “The Supremacy of God and the Rule of Law in the *Canadian Charter of Rights and Freedoms*: A Theological Analysis” (1987) 32 *McGill Law Journal* 854.
- <sup>7</sup> A challenging perspective on whether it even makes sense today to talk of a secular state exercising a territorial monopoly, given these multiple diversities, is elaborated in D. Downes and R. Janda, “Virtual Citizenship” (unpublished paper prepared for the seminar series *Théories et émergence du droit*, McGill University/University of Montreal, May, 1998).
- <sup>8</sup> The question is, of course, most sharply debated in connection with the *Canadian Charter of Rights and Freedoms*. See, for example, F.L. Morton, “The Charter Revolution and the Court Party” (1992) 30 *Osgoode Hall Law Journal* 627; M. Mandel, *The Charter of Rights and the Legalization of Politics*, rev. ed. (Toronto: Thompson Educational Publishing, 1994); and R. Sigurdson, “Left and Right-wing Charterphobia in Canada: A Critique of the Critics” (1993) 7-8 *Canadian Journal of International Studies* 95.
- <sup>9</sup> L.L. Fuller, “The Forms and Limits of Adjudication” (1978) 92 *Harvard Law Review* 353.
- <sup>10</sup> L.L. Fuller, “The Implicit Laws of Lawmaking” in K. Winston, ed., *The Principles of Social Order* (Durham: Duke University Press, 1983) at 158.
- <sup>11</sup> As Ernie Weinrib has forcefully argued, this image—that judges apply pre-existing norms to pre-existing facts in order to redress identifiable wrongs only to the measure of the harm caused—has traditionally grounded the law of contracts, of torts and even of crimes. See E. Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995).



- <sup>12</sup> The phrase was coined by J. Resnick, “Managerial Judges” (1982) 96 Harvard Law Review 374.
- <sup>13</sup> For a review of these various components in the context of due process guarantees see R. A. Macdonald, “Procedural Due Process in Canadian Constitutional Law: Natural Justice and Fundamental Justice” (1987) 39 University of Florida Law Review 218.



# *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*

**Elizabeth Edinger**

## Introduction

This paper addresses two questions. What did the initial judgement of the Supreme Court of Canada in the *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* case<sup>1</sup> (hereinafter, the *Provincial Court Judges* case) actually say? What now seems to be constitutionally required?

The short answer to the first question is that the judgement contains a great deal more than can be even outlined in this paper. The sheer length of the reasons of the majority judgement, written by Lamer C.J.C., indicates its scope. Even after subtracting the pages recounting the facts and the judicial history of the three appeals that were consolidated, the majority judgement runs over one hundred pages in the official reports.

The short answer to the second question is that what is now required is subject to considerable uncertainty. The judgement has introduced a range of new issues relating to the principle of judicial independence and the discussion of the unwritten norms underlying the constitution provides ammunition for constitutional litigation generally for years to come.

The judgement of the majority<sup>2</sup> is divisible into four parts which deal, in descending order of particularity, with:

1. the relationship of unwritten constitutional principles to the written Constitution and the role of the Court interpreting the *Constitution Acts, 1867 to 1982*;
2. judicial independence and its various dimensions;



3. the institutional dimension of financial security; and
4. the application of the principles enunciated.

The appellants focused on what the Court held to be the institutional dimension of financial security but there were also attacks on various other legislative provisions which raised questions about other characteristics of judicial independence. The individual parts of the judgement are comprehensible only in the context of the judgement as a whole and, in particular, in the context of the discussion of the relationship of the written and unwritten components of the constitution.

### The Role of the Court and the Great Entrance Hall to the Castle of the Constitution

The judgement gives us a new constitutional metaphor to add to the watertight compartments of the ship of state<sup>3</sup> and the living tree of the Constitution<sup>4</sup> and asserts and employs a level of judicial activism not formerly observed in federalism cases.

The appeals involved attacks on the constitutional validity of provincial economy measures of governments in Alberta, Manitoba and Prince Edward Island directed towards their respective provincial courts (s. 92[14] courts as distinct from s. 96 courts) and primarily affecting remuneration of judges. The appellants relied exclusively on s. 11(d) of the *Constitution Act, 1982* as the foundation for their arguments about judicial independence. The Supreme Court of Canada was concerned with the “larger question of where the constitutional home of judicial independence lies”<sup>5</sup>, taking the view that the express provisions of the *Constitution Acts, 1867 to 1982* are not exhaustive. The judicature provisions in the *Constitution Act, 1867*, ss. 96-100, protect only superior courts and then incompletely, and s. 11(d) of the 1982 Act protects only those courts and tribunals seized with jurisdiction over persons charged with offences.

The judgement holds that judicial independence is one of the unwritten foundational norms or principles whose home or “true source” is the preamble to the *Constitution Act, 1867*. The preamble:



recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, the preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also invites the use of those organizing principles to fill out the gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.<sup>6</sup>

The Preamble is, therefore, “the grand entrance hall to the castle of the Constitution”<sup>7</sup> and the Court is the designated gap filler. Gaps are to be filled by utilization of the organizing principles referred to in the passage quoted above.

Identification of those organizing principles, therefore, is critical for use. Two organizing are identified: federalism; and constitutional democracy.<sup>8</sup> There is no indication of whether this identification exhausts the category or whether there are more organizing principles to be identified when the need arises.

### Judicial Independence: Core Characteristics and Dimensions

The Court holds, following earlier cases, that judicial independence has three core characteristics: security of tenure; financial security; and administrative independence. It holds further that each of these core characteristics may have both an individual and an institutional dimension.

[T]he core characteristics of judicial independence, and the dimensions of judicial independence, are two very different concepts. The core characteristics of judicial independence are distinct facets of the definition of judicial independence. Security of tenure, financial security, and administrative independence come together to constitute judicial independence. By contrast, the dimensions of judicial independence indicate which entity—the individual judge or the court or tribunal to which he or she belongs—is protected by a particular core characteristic.<sup>9</sup>

Financial security, therefore, has two dimensions, individual and institutional, and it was the latter dimension that was affected by the provincial economy measures.





The institutional dimension of judicial independence is said to emerge from the logic of federalism and the Charter, both of which require an independent arbiter, and from the separation of powers, another unwritten principle or norm. Because the primary source of the institutional dimension of judicial independence is the preamble and not the express provisions of the Constitution Acts, the protection the principle affords extends to all courts and constrains both federal and provincial powers.

Finally, the Court holds that some judicial independence is not enough. A minimum level of judicial independence is now required by the constitution.<sup>10</sup>

### The Institutional Dimension of Financial Security

Applying the propositions about judicial independence to the core characteristic of financial security in its institutional dimension, the Court holds that the institutional dimension of financial security has three components.

First, the constitution requires a particular institutional arrangement for the setting of judicial salaries, pensions and benefits. Compensation Commissions must be created and utilized because judges must be seen to be immune from economic manipulation. Interposition of a Compensation Commission will separate the executive and legislative branches of government from the judicial branch and depoliticize the relationship.

The Compensation Commission must be independent, objective and effective.

The Court does not set out a standard model for the Compensation Commissions that it now requires but it does set out minimum criteria for such commissions which should ensure that each commission will be independent, objective and effective.

Independence may be achieved by appointments for fixed terms of three to five years. The appointment power must be divided or shared between or among the branches of government. No criteria are suggested with respect to eligibility of individuals for appointment.



Objectivity may be achieved by directing that the Compensation Commission receive submissions from all branches of government and by suggesting that the legislature provide the Commission with a list of relevant factors for consideration.

Effectiveness does not require that the recommendations of the Compensation Commission be binding but it does require that there must be a rational basis for rejection. To meet this standard, the government must only “articulate a legitimate reason” for departing from the recommendations of the Commission.<sup>11</sup> The onus may be heavier, however, if judges are singled out for reductions in remuneration. A “fuller explanation” may be required. Rejection of the recommendations of Compensation Commissions will be judicially reviewable.

Effectiveness also requires that the Compensation Commission engage in regular reviews of remuneration.

The second component of financial security is a prohibition. The judicial branch must not engage in negotiations about remuneration because such negotiations are “indelibly political”. Lamer C.J.C. explains that he is using the term negotiations as it is understood in the labour relations context as “involving a certain amount of horsetrading”.<sup>12</sup> The issue is one of definition because the judgement expressly exempts from the prohibition enunciated “expressions of concern” about remuneration by chief judges and justices which are defined as provision of information.<sup>13</sup>

The third component of financial security in its institutional sense is the existence of a floor for judicial salaries. The Court refrains from any speculation as to where that minimum floor might be.

Only a “dire and exceptional financial emergency” resulting from war or pending bankruptcy will justify departure from any of the components of the institutional dimension of financial security.<sup>14</sup>

## Comments

In 1985, ss. 96-100 of the *Constitution Act, 1867* were described in *R. v. Valente*<sup>15</sup> as the ideal guarantees of judicial independence. Provincial courts were protected by s. 11(d) of the *Constitution Act, 1982* but were



held not to be entitled to the same level of protection as the s. 96 courts. Only twelve years later, the Supreme Court of Canada has held that judicial independence is an unwritten norm or principle whose true home is the preamble to the *Constitution Act, 1867*. Sections 96-100 and 11(d) are not exhaustive. The Court has laid out the parameters of judicial independence. New dimensions and components have emerged.

The decision has serious implications for the role of the judicial branch in constitutional matters generally as well as for the future evolution of judicial independence.

The Court has staked out for the judicial branch the role of constitution maker. In future litigation, when the express provisions of the Acts fail to supply the necessary foundation for a constitutional challenge, litigants may now suggest that the courts accept the invitation of the Preamble to fill the gaps on the basis of the organizing principles which the Court in this judgement says it finds there. This goes far beyond interpretation of the express provisions which is a role that Canada is familiar with and the case itself goes beyond the precedents cited and relied on as authority for the use made of the preamble.

*Morguard Investments Ltd. v. De Savoye*,<sup>16</sup> for example, created new constitutional principles, the full faith and credit and the concomitant due process principles. The *Provincial Court Judges* case holds that new institutions, Compensations Commissions, must be created. The fact that some governments had already brought versions of such institutions into existence as a matter of policy does not render the result any less radical. The justification for the decision was that something had to be done and no better solution was suggested. A question that might be asked is: “what is to be done if and when a better solution is found?” How does one go about amending the unwritten constitution?

There is no reason to believe that the Court will confine its enthusiasm for filling the gaps to any particular area of the constitution. The organizing principles, as defined, are applicable to any and all areas. Whether lower courts will share the Court’s enthusiasm remains to be seen.

Such enthusiasm is curious in light of the Court’s concern about the separation of powers and the need to avoid even the appearance of



interference by the legislative and executive branches with the judicial branch. In filling gaps in the *Constitution Acts 1867 to 1982* the courts will be performing a legislative function reserved for the legislative branch by the separation of powers. The appropriate sovereign bodies for constitution making are of course now carefully defined with varying components for varying purposes in Part V of the *Constitution Act, 1982*.

The judgement is so wide ranging in its discussion of judicial independence and yet so general that it is sure to engender further litigation. There can be no doubt that each commission will be subject to judicial review to ensure that it meets the minimum criteria for independence, objectivity and effectiveness. The British Columbia actions are evidence of that.

The relatively brief discussion of security of tenure may provide a foundation for arguments that the constitution requires new institutional arrangements for appointment to and removal of judges from the Bench. The latter is hinted at. The former is implicit in the logic of the approach to the separation of powers. There is, moreover, a suggestion that a “judicial inquiry”, where such is required, about the fitness of a judge might be interpreted as an inquiry by judges alone. Lay members of a judicial council would not, in other words, be entitled to sit in judgement on a judge.

As with respect to remuneration, there already is some precedent in practice for the use of an independent body. Parliament uses the Judicial Council to assist it in the exercise of the power to remove judges pursuant to s.99(1) of the *Constitution Act, 1867*. The provinces, however, employ a variety of legislative regimes for removal of provincial court judges but have not yet utilized a council or commission for that purpose. The case invites litigation concerning the institutional dimension of security of tenure and the effect on judicial independence of legislation which does not conform to the parameters set out in this case.

Nothing in the reasons of the majority limits the principle of judicial independence to the traditional superior and inferior courts. Indeed the decision suggests that tribunals subject to s.11(d) of the *Constitution Act, 1982* should also enjoy the protection of the fully developed



principle. Other tribunals not covered by s. 11(d) may soon claim the benefit of the principle.

It will be unfortunate if the judgement proves to be counter-productive. The justification for the activist approach taken was that something had to be done to defuse the situation in which provincial court judges were litigating in a number of provinces. If the judgement does produce the gap filling and the volume of litigation concerning judicial independence that I suggest is likely, the administration of justice may be brought into disrepute in the eyes of the public—and public confidence is the fundamental justification for the expanded version of judicial independence.

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<sup>1</sup> [1997] 3 S.C.R. 3.

<sup>2</sup> The majority consisted of Lamer C.J.C. who wrote the judgement with L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ. concurring. The lone dissenter was La Forest, J.

<sup>3</sup> *Attorney General of Canada v. Attorney General of Ontario (Labour Conventions)*, [1937] A.C. 326 (P.C.).

<sup>4</sup> *Edwards v. Attorney General of Canada*, [1930] A.C. 124 (P.C.).

<sup>5</sup> *Provincial Court Judges* case, *supra* note 1 at 63.

<sup>6</sup> *Ibid.* at 69.

<sup>7</sup> *Ibid.* at 78.

<sup>8</sup> *Ibid.* at 69 ff. The Court goes on to give examples of cases which it says were decided on the basis of the organizing principles in the preamble, concluding at 75: “These examples—the doctrines of full faith and credit and paramountcy, the remedial innovation of suspended declarations of invalidity, the recognition of the constitutional status of the privileges of the provincial legislatures, the vesting of the power to regulate political speech within federal jurisdiction, and the inferral of implied limits on legislative sovereignty with respect to political speech—illustrate the special effect of the preamble. The preamble identifies the organizing principles of the *Constitution Act, 1867*, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.”



<sup>9</sup> *Ibid.* at 82.

<sup>10</sup> *Ibid.* at 85.

<sup>11</sup> *Ibid.* at 110.

<sup>12</sup> *Ibid.* at 113.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.* at 90.

<sup>15</sup> [1985] 2 S.C.R. 673.

<sup>16</sup> [1990] 3 S.C.R. 1077.



# The Rationality Test Established in the *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* case: Real, Effective and Flexible

**Danielle Pinard**

## Introduction

Respect for political and judicial institutions is essential for the efficient administration of justice. It is predicated on the existence of a genuinely independent judicial authority, and of a structure that bears out this independence. Granted, political authorities must not behave in such a manner as to imperil this independence, or even simply the appearance thereof. But judges also have obligations in this respect. In fact, under our constitutional system, they are responsible for defining the contours of judicial independence. They must discharge this duty with the same deference and restraint that they expect of political actions in their regard.<sup>1</sup>

In September 1997, the Supreme Court of Canada established a structure for determining judicial remuneration that it considered constitutionally mandated. In *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* (hereinafter, the *Provincial Court Judges case Reference*),<sup>2</sup> the Court read into the right of any person charged with an offence to be heard by an independent tribunal, guaranteed under s. 11(d) of the *Canadian Charter of Rights and Freedoms*,<sup>3</sup> the existence of a complex protection mechanism relating to the institutional financial security of judicial independence. According to the Court, this constitutional provision prohibits salary negotiations between the judiciary and political authorities and thus interposes an independent, objective,



efficient structure between the two, the whole for the purpose of avoiding the possibility or appearance of economic manipulation.

The purpose here is to depoliticize relations between the judiciary and other government authorities: just as judges may not intervene publicly in political matters, similarly the legislative and executive branches may not exert political pressure on the judiciary.<sup>4</sup>

The Court expressed its hope thereby to eliminate what it perceived as a degree of tension between the provincial governments and judges concerning remuneration of the latter,<sup>5</sup> by elaborating the constitutional requirements for institutional arrangements in the matter.

In March 1998, the Law Commission of Canada organized a conference on the *Provincial Court Judges case Reference* for the purpose of creating conditions for a dialogue between provincial court judges and provincial governments. This paper represents what I hope is an improved version of the presentation that I was invited to make at the conference.

I shall begin by briefly describing the judicial remuneration structure and process established in the *Provincial Court Judges case Reference* and considering the scope and effects of their constitutionalization. The second part is devoted to a study of the standard of review developed by the court, whereby a legislative assembly or provincial government can only override a recommendation of a judicial salary commission if it can demonstrate the rationality of its decision. In this section I will consider, *inter alia*, the effectiveness of the standard and a number of related issues concerning evidence. If this paper provides individuals and institutions affected by the problems that it examines with a few approaches or, better yet, a partial answer, it will, in large part, have achieved its goal.

## I. The Provincial Court Judges case Reference

In the *Provincial Court Judges case Reference*, the Court sets out the organization of judicial remuneration as required, in its view, by the Constitution. This part is devoted to a concise description of the structure and process established, and to a brief discussion of the scope and effects of their constitutionalization.





## 1. Determination of Judicial Remuneration: Structure and Process

According to the Court, the principle of judicial independence requires that neither the government nor the judiciary be directly involved in negotiations relating to judges' salaries.<sup>6</sup> The interposition of a structure said to be independent, effective and objective,<sup>7</sup> a "compensation commission", is necessary in order to avoid any real or apparent financial manipulation.<sup>8</sup>

The essential, mandatory features of the structure and process set out are the following: provincial compensation commissions must be established, whose members enjoy security of tenure (serving for a fixed term).<sup>9</sup> The appointments must not be entirely controlled by any of the three branches of government, *i.e.*, the legislature, the executive or the judiciary.<sup>10</sup> The mandate of these commissions is to "present an objective and fair set of recommendations dictated by the public interest"<sup>11</sup>, either as a result of a government proposal or, in case of government inaction, at set times. The government, or the legislature, as the case may be,<sup>12</sup> subsequently retains full authority to increase, reduce<sup>13</sup> or freeze judges' salaries, either as part of an overall measure, or as part of one directed specifically at the judiciary,<sup>14</sup> but must demonstrate the rationality of a decision to depart from a recommendation or recommendations of the commission.<sup>15</sup>

The creativity shown by the Supreme Court is surprising, given its institutional role.<sup>16</sup> The Court states, however, that it does not intend to "lay down a particular institutional framework in constitutional stone",<sup>17</sup> and that the aforesaid requirements may be met in the respect of the diversity allowed by provincial constitutional competence in the administration of justice.<sup>18</sup> Accordingly, the establishment of the structure may involve negotiations between the judiciary and political authorities. *Inter alia*, the precise composition of the commissions (some independence and diversity would be desirable here), details of appointment mechanisms, and the type of information to be considered by the commission in preparing its recommendations remain to be determined. In short, insofar as they interpose an independent, objective and



effective structure in the mechanism for determining judicial remuneration, government authorities retain significant flexibility.

## 2. The Constitutionalization of the Structure and Process:

### Scope and Effects

According to the Court, the structure and the process discussed above are much more than a desirable project relating to legislative policy; they are required by the Constitution.<sup>19</sup>

#### 2.1 Scope

First of all, the structure and process established in the *Provincial Court Judges case Reference* are required by the Constitution, by virtue of the rights guaranteed in s. 11(d) of the *Canadian Charter of Rights and Freedoms*. Technically, the judgement rendered by the Court, in fact, relates only to the scope of this provision. Thus, as a minimum, the process of determining the remuneration of all the judges of Canada judging penal or criminal cases, be they federally or provincially appointed, must fulfil the requirements set out by the Court. These requirements appear, *a fortiori*, to be applicable to all federally appointed judges contemplated in s. 100 of the *Constitution Act, 1867*, which specifically provides for the financial security of superior court judges and which was discussed by the Supreme Court in *Beauregard*.<sup>20</sup> The Court notes, indeed, that “constitutional parameters of the power to change or freeze judges’ salaries”<sup>21</sup> are enjoyed not only by superior court judges contemplated in s. 100 of the *Constitution Act, 1867* but also by provincial court judges sitting in criminal matters, in the case of the latter under s. 11(d) of the *Charter*.

One may safely infer from a lengthy *obiter* of the Court<sup>22</sup> that the constitutionalization of the remuneration process also extends to all provincial court judges who do not hear criminal cases and to whom p. 11(d) accordingly does not apply and, possibly, to all Canadian courts. In fact, the Court has much to say on the idea that constitutional provisions explicitly relating to judicial independence are merely illustrations of the fundamental constitutional principle of judicial independence which is itself implicitly enshrined by the reference to the



British Constitution found in the preamble to the *Constitution Act, 1867*. According to the Court, the latter “recognizes and affirms the basis principles” of the Canadian Constitution, and “invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme”.<sup>23</sup> The express recognition of the right of an accused to be heard by an independent tribunal is thus seen as the expression of a general principle that applies to “all courts no matter what kind of cases they hear”.<sup>24</sup>

The Court accordingly interprets the Canadian Constitution as including a general protection of judicial independence.<sup>25</sup> This may seem surprising, to say the least, as a number of attempts to formally enshrine the principle in the Constitution have failed to date.<sup>26</sup> Like *La Forest J.*, one may find it troubling here that statements of principle in a vague preamble can prevail over provisions that, at first glance, appear to have been deliberately chosen.<sup>27</sup>

## *2.2 Effects*

The application of the principle of constitutional supremacy represents the primary and fundamental effect of the constitutionalization of the process by a remuneration commission. In fact, subject to the exception made in the judgement “in cases of dire and exceptional financial emergency precipitated by unusual circumstances, for example, such as the outbreak of war or pending bankruptcy”,<sup>28</sup> any government decision on judicial remuneration in violation of the procedural requirements set out in the judgement will be in principle unconstitutional and accordingly of no force or effect.<sup>29</sup> As we have seen, these requirements are, essentially, that a commission composed of independent members be established, whose recommendations the government may only reject if it can rationally justify such a decision. Failure to fulfil any of the elements deemed in the judgement to be requirements can give rise to a finding of unconstitutionality; but the issue of the rationality of a government decision will raise the more complex problems. Part II of this paper will examine this rationality test.

A judgement that a court has become dependent because the structure and process for determining judicial remuneration was not



followed would have serious consequences. First, at the very least, it would mean that the economic measure in question was unconstitutional.<sup>30</sup> It is clear, however, that such an economic measure may not always be present, since the court's lack of independence may also be the result of the government's unjustified failure to act on a periodic recommendation by the commission.

Furthermore, litigants may refuse to be judged, in both criminal<sup>31</sup> and civil cases<sup>32</sup> by a court no longer considered independent, owing to failure to comply with the structure and process deemed by the Court to be inherent in the institutional financial security component of judicial independence.<sup>33</sup> The administration of justice would be paralysed. A fatal blow would be struck to the heart of the rule of law. There would be no winners in such a situation.

The recent opinion expressed by the Court on February 10, 1998, subsequent to a rehearing of the *Provincial Court Judges case Reference* with which we are concerned,<sup>34</sup> is a perfect illustration of this concern. In terms of the past, the Court was forced to invoke of the doctrine of necessity in order to avoid challenges of actions taken by courts whose independence had been compromised by the procedures followed to determine their remuneration. In terms of the future, the Court suspended the effects of the September 1997 judgement for one year (throughout Canada), thus demonstrating some pragmatism, given the time required to implement the new salary structure. Without this suspension, the impact of the judgement on the administration of justice would have been immediate and, at least in the short term, disastrous.

## II. Some Thoughts on the Rationality Test

The Court notes that the constitutional structure established does not deprive the government of its ultimate power to increase, reduce or freeze judges' salaries. However, if it decides to do so against the recommendations of the constitutionally required commission, it must be able to justify its decision, if necessary, in a court of law.<sup>35</sup> The Court writes:

The standard of justification here ... is one of simple rationality. It requires that the government articulate a legitimate reason for why it has



chosen to depart from the recommendations of the commission, and if applicable, why it has chosen to treat judges differently from other persons paid from the public purse.<sup>36</sup>

In this section I will examine some aspects of the standard of rationality, all of which are bound by a common thread: this standard will ensure real and effective control, but the context of judicial remuneration will require that it be applied with particular flexibility.

The rationality test is developed in the following context: the prevention of political interference in any form of financial manipulation represents the *raison d'être* of the financial component of judicial independence.<sup>37</sup> At the same time, the process of setting judicial remuneration involves an allocation of public funds which, constitutionally, falls within the jurisdiction of governmental authorities and is an “inherently political concern”.<sup>38</sup> So a compromise is introduced: government authorities retain their political power to determine judicial remuneration, but in this matter are subject to public review as they must explain and justify publicly why, where such is the case, they are departing from recommendations described as “objective and fair ... dictated by the public interest”.<sup>39</sup>

### 1. Burden of Proof and Time of Debate

A few preliminary comments are in order concerning the context of the discussion of the rationality of the government measure. The traditional breakdown of the burden of proof in a case based on the *Canadian Charter of Rights and Freedoms* was the following: the party arguing that its rights had been violated had to make its case, while the party hoping to justify the action at issue (generally, the government) had to establish that it was reasonable within the meaning of s. 1 of the *Charter*. In the *Provincial Court Judges case Reference*, however, the Court requires the government to demonstrate the rationality of its decision, as part of its analysis of the right, to an independent tribunal within the meaning of s. 11(d), hence at the stage of determining whether the right was infringed, rather than at the stage of determining whether this infringement was reasonable. The State must accordingly provide some justification in order to support the independence of the tribunal concerned.



If the reviewing court is convinced that the government decision is rational, the constitutional requirements have not been violated and the debate is closed. Conversely, if it is found that the government decision is irrational, a ruling will be made that the right to be judged by an independent tribunal has been infringed, unless the government can establish that a limit prescribed by law that meets the reasonable limits test developed at case law is involved.

One may, however, wonder whether recourse to the standard of justification referred to in s. 1 does not then become completely delusory, since the Court itself specifies that the standard of justification under s. 11(d) is less stringent than that under s. 1.<sup>40</sup> If the former standard is not met, the latter will not be met either.

## 2. Rationality Defined<sup>41</sup>

The standard of review established by the Supreme Court is that of rationality. The government must demonstrate the rationality of its decision not to follow up on a recommendation by the commission, if that is its decision.

Rationality is the quality found in that which obeys the laws of reason, that which may be known or explained by reason, that which is reasonable and appears to be done with good sense.<sup>42</sup> And good sense, synonymous with common sense, in turn refers to the ability to judge well, dispassionately, when faced with problems that cannot be resolved by scientific reasoning.<sup>43</sup> Those definitions illustrate the seriousness of a judicial finding that a government decision was unreasonable, as well as the highly subjective and relative nature of a judgement of rationality.

By way of analogy, and subject to the necessary fine distinctions, we may note here certain recent pronouncements of the Supreme Court concerning an intermediate standard of review at administrative law, *i.e.*, judicial review of an “unreasonable” administrative decision.<sup>44</sup> According to the Court, this would be a type of intermediate review that occupies the middle ground between a patently unreasonable and an erroneous decision.<sup>45</sup> “An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat



probing examination”.<sup>46</sup> The main issue would be “whether any reasons support it”.<sup>47</sup> “In the final result, writes the Court, the standard of reasonableness simply instructs reviewing courts to accord **considerable weight** to the view of tribunals about matters with respect to which they have **significant expertise**”.<sup>48</sup> In fact, expertise is likely the most important of the factors that a court must consider in settling on a standard of review.<sup>49</sup>

The wording used to describe a reasonable [or rational] standard of review for an administrative decision is extremely deferential. It is, *a fortiori*, applicable to judicial review of the rationality of the government decisions referred to in the *Provincial Court Judges case Reference*, since “decisions about the allocation of public resources are generally within the realm of the legislature and, through it, the executive” and “[t]he expenditure of public funds ... is an inherently political matter”.<sup>50</sup>

### 3. Standard Doubly Effective

In the Court’s judgement, the effectiveness of rationality as a standard of justification is demonstrated in two ways.<sup>51</sup> First, it screens out decisions which are based on purely political considerations, or which are enacted for discriminatory reasons, from those made in the public interest. Second, it allows for judicial review of the factual foundation of the government decision.<sup>52</sup>

However, when properly placed in an established tradition of case law, neither of these aspects of the standard of rationality imposes a heavy burden of proof.

#### *3.1 Identification of Decisions Involving Political Interference or Discrimination*

Here is how the Court describes the first aspect of the standard of justification, *i.e.*, the review of the reason for the government action:

[I]t screens out decisions with respect to judicial remuneration which are based on purely political considerations, or which are enacted for discriminatory reasons. Changes to or freezes in remuneration can only be justified for reasons which relate to the public interest, broadly understood.<sup>53</sup>



The standard is expressed here in terms of “considerations” and “reasons”. This is a traditional type of judicial review based on concepts, ideas and perceptions. We can therefore see some concern over possible attempts to exert political pressure on the judiciary through economic issues.<sup>54</sup> We approach the more traditional concept of judicial independence, i.e., freedom to judge without fear of political intervention. Under this concept, the potential effect of any economic measures aimed at the judiciary will have to pass the test of how a reasonable, informed person would perceive the situation. This is the conventional test developed over the years through case law and applied by La Forest J. in his dissenting opinion.<sup>55</sup>

Note that the majority of the bench and the dissenting judge are in agreement that, in principle, an across-the-board measure to reduce salaries paid from the public purse, which was adopted on the basis of the government’s budget priorities, does not threaten judicial independence.<sup>56</sup> In fact, the Court acknowledges that such a decision by the government would be *prima facie* rational. It “will typically be designed to effectuate the government’s overall fiscal priorities, and hence will usually be aimed at furthering some sort of larger public interest”.<sup>57</sup> This passage makes it clear that in certain cases strict budgetary considerations will suffice to demonstrate the rationality of government decisions.<sup>58</sup> The Court explains in the same breath that the less likely the measure in question is to serve as a means of economic manipulation and political interference, the easier it will be to prove its rationality.<sup>59</sup> Here, the rationality test described by the majority of the Court is similar to the test preferred by La Forest J.: the reasonable, informed person will see no infringement of the financial security of the judiciary in a measure applicable to all persons paid from the public purse.<sup>60</sup>

### *3.2 Test of the “Reasonableness of the Factual Foundation of the Claim Made by the Government”*

In the view of the Court, rationality is also effective as a standard of justification in that it authorizes judicial review “of the reasonableness of the factual foundation of the claim made by the government”.<sup>61</sup> Not only must the budgetary measure introduced by the government reflect





an objective relating to the public interest, but also it must be justified by the **facts**. For a moment, we may have the impression that we are leaving behind the uncertain world of principles and values, and entering the more objective realm of empirical information.<sup>62</sup> It is, however, a fleeting impression, both for reasons of principle and because the Court quickly and explicitly dispels the impression.

On the question of principles, it must be acknowledged from the outset that any government measure to spend public funds remains a decision or choice made, admittedly, in the light of a particular factual context, but by no means dictated by the latter.<sup>63</sup> It is not a brute fact; at most, it could be called a “judgemental fact”.<sup>64</sup> It is an exercise in balancing values and interests, in assigning priorities among them, and it cannot be reduced to any form of scientific reasoning. The fairness or accuracy of such a decision cannot be scientifically proven. We are **not** dealing here with an empirical question.<sup>65</sup>

The Court was certainly aware of this reality and explicitly related its requirement that a factual basis be demonstrated to the approach that it developed in the *Anti-Inflation Act* case.<sup>66</sup> As may be recalled in this case, in a context in which the constitutionality of a federal Act regulating wages and prices depended on the economic situation of the country, the Court noted that the factual evidence was only required in this regard in order to prove the existence of a rational basis for the legislative decision.<sup>67</sup>

It is different from evidence of the existence of a fact, traditionally known at law. It is evidence of the existence of a rational basis for the legislative belief in the existence of certain facts, rather than of their actual existence.<sup>68</sup> This particular kind of evidence has likely, since that case, become the standard in constitutional cases based on the distribution of power,<sup>69</sup> and may be in the process of becoming the standard in cases based on *The Canadian Charter of Rights and Freedoms* as well.<sup>70</sup> The nature of the facts referred to here, both economic and social, with indistinct contours and with respect to which one can hold only limited certainties, requires such a form of evidence.<sup>71</sup> Furthermore, these facts are, in principle, not an issue, not at the heart of the judicial debate, but instead serve to clarify the context of a government measure.



It is not by chance that the Court refers to the kind of burden of proof developed in the *Anti-Inflation Act* case. The Court does so intentionally, because the fixing of judicial remuneration is a decision made on the basis of economic and social facts with respect to which there are, for all practical purposes, no empirical certainties. As we have seen, a decision concerning judicial remuneration will never be good or bad, right or wrong. It will only be rational or not, in the light of certain facts.

The deliberate reference to the *Anti-Inflation Act* case is confirmed when the Court expressly excludes the reasonable limits test developed with respect to s.1 of the *Canadian Charter of Rights and Freedoms*.<sup>72</sup> In the Court's view, therefore, it is inappropriate, when dealing with judicial remuneration, to consider the significance of the objective and the proportionality between this objective and the means used.<sup>73</sup>

#### 4. Nature of Evidence

The Court thus requires both a public statement of the reasons for the government decision, and evidence "of the reasonableness of the factual foundation of the claim made by the government".<sup>74</sup>

##### 4.1 *Inadequacy of Government Statement?*

The court requires government authorities to give legitimate reasons why they made a decision to go against the recommendations of the judicial compensation commission. The government decision will only be constitutional if it is found to be "rational" in a specific factual context.

What type of evidence will be required on which to base such a finding of rationality?

The mere affirmation of the existence of certain facts, by a government authority or legislature, cannot, in itself, constitute absolute proof of its existence;<sup>75</sup> it should, however, at least serve as *prima facie* evidence thereof. This is especially true in a constitutional context. The accepted principles of constitutional law, in fact, prevent us from giving decisive value to such a statement. A legislature or government authority cannot insulate its action from judicial review by declaring of its own motion the existence of the facts upon which its constitutional validity depends.<sup>76</sup> If such a disqualification stands for the purpose of



making a factual finding, *a fortiori* it stands for the constitutional characterization of these facts: in the matter of judicial compensation, for example, a government would not be able, by making a peremptory declaration that its action was reasonable, to insulate the latter from judicial review. The remedy of judicial review in constitutional matters is enshrined in Canadian constitutional law. Furthermore, it is clear that if decisive weight were granted to such a statement, the equity of the process of judicial review in constitutional matters would be diminished, by providing one party with exclusive control of a lethal weapon. Fairness requires that there be some possibility of challenging government statements of fact.

The courts should, however, give serious consideration to such statements of fact.<sup>77</sup> This minimal respect required to be shown by judges is based both on a deferential attitude toward the legislative assessment of facts and on the recognition that the government has greater expertise in the matter.

A statement by a legislative assembly or government that certain facts exist must accordingly be treated with the greatest respect. While it is not binding on the court, it does represent an informed opinion with democratic legitimacy. Such a statement should *prima facie* be considered true and based on an adequate analysis of the situation.<sup>78</sup>

#### 4.2 Other Evidence

Other evidence may support the rationality of the government decision. In the case of social facts, sometimes referred to as legislative facts, they will be easier to present. “Legislative facts, wrote the Supreme Court in another judgement, are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements”.<sup>79</sup> They cannot be proven “as a matter of a fact”.<sup>80</sup> Evidence as to this type of social fact is accordingly more flexible and less formal. In this connection, the Brandeis briefs technique<sup>81</sup> has a role to play and the courts have eased the traditional requirements of judicial notice.<sup>82</sup> The Court may, for example, take judicial notice of difficult economic circumstances<sup>83</sup> and of the existence of



similar government action taken in other jurisdictions. Expert testimony may shed light on the economic situation. Studies in the social sciences and economics may be introduced as evidence. These various forms of evidence need only establish the existence of a rational basis for the government's action, and not the reality of the facts discussed *per se*.

#### *4.3 Evidence to the Contrary*

As the burden of proof on the government is limited to demonstrating a reasonable basis for its action, the opposing party is in the difficult position of having to demonstrate that the government action is unreasonable. There is no need here for the court to rule on the balance of evidence.<sup>84</sup> The very existence of countervailing evidence is therefore immaterial. It only becomes relevant insofar as it destroys the rational basis of the legislative belief.<sup>85</sup>

Furthermore, I do not believe that the Court intended to set the stage for an interminable battle between experts on the seriousness of the economic situation, or on the urgency of reducing the deficit. The courts cannot<sup>86</sup> and should not become the arbiters of such a debate. Nor do I believe that they wish to.

The effectiveness of the structure introduced resides rather in the transparency and public justification required of government actions in the matter of judicial compensation<sup>87</sup> in order “to ensure public confidence in the justice system”.<sup>88</sup> Compliance with the formalities introduced is seen as effective protection against economic manipulation and a gauge of respect for judicial independence.<sup>89</sup>

On the subject of constitutional protection of judicial remuneration, what is at stake is, in fact, the existence of judicially required public justification to avoid economic manipulation of the judiciary, and not the “truth” of allegations concerning certain facts which is supposed to arise from arguments on both sides.

### 5. Weight Given to Recommendations by Compensation Commission

The very existence of recommendations by the compensation commission represents, in principle, the most compelling argument by those



challenging the rationality of a government decision not to implement them. In fact, such recommendations are, in principle “objective and fair ... dictated by the public interest”,<sup>90</sup> and based on “objective criteria, not political expediencies”.<sup>91</sup> They have likely been developed by an independent, informed body, that has considered the submissions from the judiciary, the executive and the legislature, as well as a list of relevant factors, and may have hired consultants and commissioned studies in social sciences and economics.

The argument would be along the following lines: the structure within which the commission’s recommendations are developed guarantees, in principle, their objectivity, reasonableness and merit. Therefore, a government that decides not to implement them but is required by the constitution to justify its action would have to begin by proving that they were defective. It is somewhat as if the commission’s recommendations were an initial decision that the government could only overturn by proving its inherent defects, i.e., its erroneous, unreasonable or irrational nature.

This argument, although not without logic, is untenable.

First, it applies a way of thinking appropriate to administrative law, for judicial review of unreasonable administrative error, in a context that is inappropriate. Compensation commissions are not decision-making bodies capable of authorizing the expenditure of public funds, as the Court itself has made clear. They can only make non-binding recommendations. It is the legislature or government authorities that are still constitutionally entitled to determine the amount of judicial remuneration, which must be paid from the public purse.

Furthermore, the court has carefully avoided the language previously used by others on the subject of judicial remuneration, and which may have been interpreted as creating an obligation on the legislature or government authorities to prove that the recommendations that they decide not to implement were defective. This calls to mind certain provisions of the *Provincial Court Act (B.C.)*,<sup>92</sup> as discussed and interpreted by the British Columbia Supreme Court in *Re Judicial Compensation Committee*.<sup>93</sup> This Act created a judicial compensation committee whose recommendations were binding unless rejected by a



resolution of the provincial legislature as being unfair or unreasonable.<sup>94</sup> Such a rejection resolution was challenged by the provincial judges' association as being unlawful and not authorized by the relevant legislation. Note that this case involved an issue of administrative law and statutory construction, and that the rejection resolution was not challenged at trial as infringing the constitutional principle of judicial independence.<sup>95</sup> The Association argued specifically that the wording and purpose of the Act determined the power of the legislative assembly in the following way: in assessing whether a recommendation by the committee is reasonable or unreasonable, the only issue is whether the recommendation is objectively unreasonable, in other words, clearly unreasonable to the extent that no reasonable person could support it. Within the context of such an analysis, the only relevant information is the factual findings and the recommendations of the commission; the legislature has no authority to take into account its own government policy considerations, for example.

The B.C. Supreme Court dismissed this argument and held that the Act gave the legislature considerably more flexibility. The wording and purpose of the provisions in question led to the following conclusion: in assessing the committee's recommendations, the legislative assembly may make its own assessment, in light of the province's financial position and its particular perspective toward public spending.<sup>96</sup> In such matters, judicial review of the decision by the legislative assembly must be marked by the greatest deference.<sup>97</sup> In the case at bar, the Supreme Court upheld the validity of the resolution *a quo*.<sup>98</sup>

Legislative provisions authorizing the rejection of recommendations of a judicial compensation commission only if considered unfair or unreasonable were accordingly interpreted as allowing the legislative assembly significant flexibility in its assessment. *A fortiori*, this flexibility should be allowed in the structure established in the *Provincial Court Judges case Reference*, as nothing in the judgement subjects the government's authority to determine judicial remuneration to a prior obligation to offer a responsible criticism of the commission's recommendations. The language of the *Provincial Court Judges case Reference* is clear: the government's obligation is to demonstrate the reasonableness of its own



decision on the issue of remuneration, not the irrationality or unreasonableness of the recommendation that it decides not to implement. This recommendation is, of course, but one piece of relevant information that the government is not “free to ignore”,<sup>99</sup> but a demonstration of its defects, in particular, in terms of its unreasonableness, is not a necessary condition to the rationality of the government’s decision not to implement it. From all the information at its disposal, which it is not obliged to divulge to the commission, and in light of its budget priorities [“inherently political decision”],<sup>100</sup> the government may make a decision concerning judicial remuneration that is every bit as rational as the recommendation that it rejects. In terms of social and economic policy, where, “decisions on such matters must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components”,<sup>101</sup> two different decisions may be equally rational. Furthermore, in such cases, it may very well be that, “those engaged in the political and legislative activities of Canadian democracy have evident advantages over members of the judicial branch”.<sup>102</sup>

## Conclusion

When all is said and done, all the parties concerned still have considerable powers. The judiciary has of course defined the applicable parameters, the rules of engagement, which some will see as the ultimate power. The Court has, in fact, gone a long way. The sharp criticism seen in the dissenting opinion of Forest J., in particular, his denunciation of the illegitimacy of the type of judicial review introduced by the majority opinion, is most interesting. The majority opinion is, in fact, based on the assumption that public confidence in the independence of judicial authority is weakened by the existence of direct negotiations between judges and governments, but strengthened by the interposition between them of a so-called independent, objective structure. In theory, this assumption has some appeal. However, it appears much weaker when placed in the context of the case, *i.e.*, one of (1) across-the-board general wage reductions applicable to everyone paid from the public purse, and (2) an opinion in which the Supreme Court, from its



position at the apex of Canada's judicial edifice, defines a complex, detailed structure and process for determining judicial remuneration, which it holds to be constitutionally required but which has no basis in either constitutional documents or constitutional tradition.

We should, however, be thankful that the Supreme Court, despite all this, was quite reasonable in its burst of creativity. The provincial governments retain authority to determine judicial remuneration, on the basis of their priorities and without being restricted to a uniform model for every province. They must establish a structure whose greatest effectiveness should, in principle, be to reassure the public against improper political interference and, therefore, to encourage confidence in the administration of justice. The courts will assess the rationality of a decision by the government not to implement the recommendations of the provincial commission on the basis of a flexible criterion that should, in fact, only translate the concerns of a reasonable person confronted with the possibility of economic manipulation of the judiciary. Co-operation is possible, whereby respective powers are allied in their pursuit of a common goal: protection of the rule of law by preserving public confidence in the existence of an independent judiciary.

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<sup>1</sup> It was partly a concern over judges' self-interest in their interpretation of judicial independence that prompted Peter Russell to question the possibility of a formal constitutional guarantee of the principle. He wrote: "There is a further, somewhat indelicate, thought that must be added to these reservations about a constitutional guarantee of judicial independence. In interpreting such a guarantee, judges are policing the boundaries of their own power. In doing so, their own institutional interests are involved in a manner that does not arise when they are umpiring constitutional disputes between the two levels of government or between the citizen and government (...) Canadians might well be cautious about making changes in the Constitution which will give judges a more powerful role in defining their own power and shift power away from those who are politically accountable and represent other interests in society": Peter H. Russell, *The Judiciary In Canada: The Third Branch Of Government* (Toronto: McGraw-Hill Ryerson Ltd, 1987) at 97. Similarly, in addressing the problem raised by the possible application of a wage reduction statute to the judiciary, Holdsworth wrote





in 1932: “It is a nice problem; but the difficulty is to find out who is to solve it. The judges cannot be judges in their own cases; and there is no other tribunal which has authority to settle the problem (...) But the fact that it is now possible that a case can arise, in which it is constitutionally impossible for the judges to obtain an authoritative ruling upon a point of law by the ordinary methods open to any other subject, raises the much wider question of the policy pursued by the state in recent years with respect to the question of the remuneration of the judges”: W.S. Holdsworth, “The Constitutional Position of the Judges” (1932) *Law Quarterly Review* 25 at 30. For an articulation of the same concern, by the Supreme Court of the United States, in a case relating to the applicability of a tax on judicial remuneration: “Because of the individual relation of the members of this court to the question, thus broadly stated, we cannot but regret that its solution falls to us (...) But jurisdiction of the present case cannot be declined or renounced,” *Evans v. Gore*, (1919) 40 Sup. Ct. Reporter 550, 253 U.S. 245.

<sup>2</sup> [1997] 3 S.C.R. 3.

<sup>3</sup> Part I of the *Constitution Act, 1982*, Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>4</sup> “The legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely (...) members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice.” (*Provincial Court Judges case Reference*, *supra* note 2 at 91. See also *Ibid.* pp.87-88 and 93).

<sup>5</sup> *Ibid.* at 33.

<sup>6</sup> “[U]nder no circumstances is it permissible for the judiciary (...) to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence” (*Ibid.* at 89). On prohibited negotiations, see also pp. 112 to 115. Note that the Court states that this prohibition in no way precludes a simple expression of concerns or representations. On the risk of improper politicization related to direct negotiation between judges and government, see, in particular, Peter H. Russell, *supra* note 1 at 15: “Collective bargaining implies that both sides may resort to economic or political sanctions when the bargaining breaks down”. See also Martin H. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 65: “Nevertheless, the more one can avoid head-to-head bargaining between the



government and the judiciary, the better. Some buffer mechanism will help prevent the danger of subtle accommodations being made, involving, for example, increased pay or pensions for not blocking important government initiatives”. See, finally, Richard Chernick and Steven S. Lucas, “The Need for Judicial Compensation Commissions” (1994) 78 *Judicature* 6 at 6: “[S]uch judicial lobbying may have adverse collateral effects. The specter of judges traveling to the legislature, hat in hand, to argue their cause tends to tarnish the judiciary with the imprint of politics in a manner inconsistent with the traditional role of the courts. The effect, over time, is to call into question the judiciary’s autonomy and independence, attributes that are fundamental to public support of the justice system”. La Forest J., dissenting in the case has a very different view on the issue: in his opinion, in terms of institutional relations, “the fixing of provincial court judges’ remuneration is entirely within the discretion of the government” (*Provincial Court Judges case Reference, supra* note 2 at 198); there is nothing to negotiate, and judges are free to make recommendations regarding their salaries, while governments would be wise to seriously consider them (*Ibid.*).

<sup>7</sup> See the extremely systematic description (*Ibid.* at 103ff).

<sup>8</sup> “The imperative of protecting the courts from political interference through economic manipulation is served by interposing an independent body—a judicial compensation commission—between the judiciary and other branches of government” (*Ibid.* at 102). If the Court is constitutionalizing compensation commissions here, it is not creating the concept. Both at the federal and provincial levels, such commissions already existed, set up by statute. We must now determine whether the existing structures are compatible with the constitutional requirements set out by the Court. For La Forest J., dissenting, the principle of judicial independence does not demand such a structure since, in his opinion, “it is abundantly clear that a reasonable, informed person would not perceive that, in the absence of a commission process, all changes to the remuneration of provincial court judges threaten their independence” (*Ibid.* at 192).

<sup>9</sup> *Ibid.* at 104.

<sup>10</sup> *Ibid.* at 105.

<sup>11</sup> *Ibid.* The Court refers to a 1995 report by the federal Minister of Justice, adding: “They must make recommendations on judges’ remuneration by reference to objective criteria, not political expediencies” (*Ibid.*)



- <sup>12</sup> The legislative assembly or the government may be responsible for determining judicial remuneration. For the author's writing convenience, the general expression "government" will be used here.
- <sup>13</sup> The Court agrees from the outset that the Canadian Constitution does not, in principle, prohibit salary reductions for the judiciary. The only restriction in this respect relates to the existence of a minimum level beyond which judicial independence would be compromised (*Ibid.* at 112 to 115). *Contra*: the American Constitution, Article III: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office". See also the debate that arose at British law, over whether the judiciary were covered by the *National Economy Act, 1931*, which imposed a 20% salary reduction on persons "in His Majesty's Service". See, specifically, W.S. Holdsworth, *supra* note 1, who argues against the application of this Act to the judiciary on the grounds that they are, in fact, not "in His Majesty's Service". See also R.F.V. Heuston, *Lives of the Lord Chancellors 1885-1940* (Oxford: Clarendon Press, 1964) at 513ff; W.R. Lederman, "The Independence of the Judiciary" (1956) 34 *Canadian Bar Review* 769 and 1139 at 792ff, and finally Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (Oxford: North-Holland Publishing Company, 1976), who writes at 35: "The administrative reduction of judicial salaries invoked a heated public controversy and divided legal scholars. The judges strongly protested against the reduction. In meeting the Prime Minister and in a collective memorandum to the Lord Chancellor, which was subsequently read in the House of Lords, they argued that the independence of the judiciary would be impaired if their salaries were reduced in this manner. The government finally retreated and the reduction of judicial salaries was cancelled".
- <sup>14</sup> "[A]s a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class ( ) when governments propose to single out judges as a class for a pay reduction, the burden of justification will be heavy" (*Ibid.* at 88. See also pp. 94-5, 99 and 111).
- <sup>15</sup> See Part II of this paper, dealing with the standard of rationality. The structure established by the Court resembles the AJS (American Judicature Society) Model



Statute, the text of which, along with comments, is found in Richard Chernick and Steven S. Lucas, *supra* note 6. The requirement that the decision to reject be reasonable is, however, supplemented by a negative resolution procedure, whereby the commission's recommendations are binding if political authorities are silent on the matter.

<sup>16</sup> Merely as an example, since the so-called “constitutional” procedural requirements were set out for the first time in the *Provincial Court Judges* case *Reference* it is difficult to see how political authorities could have prepared a timely justification within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*.

<sup>17</sup> *Ibid.* at 103.

<sup>18</sup> “Within the parameters of s. 11(d), there must be scope for local choice, because jurisdiction over provincial courts has been assigned to the provinces by the *Constitution Act, 1867*” (*Ibid.* at 103).

<sup>19</sup> According to La Forest J., dissenting, these are at most “desirable as matters of legislative policy”, but not mandated by s. 11(d) of the *Charter* (*Ibid.* at 188).

<sup>20</sup> *Beauregard v. Canada*, [1986] 2 S.C.R. 56.

<sup>21</sup> *Provincial Court Judges* case *Reference*, *supra* note 2 at 102.

<sup>22</sup> *Ibid.* at 63 to 78.

<sup>23</sup> *Ibid.* at 69.

<sup>24</sup> *Ibid.* at 77.

<sup>25</sup> “In conclusion, the express provisions of the *Constitution Act, 1867* and the *Charter* are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located” (*Ibid.* at 78).

<sup>26</sup> It is interesting in this matter to reread today the words of Martin Friedland, who in 1995 examined the advisability of constitutionalizing a general principle of judicial independence in Canada. Martin H. Friedland, *supra* note 6 at 23 to 27. He noted, in particular, the unsuccessful attempt to do so formally through the Constitutional Reform Bill, 1978 [s. 100: The principle of the independence of the judiciary under the rule of law and in consonance with the supremacy of the law is a fundamental principle of the Constitution of Canada].



In order to explain the failure to date to recognize a general principle of judicial independence in the Constitution, he suggested that the provinces were worried about “the boost such a provision would give to institutional autonomy” (*Ibid.* at 25). Finally, he noted a number of unsuccessful judicial initiatives in the ‘80s and ‘90s, to encourage the constitutionalization of judicial independence, in particular, at the time of the Meech Lake and Charlottetown agreements. Similarly, Peter Russell wondered in 1987 whether the judicial interpretation of a constitutional guarantee was the best way of managing relations between the three branches of the State (Peter H. Russell, *supra* note 1 at 97) and expressed his concern over the considerable judicial power granted to define the essential elements of judicial independence inherent in the constitutionalization of the principle (*Ibid.* at 96).

<sup>27</sup> “Given that the express provisions dealing with constitutional protection for judicial independence have specifically spelled out their application, it seems strained to extend the ambit of this protection by reference to a general pre-ambular statement” (*Provincial court Judges case Reference, supra* note 2 at 184-85).

<sup>28</sup> *Ibid.* at 90.

<sup>29</sup> Section 52(1) of the *Constitution Act, 1982* reads as follows: “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”.

<sup>30</sup> The Court stressed the retroactivity of a judicial declaration of unconstitutionality of a financial measure incompatible with judicial independence is unconstitutional is retroactive (*Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1998] 1 S.C.R. 3* at 10ff; hereinafter, *Provincial Court Judges case Rehearing*): “The declarations of invalidity of offending provisions in provincial statutes and regulations retroactively nullified them.” See text accompanying note 33, for a presentation of this rehearing. In the case of the *Provincial Court Judges case Reference*, since the unconstitutional measure involves a salary reduction, the retroactive unconstitutionality involves a reimbursement to the judges: the one-year suspension also covers “any reimbursement for past salary reductions” (*Ibid.* at 19). More complicated problems could arise in cases where the economic measure involved a salary increase granted in violation of procedural requirements. Would its retroactive unconstitutionality involve repayment by the judges in such a case. Furthermore, if a government decision not to follow through on a recommendation made by a duly mandated commission was found to be irrational, what would be the applicable economic measures? The rejected recommendation



could not be implemented, as the Court explicitly rejected the binding decision and negative resolution models (*Provincial Court Judges case Reference*, *supra* note 2 at 107-8). The economic *status quo* would only perpetuate the dependence of the courts concerned. Could this be a case of “reading in” within the meaning of *Schachter v. Canada*, [1992] 2 S.C.R. 731, where the appropriate sanction under s. 52(1) of the *Constitution Act, 1982* would be to implement the unconstitutionally rejected recommendation?

<sup>31</sup> Pursuant to s. 11(d) of the *Charter*.

<sup>32</sup> Possibly under the preamble to the *Constitution Act, 1867*: see above.

<sup>33</sup> The Court refers to the unconstitutionality of the courts concerned in the following terms: “The upshot of this court’s judgement is that every person found guilty by a provincial court in Alberta, Manitoba or Prince Edward Island has suffered a breach of his or her s. 11(d) rights” (*Provincial Court Judges case Rehearing*, *supra* note 30 at 10).

<sup>34</sup> *Provincial Court Judges case Rehearing*, *supra* note 30.

<sup>35</sup> *Provincial Court Judges case Reference*, *supra* note 2 at 109.

<sup>36</sup> *Ibid.* at 110.

<sup>37</sup> “With respect to the judiciary, the determination of the level of remuneration from the public purse is political in another sense, because it raises the spectre of political interference through economic manipulation. An unscrupulous government could utilize its authority to set judges’ salaries as a vehicle to influence the course and outcome of adjudication” (*Ibid.* at 93).

<sup>38</sup> *Ibid.* at 107. See also p. 92: “[R]emuneration from the public purse is an inherently political concern, in the sense that it implicates general public policy (...) The decision to reduce a government deficit, of course, is an inherently political decision”.

<sup>39</sup> *Ibid.* at 105.

<sup>40</sup> *Ibid.* at 110. Furthermore, if it is agreed that the judicial independence of provincial courts not adjudicating in criminal matters is protected under the preamble to the *Constitution Act, 1867* (*obiter* of the Court, *Ibid.* at 63 to 78), one may wonder how the reasonable limits test under s. 1, technically restricted to the rights and freedoms safeguarded by the *Canadian Charter, 1982*, could play a role, if this were the case.



- <sup>41</sup> As for the ambiguity of the concept of rational basis in constitutional law, see Joseph Eliot Magnet, “The Presumption of Constitutionality” (1980) 18 Osgoode Hall Law Journal 87 at 113ff.
- <sup>42</sup> Nouveau Petit Robert, 1995.
- <sup>43</sup> *Ibid.*
- <sup>44</sup> *Investigation and Research Branch v. Southam Inc.*, [1997] 1 S.C.R. 748. The British Columbia Court of Appeal refers to this decision in *Re Judicial Compensation Committee*, from May 28, 1998, overturning a trial decision reported in (1997), 27 B.C.L.R. (3d) 134.
- <sup>45</sup> *Ibid.* at 775-76.
- <sup>46</sup> *Ibid.* at 776.
- <sup>47</sup> *Ibid.* at 776-77.
- <sup>48</sup> *Ibid.* at 779 (emphasis added).
- <sup>49</sup> *Ibid.* at 773.
- <sup>50</sup> *Provincial Court Judges case Reference, supra* note 2 at 107.
- <sup>51</sup> *Ibid.* at 110.
- <sup>52</sup> “Second, if judicial review is sought, a reviewing court must inquire into the reasonableness of the factual foundation of the claim made by the government, similar to the way that we have evaluated whether there was an economic emergency in Canada in our jurisprudence under the division of powers (*Re Anti-Inflation Act*, [1976] 2 S.C.R. 373)” (*Ibid.* at 110).
- <sup>53</sup> *Ibid.* at 110.
- <sup>54</sup> *Ibid.* at 91.
- <sup>55</sup> “The threat to judicial independence that arises from the government’s power to set salaries consists in the prospect that judges will be influenced by the possibility that the government will punish or reward them financially for their decisions. Protection against this potentiality is the *raison d’être* of the financial security component of judicial independence” (*Ibid.* at 194). For La Forest J., the traditional test of the reasonable person is effective and sufficient. He notes: “Judges, in my opinion, are capable of ensuring their own independence by an appropriate application of the Constitution. By employing the reasonable perception test, judges are able to distinguish between changes to their



remuneration effected for a valid public purpose and those designed to influence their decisions” (*Ibid.* at 196).

<sup>56</sup> *Ibid.* at 111 and 192.

<sup>57</sup> “Across-the-board measures which affect substantially every person who is paid from the public purse, in my opinion, are *prima facie* rational. For example, an across-the-board reduction in salaries that includes judges will typically be designed to effectuate the government’s overall fiscal priorities, and hence will usually be aimed at furthering some sort of larger public interest” (*Ibid.* at 111).

<sup>58</sup> This statement should be considered in light of the words of Lamer C.J. on the part played by economic considerations in issues of constitutionally protected rights and freedoms (*Ibid.* at 155 to 57). He notes that while purely financial considerations are not sufficient within the meaning of s. 1 of the *Charter*, they may be relevant in determining the standard of deference for the test of minimal impairment and in determining appropriate sanction, where applicable.

<sup>59</sup> “Although the test of justification—one of simple rationality—must be met by all measures which affect judicial remuneration and which depart from the recommendation of the salary commission, some will satisfy that test more easily than others, because they pose less of a danger of being used as a means of economic manipulation, and hence of political interference” (*Ibid.* at 111).

<sup>60</sup> He writes: “It is simply not reasonable to think that a decrease to judicial salaries that is part of an overall economic measure which affects the salaries of all persons paid from public funds imperils the independence of the judiciary” (*Ibid.* at 192) and “[t]here is virtually no possibility that such economic manipulation will arise where the government makes equivalent changes to the remuneration of all persons paid from public funds” (*Ibid.* at 194). For a classic expression of a similar idea, at American law: “The exemption of salaries from diminution is intended to secure the independence of the judges, on the ground, as it was put by Hamilton in *The Federalist* (No. 79) that “a power over a man’s subsistence amounts to a power over his will”. That is a very good reason for preventing attempts to deal with a judge’s salary as such, but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others. To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. 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”, Holmes J., dissenting, with the support of Brandeis J., in *Evans v. Gore*, *supra* note 1.





- <sup>61</sup> *Provincial Court Judges case Reference*, *supra* note 2 at 111.
- <sup>62</sup> Tribe has criticized a judicial approach focusing too closely on scientific studies and technical cost/benefit analyses: “It is a managerial vision of deference to authority and expertise, couched in the technocratic garb of “cost-benefit analysis”, and reinforced by the illusory precision and the pretended neutrality of a pseudo-scientific calculus for measuring claims and counterclaims”, Laurence H. Tribe, “Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve” (1984) 36 *The Hastings Law Journal* 155 at 156. He also decries the sloughing off of responsibility arising from the overdependence on so-called scientific analysis: “They create an illusion, a comforting illusion, of inexorability ... They enable each of us to don a mantle that says, “I didn’t do it” (*Ibid.* at 168).
- <sup>63</sup> Hogg wrote something similar in 1976: “A legislature acts not merely on the basis of findings of fact, but upon its judgement as to the public perceptions of a situation and its judgement as to the appropriate policy to meet the situation. These judgements are political, and they often do not coincide with the views of social scientists or other experts. It is not for the court to disturb political judgement, much less to substitute the opinions of experts”, Peter Hogg, “Proof of Facts in Constitutional Cases” (1976) 36 *U.T.L.J.* 376 at 396.
- <sup>64</sup> See Kenneth Culp Davis, *Administrative Law Treatise*, 2d ed. (San Diego, 1980) vol. 3 at 178: “Even when they are controverted, judgemental facts may often be found without supporting evidence. A judgemental fact is a fact that is mixed with judgement, policy ideas, opinion, discretion, or philosophical preference”. See also Susan Kenny, “Constitutional Fact Ascertainment” (1990) 1 *Public Law Review* 134 at 143 who wrote, concerning American constitutional control of economic matters, approving of the establishment of a rational basis: “[R]elevant facts are likely to be virtually inseparable from matters of policy—the sole preserve of the elected branches of government.”
- <sup>65</sup> Laskin J. wrote, in *Re Anti-Inflation Act*, [1976] 2 *S.C.R.* 373 at 425 [hereinafter, *Anti-Inflation Act* case]: “The economic judgement can be taken into account as an element in arriving at an answer to the question whether there is a rational basis for the governmental and legislative judgement exercised in the enactment of the *Anti-Inflation Act*. It cannot determine the answer.” Likewise, the Supreme Court justices agreed that, in the context of an analysis pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*, the rationality of the relation between a legislative measure and the end sought was sometimes a matter of “common sense”, “reason” and “logic”: see, for example, *RJR MacDonald Inc. v. Canada (A.G.)*, [1995] 3 *S.C.R.* 199 at par. 127. McLachlin J. wrote: “[t]he infringing measure must be justifiable by the processes of reason and rationality. The



question is not whether the measure is popular or accords with the current public opinion polls. The question is rather whether it can be justified by application of the processes of reason. In the legal context, reason imports the notion of inference from evidence or established truths. This is not to deny intuition its role, or to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility”, and: “The causal relationship between the infringement of rights and the benefit sought may sometimes be proved by scientific evidence showing that as a matter of repeated observation, one affects the other. Where, however, legislation is directed at changing human behaviour, as in the case of the *Tobacco Products Control Act*, the causal relationship may not be scientifically measurable. In such cases, this court has been prepared to find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective” (par. 154). See also the comments by La Forest J. at 84.

<sup>66</sup> *Anti-Inflation Act* case, *supra* note 65.

<sup>67</sup> Laskin J. wrote: “In considering such material and assessing its weight, the Court does not look at it in terms of whether it provides proof of the exceptional circumstances as a matter of fact. The matter concerns social and economic policy and hence governmental and legislative judgement. It may be that the existence of exceptional circumstances is so notorious as to enable the Court, of its own motion, to take judicial notice of them without reliance on extrinsic material to inform it. Where this is not so evident, the extrinsic material need go only so far as to persuade the Court that there is a rational basis for the legislation which it is attributing to the head of power invoked in this case in support of its validity” (*Ibid.* at 423). For his part, Beetz J. wrote: “We were provided with a wealth of extrinsic material the consideration of which, it was expected, would enable us to make a finding of facts as to whether or not there was a rational basis for Parliament to judge that it could rely upon that power” (*Ibid.* at 470).

<sup>68</sup> “This test demonstrates a judicial deference to the legislative branch, when the latter makes controversial judgements as to the need for legislative intervention to address a social or economic problem. With such a test, the Court need not get into complex debates about the truth and reliability of the evidence filed. So long as the material is sufficiently cogent to show that the legislators were not acting arbitrarily in enacting the legislation, the statute stands”, Katherine E. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990) at 83.



- <sup>69</sup> “The Anti-Inflation Reference (1976) decides that, in distribution-of-power (or federalism) cases, the proponent of legislation need show no more than a rational basis for legislative facts that are prerequisite for the validity of the legislation”, Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1992) at 1296.
- <sup>70</sup> Danielle Pinard, “La rationalité législative, une question de possibilités ou de probabilités? Commentaire à l’occasion de l’affaire du tabac”, (1994) 39 McGill Law Journal 401 at 419ff. See also the dissenting opinion of Sopinka J. in *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, on evidence of the rational connection between the objective sought and the legislative measure selected, as required under s. 1 of the *Charter*: “[I]n dealing with governmental actors, it is often difficult, if not impossible, to prove in the ordinary way whether a particular measure will in fact achieve its objective. Accordingly, if Parliament, a legislature or other governmental body had a reasonable basis for concluding that the measure would achieve its objective, that is ordinarily a basis for concluding that there is a rational connection between the measure and the governmental objective. Accordingly, although the government could not prove that advertising toys on television had a manipulative effect on children, nor that hate propaganda actually promoted hatred against an identifiable group, nor that pornography caused harm to women, the fact that there was sufficient evidence to provide a reasonable basis for the legislature to adopt the impugned legislation in aid of its objective was sufficient to save it” (*Ibid.* at 1195-96).
- <sup>71</sup> See Pinard, *Ibid.* at 409ff; Danielle Pinard, “La connaissance d’office des faits sociaux en contexte constitutionnel”, (1997) 31 Revue Juridique Thémis 315; Paul A. Freund, “Review of Facts in Constitutional Cases” in Edmond Cahn (under the direction of) *Supreme Court and Supreme Law* (New York: Indiana University Press, Bloomington, 1954) 47 at 47: “A conventional formulation is that legislative facts—those facts which are relevant to the legislative judgement—will not be canvassed save to determine whether there is a rational basis for believing that they exist, while adjudicative facts—those which tie the legislative enactment to the litigant—are to be demonstrated and found according to the ordinary standards prevailing for judicial trials”.
- <sup>72</sup> “Moreover, I wish to clarify that the standard of justification required under s. 11(d) is not the same as that required under s. 1 of the *Charter*” (*Provincial Court Judges case Reference*, *supra* note 2 at 110-11). “The standard of justification here, by contrast, is one of simple rationality” (*Ibid.* at 110).
- <sup>73</sup> It is, incidentally, noteworthy that, although the Court initially developed the test of reasonable limits to rights and freedoms using traditional evidential wording, it soon had to fall back, there too, on the simple requirements of a



rational basis: see Danielle Pinard, *supra* note 70. *A fortiori*, only these requirements may be applied in the case of division of power.

<sup>74</sup> *Provincial Court Judges case Reference*, *supra* note 2 at 111.

<sup>75</sup> Along the same lines, see Joseph Magnet, *supra* note 41 at 115.

<sup>76</sup> See, for example, Henry Wolf Bickl , "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action" (1924) *Harvard Law Review* 6 at 19: "It is clear that the legislative finding as to the fact upon which the validity of the legislation depends cannot be allowed to be binding upon the courts, since this would furnish a simple means of preventing judicial review of such legislation in this class of cases"; Henry P. Monaghan, "Constitutional Fact Review" (1985) 85 *Columbia Law Review* 229 at 252: "[N]o legislature could insulate its action from judicial review by determining initially the facts upon which the constitutionality of those actions depended and thereafter making such factual findings binding upon the courts".

<sup>77</sup> This is what the Supreme Court of Canada did in the *Anti-Inflation Act* case, *supra* note 65. The preamble to the Act in question read as follows: "Whereas the Parliament of Canada recognizes that inflation in Canada at current levels is contrary to the interests of all Canadians and that the containment and reduction of inflation has become a matter of serious national concern and whereas to accomplish such containment and reduction of inflation it is necessary to restrain profit margins, prices, dividends and compensation". Laskin J. wrote: "The preamble in the present case is sufficiently indicative that Parliament was introducing a far-reaching programme promoted by what in its view was a serious national condition. The validity of the *Anti-Inflation Act* does not, however, stand or fall on that preamble, but the preamble does provide a basis for assessing the gravity of the circumstances which called forth the legislation" (*Ibid.* at 422). Ritchie J. also gave serious consideration to the legislative statement of facts (*Ibid.* at 438). Beetz J., dissenting on this question, also considered the statement of fact from the preamble, but deemed the failure to classify the facts stated as constituting an emergency situation to be a fatal omission. In his view, the seriousness of such a classification, in terms of the federal division of legislative authority, required Parliament to assume responsibility for it.

<sup>78</sup> Joseph Magnet, *supra* note 41 at 105: "The presumption of regularity as applied to legislative declarations of facts can mean only that the facts as declared, at least *prima facie*, are true ... [T]he court presumes that the legislature presents an adequate picture resulting from a sufficient investigation".

<sup>79</sup> *Danson v. A.G. Ontario*, [1990] 2 S.C.R. 1086 at 1099, Cory J. for the Court.



- <sup>80</sup> *Anti-Inflation Act* case, *supra* note 65.
- <sup>81</sup> The first social science brief submitted to the court by Louis Brandeis was, in fact, intended only to establish the rationality of the legislative decision, not the reality of the facts stated therein. See Danielle Pinard, “La preuve des faits sociaux et les Brandeis Briefs: quelques réserves” (1996) 26 *Revue De Droit De L’Université de Sherbrooke* 497 at 507ff.
- <sup>82</sup> Danielle Pinard, “La notion traditionnelle de connaissance d’office en droit de la preuve” (1997) 31 *Revue Juridique Thémis* 87; Danielle Pinard, *supra* note 71.
- <sup>83</sup> In fact, this is, in part, what it probably did in *Anti-Inflation*, in order to conclude that the introduction of wage and price controls by the federal Parliament in difficult economic circumstances was reasonable. See commentary in Danielle Pinard, *supra* note 71 at 337ff.
- <sup>84</sup> “The rational basis test enables a court to uphold the validity of legislation without the necessity for strict proof of the underlying facts. It enables a court to resolve conflicting evidence without the need to make a definitive ruling on the conflict”, Hogg, *supra* note 69 at 1297.
- <sup>85</sup> Paul Freund, *On understanding The Supreme Court, 88–89* (1949), cited in Paul Brest, *Processes of Constitutional Lawmaking: Cases and Materials* (Boston: Little, Brown, 1975) at 1006: “The data are offered not for the truth of the facts asserted but only to establish that responsible persons have made the assertions and hold the opinions which are disclosed (...) Consequently, the introduction of countervailing evidence would be immaterial (...) The opponent must show that the opinion in support of legislation is wholly untenable.” The author, however, qualifies his position: Paul A. Freund, “Review of Facts in Constitutional Cases” in Edmond Cahn (under the direction of) *supra* note 71 at 49 (concerning the Brandeis briefs): “Even though the data adduced are presented not to demonstrate the truth of the facts but only to establish a respectable body of opinion holding them to be true, it would seem that upon challenge the data ought to be presented on the record, giving an opportunity to discredit or refute the body of opinion so offered”.
- <sup>86</sup> *Contra*: statement by Lamer J., *Provincial Court Judges case Reference*, *supra* note 2 at 117, on determining the minimal acceptable level of judicial compensation: “... I note that this Court has in the past accepted its expertise to adjudicate upon rights with a financial component ...”
- <sup>87</sup> The government must formally respond to the recommendations of the commission (*Ibid.* at 108), and its reason must be legitimate (*Ibid.* at 110) and given in writing (*Ibid.* at 109).



- <sup>88</sup> “The need for public justification, to my mind, emerges from one of the purposes of s. 11(d)’s guarantee of judicial independence—to ensure public confidence in the justice system. A decision by the executive or the legislature, to change or freeze judges’ salaries, and then to disagree with a recommendation not to act on that decision made by a constitutionally mandated body whose existence is premised on the need to preserve the independence of the judiciary, will only be legitimate and not be viewed as indifferent or hostile to judicial independence if it is supported by reasons” (*Ibid.* at 109).
- <sup>89</sup> One may legitimately wonder whether a simple public discussion in the legislature could not have fulfilled these requirements. See, for a laudatory account of the parliamentary debate on the remuneration of federal judges: Peter Russell, *supra* note 1 at 151-52: “From a democratic perspective the legislative method of determining judicial remuneration has the advantage of exposing the process to public scrutiny and discussion (...) The Canadian judiciary is strong enough to take the buffeting which may be associated with periodic discussion of its level of compensation on the floor of the House of Commons. Legitimate debate on the remuneration of judges provides one of the few opportunities for public review of judicial performance. It would be a shame to eliminate this ounce of accountability”.
- <sup>90</sup> *Provincial Court Judges case Reference*, *supra* note 2 at 105.
- <sup>91</sup> *Ibid.*
- <sup>92</sup> *Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 7.1.
- <sup>93</sup> *Re Judicial Compensation Committee* (1997), 27 B.C.L.R. (3d) 134, overturned by the British Columbia Court of Appeal on May 28, 1998. See comments *infra* note 98.
- <sup>94</sup> “The Legislative Assembly may, by a resolution passed within 21 sitting days after the date on which the report and recommendations are laid before the Legislative Assembly under subsection (8), (a) resolve to reject one or more of the recommendations made in the report as being unfair or unreasonable (...)”, *Provincial Court Act*, *supra* note 92, s. 7.1(9).
- <sup>95</sup> *Re Judicial Compensation Committee*, *supra* note 93 at par. 57. The Court of Appeal handed down its judgement in the case on May 26, 1998, subsequent to the Supreme Court *Provincial Court Judges case Reference*, and discussed the constitutional question: see *infra* note 98.
- <sup>96</sup> “In this context, it is an appropriate use of the words “unfair or unreasonable” to characterize the recommendation as being one or the other or both based on the Legislature’s particular perspective towards matters of public spending, and



the policy of the government with respect to that (...) Having regard to the language of s. 7.1, I conclude that the legislative intention was to allow the Legislature to make its own assessment of the fairness and reasonableness of recommendations, particularly in relation to the financial position of the government”, *Re Judicial Compensation Committee*, *supra* note 93 at pars. 38 and 40. The Court of Appeal upheld this interpretation of the Act: par. 23 of the judgement of the Court of Appeal.

<sup>97</sup> “While the resolution of the Legislative Assembly is subject to judicial review, it is relevant to consider that it is a resolution passed by a sovereign legislature under one of its own statute in relation to a question peculiarly within its area of responsibility and knowledge. That question relates, in the language of the section, to the current financial position of the government”, *Re Judicial Compensation Committee*, *supra* note 93 at par. 49. The Court of Appeal instead applied a standard of review of rationality, which it called an administrative law standard, like the one selected by the Supreme Court in the *Provincial Court Judges* case *Reference*: decision of the Court of Appeal at par. 26.

<sup>98</sup> The British Columbia Court of Appeal rendered its judgement in this case on May 26, 1998. It overturned the trial decision and held that the resolution *a quo* infringed both the requirements under the provincial legislation and the constitutional criteria developed in the meantime by the Supreme Court of Canada in the *Provincial Court Judges* case *Reference*. The Court of Appeal appears to agree that the provisions of the provincial legislation were, in that case, more exacting than the structure established in the *Provincial Court Judges* case *Reference*. It concurs with the analysis by the trial court, to the effect that, in assessing the recommendations of the committee, the legislative assembly may conduct its own assessment, in particular, in light of its economic concerns. The Court of Appeal, however, was of the opinion that the resolution of the legislative assembly did not pass the rationality test (according to the Court of Appeal, a criterion at administrative law that was also applied by the Supreme Court in the *Provincial Court Judges* case *Reference*), particularly in its across-the-board rejection of the committee’s recommendations, including the most innocuous among them. It is therefore the standard of review applied, and not the interpretation of the legislative authority in question, that explains the judgement by the Court of Appeal. The Supreme Court had instead used a much more minimalist standard of review at administrative law, deferring to the sovereignty of the legislative assembly. Furthermore, the rationality test applied by the Court of Appeal does not appear to respect the requirements developed in the matter by the Supreme Court in the *Provincial Court Judges* case *Reference*. In fact, the Court of Appeal gives no thought here as to whether the government’s objec-



tive is legitimate or whether the measure in question has a rational basis. Instead, it appears to analyse the merits of the decision and the **attitude** of the political authorities.

<sup>99</sup> *Provincial Court Judges case Reference*, *supra* note 2 at 108.

<sup>100</sup> *Ibid.* at 92.

<sup>101</sup> *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 304–5, passage concerning a study of the effects of forced retirement. Another passage from the same decision: “The Legislature, like this Court, was faced with competing socio-economic theories, about which respected academics not unnaturally differ. In my view, the Legislature is entitled to choose between them and surely to proceed cautiously in effecting change on such important issues of social and economic concern. On issues of this kind, where there is competing social science evidence ... the question for this Court is whether the government had a reasonable basis for concluding that the legislation impaired the relevant right as little as possible, given the government’s pressing and substantial objectives” (*Ibid.* at 309, per La Forest, Dickson and Gonthier). See, finally, *Irwin Toy v. A.G. Quebec*, [1989] 1 S.C.R. 927 at 993: “Thus, in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck ... When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices”.

<sup>102</sup> *McKinney*, *Ibid.* at 305.





# Setting *Judicial* Compensation: Implications of the Decision of the Supreme Court of Canada in the *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* Case

**Nicholas d’Ombrain**

## Introduction

On September 18, 1997, the Supreme Court of Canada handed down a decision requiring all jurisdictions in Canada to create particular institutions and follow prescribed procedures necessary to protect the independence of the judiciary in matters respecting judicial compensation.<sup>1</sup> This paper deals with the institutional and procedural elements of the Supreme Court decision and their implications for governments and the judiciary in Canada.

## The Supreme Court Decision

Chief Justice Lamer wrote a majority decision concurred in by five of his colleagues (L’Heureux-Dubé, Sopinka, Gonthier, Cory, and Iacobucci). The import of the decision for future arrangements for determining judicial compensation is as follows:

1. The *Constitution Act, 1867* provides for federal judicial salaries to be set by Parliament. Provincially appointed judges are not paid pursuant to a constitutional provision. However,
  - as a matter of broad judicial independence flowing from the provision in the preamble to the *British North America Act* that provided Canada with “... a Constitution similar in Principle to



that of the United Kingdom”, and in order to ensure the right to a fair and impartial trial under section 11(d) of the *Charter*,<sup>2</sup> the remuneration of judges must be determined through a “de-politicized” process.

2. In order for the process to be “de-politicized”, it is necessary to interpose an institutional arrangement that will act as an “institutional sieve” between the “executive” and the “legislature”, on the one hand, and judges, on the other.
3. This sieve is to consist of a commission, one to each jurisdiction. The commission is to be appointed for a fixed term, and it is to consist of three persons, one appointed by each of the “branches of government”, the judiciary, the executive and the legislature.
4. No changes are to take place in judicial compensation without prior consultation and a report from the relevant commission.
5. The commission’s reports are to be acted on “... directly, with due diligence and reasonable dispatch”<sup>3</sup> within a specified period of time, and where recommendations are not followed, an explanation is to be laid before Parliament and the legislature and this can be challenged in court to determine if the reasons given meet a test of “simple rationality”. Each commission is to review action taken on its recommendations on a regular basis.

A re-hearing of certain aspects of the case took place in January 1998. This dealt with a number of matters (principally the validity of trials in certain jurisdictions following salary actions respecting judges deemed “unconstitutional” by the Court). In February 1998 the Court issued a clarification that *inter alia* set out a transition period ending 18 September 1998 by which time each jurisdiction must have in place “... an independent, objective and effective process for setting judicial remuneration, including any reimbursement for past salary reductions”.<sup>4</sup>



## Dissent by Justice La Forest

Justice La Forest wrote a lengthy dissent, taking as his point of departure that his colleagues erred in believing that “... a Constitution similar in Principle to that of the United Kingdom” placed judicial independence beyond the reach of the Westminster Parliament.<sup>5</sup> His overriding concern, however, was that the decision of the majority ventured unnecessarily into new constitutional territory and prescribed institutions and processes that in his opinion were not required by the facts before the Court.

Justice La Forest noted that the judgement goes beyond the principles and criteria for judicial independence set out by the Supreme Court in *Valente* in 1985, which prescribed a test of a perception of independence by a reasonable, informed person.<sup>6</sup> From this basis, Justice La Forest made several observations relevant to institutional arrangements and processes.

1. Parliament and the legislatures under the *Constitution Act, 1867* fix the salary of a judge, and until now this has been considered adequate protection of judicial independence in matters of compensation.
2. There is no constitutional bar to judges discussing their compensation needs directly with the government.
  - “The government” within the constitutional requirement that salaries be established by statute determines the exact compensation of judges. There is no requirement to discuss, consult or negotiate salaries with judges or judges’ associations.
  - “The atmosphere of negotiation the Chief Justice describes, which fosters expectations of ‘give and take’ and encourages ‘subtle accommodations’, does not therefore apply to salary discussions between government and the judiciary. The danger that is alleged to arise from such discussions—that judges will barter their independence for financial gain—is thus illusory.”<sup>7</sup>
3. “Section 11(d) [of the *Charter*] does not empower this or any other court to compel governments to enact “model” legislation



affording the utmost protection to judicial independence. This is the task of the legislature, not the courts.<sup>8</sup>

4. The requirement to refer the matter to a commission “represents a triumph of form over substance”<sup>9</sup> in circumstances where the government decides to alter judicial salaries as part of an across the board economic measure applied to all holders of public office—a circumstance characterized by the decision “... as *prima facie* rational”.<sup>10</sup>
5. Contrary to the majority decision, a reasonable, informed person “... would not view the linking of judges salaries to those of civil servants as compromising judicial independence.”<sup>11</sup>

### Some Federal Background

The judgement affects all courts in Canada, although it is written on the basis of references and appeals arising from judgements at the provincial court level. The relevant parties not having been before the Court, no mention is made of the impact of the decision on federal arrangements for settling judicial compensation, including that of the justices of the Supreme Court. Nor is it acknowledged that the decision bears directly on the salary base of all Section 96 judges.

The history of federal institutional arrangements is germane to understanding the full import of this decision. Beginning in 1974, the federal government had appointed *ad hoc* committees to review and provide advice on judicial compensation.<sup>12</sup> In 1983, the first of a series of commissions was appointed pursuant to amendments to the *Judges Act*, which made provision for such a review body to be appointed every three years.<sup>13</sup>

Triennial commissions reported in 1983, 1987, 1990, 1993 and 1996.<sup>14</sup> Each was established on a temporary basis and until latterly was required to report within six months. There is no statutory requirement for the government to respond to the recommendations of the commissions. Tardy, incomplete, inadequate and absent responses led successive commissions to complain and recommend that the government



be forced to respond, and various ingenious proposals were made to force the government to implement commission recommendations.

The judicial community apparently considers the commissions to have been inadequate in protecting their pecuniary interests. It is interesting, however, that dating from the first, informal advisory committees in the 1970s, explicitly or implicitly successive recommendations sought to establish a benchmark that would provide superior court judges with salaries roughly equivalent to the mid-range of a DM-3, which is the most senior federal level for a deputy minister.<sup>15</sup> And the benchmark has generally been respected, despite the complaints of successive commissions about inadequate responses to their reports. Of course, the freeze on salaries affected all public office holders, so that the inadequacy of the pay of a deputy minister today is reflected in the pay of a superior court judge.

The Canadian Judicial Council and the Canadian Conference of Judges are on record opposing the benchmark. The last triennial commission preferred a comparison with the compensation of members of the bar in private practice.<sup>16</sup> The Court may have been making an elliptical reference to its preferences with its conclusion that judicial independence “... can be threatened by measures which treat judges either differently from, or identically to, other persons paid from the public purse.”<sup>17</sup> Justice La Forest disagreed, stating that a reasonable, informed person “... would not view the linking of judges salaries to those of civil servants as compromising judicial independence.”<sup>18</sup>

The Supreme Court judgement takes on certain coloration when seen in the light of federal experience with the triennial commissions and the consequences of the six-year long freeze on federal salaries.

It is also worth noting that had governments not been faced with the urgent need to reduce deficits in the 1990s, wage restraint would not have occurred and these cases would not have arisen. Given the emphasis in the decision on the “simple rationality” of across-the-board compensation measures, it is to be wondered why now is the time to create a constitutional requirement to set up an institution to give some weight to revisions in judicial compensation. In the perception of a reasonable, informed person, the answer lies in the frustration of federally appointed



judges with the allegedly tardy and dismissive attitude of successive governments to the recommendations of the triennial commissions—and more particularly the effect of the wage freeze on their overall compensation.

### The Institutional Implications

The Supreme Court has stipulated that commissions must be created and it has set out criteria to guide several important aspects of the commission process: the method of appointment to the commission; the need to consult prior to changing judicial compensation; and the disposition of its recommendations.

There is a striking difference in language between the reasoning of Chief Justice Lamer and that of Justice La Forest. The Chief Justice refers throughout to the “three branches” of government. It is, of course, the case that judicial salaries are set by Parliament, but of course Parliament means the Crown in Parliament, which in the context of responsible government, means the executive acting with the support of a majority in the House of Commons and the Senate.

The decision of the Court appears to attach a good deal of importance to the separation of powers. There is no doubt that the Queen in Her Courts is separate and distinct from the other branches of government. It is, however, a mistake to differentiate between the powers of the executive and the legislature. They are, in Bagehot’s phrase, fused in such a way that it is wrong to speak of them in the context of the separation of powers.<sup>19</sup>

This is not a mere quibble about the nicer points of responsible government. The Court has imported republican principles of separation of powers, and its thinking on these lines leads it to detailed conclusions about institutional change, particularly in respect of appointments to commissions dealing with judicial compensation.

#### *Appointments*

The Court has said “... appointments [should] not be entirely controlled by any one of the branches of government. The commission should have members appointed by the judiciary, on the one hand, and



the legislature and the executive, on the other.”<sup>20</sup> Thus it wants each commission to have a person selected by each of the judiciary, the legislature and the executive.

In order for the legislature to appoint a person to a commission, a resolution of the House of Commons and the Senate or of a committee or committees of that body or the relevant legislature would be required in most circumstances. By definition, such a resolution can only pass if a majority of members support it, and for that to occur the resolution needs to be supported by the government. There can, therefore, be no truly independent expression of the will of the legislature that leads to executive action and the expenditure of public monies. This is not surprising in view of the fusion of the executive and the legislature in our system of responsible government.

It is also worth noting that persons who exercise the powers conferred by Parliament are appointed to office by the Queen, the Governor General, the Governor-in-Council, individual ministers, and the Public Service Commission—or their delegates. In addition, responsible government requires that public expenditures be made on the basis of a Royal Recommendation, which can only be proposed to the Governor General by the Cabinet or the Prime Minister on behalf of the Cabinet. All of which reinforces the point that the legislature cannot act independently of the executive in assigning, or funding the exercise of, the powers of the state.

Finding a way to implement this part of the decision will strain the powers of alchemy of creative government organization, although fortunately the Court has referred favourably to models that do not fit its prescription but which may be more workable.<sup>21</sup> Perhaps it could be left to a Parliamentary committee to propose someone for appointment by the Government. Perhaps the Speaker could be mandated to select someone. Whatever route is chosen, an appointment by the legislature will require the support of the Government.

The decision is also deficient in its apparent assumption that direct involvement of the legislature in the process of selecting persons to sit on commissions will contribute to “de-politicizing” the process.



### *Prior Consultation*

The decision states that “Any changes to or freezes in judicial remuneration made without prior recourse to the independent body are unconstitutional”<sup>22</sup>.

There are several implications to this pronouncement. Most obviously, commissions are going to have to be appointed on a permanent basis, so that even if not actively considering judicial compensation, its members may be called upon to be consulted prior to a change, such as occurred in 1992 and 1995 when the federal government decided on across-the-board freezes for all office holders.

In the case of across-the-board measures, the commissions will have to be consulted before budgets are tabled. Both recent federal freezes were announced as part of the government’s budgetary measures. This raises some important questions about budgetary secrecy. It also raises a practical problem because such measures are held so closely that few beyond the confines of the Finance Department are aware of what is proposed until the budget is brought down. The possibility is high that the Minister of Justice, for example, will not be involved in decisions on system-wide budgetary measures.

The decision not only requires that the commission be consulted, but that it review the proposed measure and report to the government concerned. It remains to be seen how the Minister of Finance and Finance and Privy Council Office budget planners will treat this requirement. A possible approach would be to announce across-the-board measures but indicate that the effect on judges would be suspended pending a review and report from the commission. The purpose of such a review would be to determine if the government’s decision met the test of “simple rationality”. This may not be more appetizing for judges than for the government, and certainly creates a perception of special treatment.

### *Simple Rationality*

The decision declares that “The recommendations of the independent body are non-binding. However, if the executive or legislature chooses to depart from those recommendations, it has to justify its





decision according to a standard of simple rationality—if need be, in a court of law.”<sup>23</sup> The intent of this part of the decision is to prevent future governments from simply ignoring commission recommendations.

As noted, this element of the decision addresses the frustration of federally-appointed judges over the fate of the reports of the triennial commissions and the effects of the 1992 and 1995 compensation freezes. On its face, the measure is sensible. Note, however, that successive governments have been extremely reluctant to respond swiftly or fully to commission recommendations. To some degree this is simply the embarrassment factor of having to say No, or Yes in a structured, public way.

The Supreme Court decision makes much of the inherently political nature of government and the need to ensure judges do not contaminate themselves by entering into what it terms “salary negotiations” with the government. The judges are right, of course, about the political nature of the democratic process and its practitioners in government. They would, however, have been well advised to consider that one of the reasons for tardiness in dealing with commission reports has been finding ways to deal with adverse public reaction to salary increases in the public sector, judges included. The Court may have reflected on this in noting that decisions based on “simple rationality” could be the subject of judicial review. They may not, however, have weighed adequately the role of government in protecting judges from public outrage if the practical effect of this is that judges will determine for themselves how much they should be paid from the public purse.

Swift public responses from government are more likely to be parsimonious than generous. Indeed, if the public is forced to think about judicial salaries as a result of formal parliamentary responses to commission reports, the rule of thumb that Section 96 judges should be paid at the same level as senior federal deputy ministers may prove more difficult to justify, still less exceed, than some may think. At any given time, there are usually no more than 5 to 10 senior deputy ministers in Ottawa. They are the Secretary to the Cabinet, the Deputy Minister of Finance, the Secretary to the Treasury Board, the Deputy Minister of



Foreign Affairs and a few other line deputies paid at the DM-3 level in recognition of long, senior service.

If deputy ministers' salaries are eventually adjusted upwards to restore comparability with pre-freeze levels and private sector differentials, it may be that paying the same salary (or greater for chiefs and Supreme Court members) to some 1,000 federally-appointed judges will be difficult to defend. It will undoubtedly be more difficult for ministers if their feet are publicly held to the fire by forcing the government to produce a high profile, comprehensive and timely response to commission recommendations.

### Other Implications

The decision also requires that commissions be provided with access to expert advice on relative compensation. This is eminently sensible. It will not be implemented cheaply. Compensation is a highly complex area and getting accurate, relevant and properly interpreted data is expensive and contentious. Governments across Canada are working up Bills, and in some cases have tabled legislation to respond to the decision. Commissions will have to have some form of continuing secretariat, and no doubt it will be argued that their impartiality requires that they not be located inside ministries of justice or attorneys general departments. All of this will be costly and duplicative. There is, therefore, a good case for establishing some sort of central repository of expertise on which all the commissions could draw from time to time. It would be better, although unrealistic in Canada, to have some sort of common administrative structure to support commissions as they go about their work.

### Conclusions and Observations

The Supreme Court has directed governments to exercise their powers over machinery of government to establish a mechanism to provide authoritative advice on judicial compensation. It appears to think that such mechanisms will come as close as the Constitution permits to directing decisions on these matters.



The machinery prescribed reflects a less than complete understanding of the relationship between the executive and parliament, and is based on a view that current arrangements do not provide an adequate perception of judicial independence as seen by a reasonable, informed observer.

The process prescribed potentially interferes with budget making, and may not be workable given the timeframes and secrecy surrounding budgets. It also has the effect of forcing the government to deal in a public and expeditious way with issues that may be politically difficult, and in the interests of judges better left to the somewhat indirect methods often preferred by ministers.

The decision carries with it significant costs to the public purse, which could be mitigated if the federal and provincial governments were willing to pool resources.

The consequences of implementing the decision risk drawing the judiciary into the public spotlight in ways the Supreme Court would doubtless find regrettable. Judges are officials of the state. It is not for them to decide how much they should be paid. This is the duty of the duly elected government, and judges should be thankful that it is the government and not they who are accountable to the public for their compensation. The decision is naïve in these matters. The admirable objective of protecting judicial independence is more likely to be undermined as this decision is implemented in the way prescribed by the Supreme Court of Canada.

The decision is, moreover, a clear instance of the courts invading the realm of government, prescribing detailed legislation and supporting changes to the machinery of government. Given that the substance of what is definitively and constitutionally laid down by the Court bears directly on the personal benefits of all judges including those of the Supreme Court, the decision appears more than mildly inappropriate. The fact that it may produce unintended and perverse consequences, of the sort described in this paper, casts doubt on the wisdom of the Supreme Court. Justice La Forest warned his colleagues of this, so the final word should be his:



I am, therefore, deeply concerned that the Court is entering into a debate on this issue without the benefit of substantial argument. I am all the more troubled since the question involves the proper relationship between the political branches of government and the judicial branch, an issue on which judges can hardly be seen to be indifferent, especially as it concerns their own remuneration. In such circumstances, it is absolutely critical for the Court to tread carefully and avoid making far-reaching conclusions that are not necessary to decide the case before it.<sup>24</sup>

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- <sup>1</sup> *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (hereinafter, *Provincial Court Judges* case).
- <sup>2</sup> Section 11(d) reads as follows: “Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”
- <sup>3</sup> *Provincial Court Judges* case, *supra* note 1 at 108.
- <sup>4</sup> *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3.
- <sup>5</sup> *Provincial Court Judges* case, *supra* note 1 at 178 and 182–183.
- <sup>6</sup> *Valente v. The Queen*, [1985] 2 S.C.R. 673.
- <sup>7</sup> *Provincial Court Judges* case, *supra* note 1 at 198–199.
- <sup>8</sup> *Ibid.* at 190.
- <sup>9</sup> *Ibid.* at 195.
- <sup>10</sup> *Ibid.* at 111.
- <sup>11</sup> *Ibid.* at 194.
- <sup>12</sup> There were three such committees chaired respectively by Emmett Hall in 1974, Irwin Dorfman in 1978, and Jean de Grandpré in 1981.
- <sup>13</sup> The provision is contained in Section 26 of the *Judges Act*, R.S.C. 1985, c. J-1 and reads as follows:
- 26(1) Within six months after April 1, 1986 and within six months after April 1 in every third year thereafter, the Minister of Justice of Canada shall appoint not fewer than three and not more than five commissioners to



inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally.

26(2) Within twelve months after being appointed, the commissioners shall submit a report to the Minister of Justice, containing such recommendations as they consider appropriate, and the Minister shall cause the report to be laid before Parliament not later than the tenth sitting day of Parliament after the Minister receives it.

<sup>14</sup> The triennial commissions were chaired respectively by Otto Lang in 1983, Donald Guthrie in 1987, Jacques Courtois in 1990, Purdy Crawford in 1993, and David Scott in 1996.

<sup>15</sup> Puisne judges of superior courts are paid \$159,000 and the mid-point of the DM-3 salary range is \$155,300.

<sup>16</sup> See: *Report and Recommendations of the 1995 Commission on Judges Salaries and Benefits* (Scott Commission) (Ottawa: Ministry of Supply and Services Canada, 1996) p. 14.

<sup>17</sup> *Provincial Court Judges* case, *supra* note 1 at 99.

<sup>18</sup> *Ibid.* at 194.

<sup>19</sup> “The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers.” See Walter Bagehot, *The English Constitution* (London: Oxford University Press, 1958), first published 1867, p. 9.

<sup>20</sup> *Provincial Court Judges* case, *supra* note 1 at 105.

<sup>21</sup> *Ibid.* at 105. “The exact mechanism is for provincial governments to determine. Likewise, the nominees of the executive and the legislature may be chosen by the Lieutenant Governor in Council, although appointments by the Attorney General as in British Columbia (*Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 7.1(2)), or conceivably by the legislature itself, are entirely permissible.”

<sup>22</sup> *Ibid.* at 106.

<sup>23</sup> *Ibid.* at 158.

<sup>24</sup> *Ibid.* at 175.



# Interdependence, not Independence: Institutional and Administrative Dimensions of Judicial Independence

## Richard Simeon

The Manner of establishing it, with Powers neither too extensive, nor too limited; rendering it properly independent yet properly amenable, involved Questions of no little intricacy.

John Jay, first US Chief Justice<sup>1</sup>

Judicial independence is not a talismanic slogan to be invoked every time [government] performs its constitutional duty to oversee and regulate the federal courts.

American Bar Association<sup>2</sup>

My assignment is to explore issues of institutional design to give effect to a workable conception of judicial independence. This requires that we ask how are the courts to be governed? What is the appropriate relationship between the courts on one hand, and legislatures and executives on the other? How do we strike the right balance between the essential elements of judicial independence, and the need to create an integrated, effective criminal justice system that inevitably and necessarily must involve all the elements of our political system?

The approach I bring to this task is that of a political scientist, concerned with governance and public administration. It is not my intent to parse the constitution for guidance on how to define and manage the relationship. Indeed, beyond the core concepts of security of tenure and financial security that are so thoroughly canvassed in the recent judgments, I do not think the constitution is much help to us here. My approach will be more functional, or policy oriented. Moreover, I will focus not on the decisional independence of judges with respect to



individual cases being considered in the courtroom, but on their institutional and administrative independence.

Once we shift from decisional independence to institutional independence, the whole concept of judicial independence becomes much murkier. Administrative independence is defined in the *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* (hereinafter the *Provincial Court Judges* case) as “control by the courts over the administrative decisions that bear directly and immediately on the exercise of the judicial function.”<sup>3</sup> The principle may be clear, but its application certainly is not. Virtually all decisions with respect to budgets, staffing, facilities, and the like have implications for how judges do their work, and the resources that are available to them.

How far then should one take the idea of institutional and administrative independence? When does that essential concept trump the equally central concepts of democratic accountability and policy-making, exercised through the legislature, and administrative efficiency and effectiveness, exercised by the executive?

I argue that no clear line can be drawn. Therefore, I want to stress not the **autonomy** of the courts and the judiciary, but rather the **interdependence** between the courts and the other branches of government.<sup>4</sup> The doctrine of separation of powers is often invoked to justify the institutional independence of the judiciary. But sometimes forgotten is the other core principle of the U.S. constitution, checks and balances. The American constitutional design does not envision the three branches as existing in splendid isolation from each other. Rather, tyranny is to be avoided by having each branch check and balance each other—in other words to be interdependent. The relationship among them is indeed “indelibly political.” A blend, as a U.S. judge puts it, of “separateness, but interdependence, autonomy, but reciprocity.”<sup>5</sup> “At any time there is a dialogue, or negotiation with the other branches about ... budget, jurisdiction, size, procedures, administration.”

Thus I find myself to be unsympathetic to Chief Justice Lamer’s strong emphasis on depoliticizing the relationship between governments and the judiciary—building firewalls between them. I think it is somewhat unrealistic and unsustainable. He suggests it is illegitimate



for judges and governments to negotiate with each other; I cannot imagine why the effective administration of justice does not require them to.

Nor do I believe it is possible for the courts to be “a place apart.” Courts and governments interact with each other, or exercise mutual influence, in a myriad of ways, and this in the broad sense of the word is, and should be, political. Nor do I believe that the default position should always favor independence, with the burden of proof falling on the intervenor. Judicial independence too must be justified and defended. Again, the hard questions about which is to win out lie at the intersection of courts and the wider political/administrative process.

This interaction between the courts and the other branches is, of course, long-standing. Indeed, it appears that the idea of institutional and administrative judicial independence is relatively new, at least in the American context, and that it has little grounding in the constitution itself.

It also takes many forms, constitutional, statutory and administrative. Appointment procedures determine what kinds of people will be judges. Criminal code provisions will affect the scope of judicial discretion, both in the way it defines offences and in the rules with respect to sentencing. Other legislation will shape the judicial workload, while budgets will determine the facilities and resources judges have to manage it. Administrative rules with respect to staffing, scheduling, case management and the like shape the working environment. Even in countries like the United States and Australia, where courts enjoy a high level of institutional and administrative autonomy or self-management, the range of external pressures and influences is very wide.<sup>6</sup>

And this legislative and executive—and, by extension, public—intervention in the structure and work of the courts takes place for very good reasons. Some are democratic. Not only in the sense that citizens expect accountability and transparency in the work of public institutions, but also in the more profound sense that the judiciary are society’s agents in the definition and enforcement of public norms and values. Some are more functional or practical. It must be remembered that the courts are just one—albeit the pivotal—link in a long chain that constitutes the





justice system—from writing the laws, to policing and enforcement, to judging, to sentencing and enforcement of remedies. No link in this chain can be severed from the others. Governments, while delegating the judicial function to a highly specialized, and independent, institution in the form of the courts are responsible for the overall functioning of the whole system. And while judges are rightly treated differently from other public employees by virtue of their security of tenure and financial security, they are indubitably “public servants.”

A wide variety of factors have in recent years sharpened the tension between autonomy and interdependence, making the search for more effective means of court governance more vital, and more difficult. Again, in various forms, these tensions have arisen not only here in Canada, but also in most other countries.

Let us mention a few of these forces.

On the “democratic” side of the equation there is the ‘judicialization of politics’ which has also occurred everywhere, but which has had especially dramatic impact in Canada as a result of the Charter. To the extent that judges are, and are seen to be, cast into the role of lawmakers and policy-makers, then inevitably the decisions they make and how they make them, become a matter for greater public debate and discussion. There is a paradox here: the more judges take on this role, the more judges will seek to underline their independence in order to distinguish themselves and their mode of decision-making from other political actors; but the more citizens and groups are likely to see them as just another set of political decision-makers, who should be subject to the same constraints as other decision-makers.

In addition, there is the wide range of other public concerns—with crime and punishment, with costs, delays and the like. Faced with these issues, the first inclination of the public is to turn to legislatures and executives and demand their intervention. The more resistant courts appear to be to these concerns, the more justification there is for increased managerial control by governments. As Judge White of Saskatchewan has observed: “whatever the constitutional niceties of the concept of Judicial Independence, the media and the public interest demand accountability.”<sup>7</sup> Courts are not immune from the “decline of



deference” that leads citizens to be more critical and demanding of all governing institutions, including the courts.<sup>8</sup> This phenomenon is common to most modern industrial societies. As the Chief Justice of the Federal Court of Australia puts it, a changing society has led to “scrutiny, public discussion and at times criticism to a far greater extent than was generally the case in the past.”<sup>9</sup>

On the side of efficiency and effectiveness, there are also many concerns. Most pressing in recent years has been the impact on the courts of the broader need for governments to control costs and reduce expenditures. Despite coming victories over the deficit, these purely financial pressures are not likely to go away. Nor are they likely to show up simply in overall caps on courts’ budgets. The search for cost savings is taking governments more deeply into internal administration, in such areas as staffing and efficient use of facilities. It has also led governments to be more aggressive in pressuring courts to engage in more “modern” management techniques, such as performance evaluation, and to adopt the latest advances in information technology. And all this at a time when increasing judicial review of executive actions “has blown the wind of legal orthodoxy through the silent corridors of the bureaucracy, ensuring that powers whose exercise is apt to affect individual interests are constrained by requirements of procedural fairness.”<sup>10</sup>

The implication of this analysis is that there is a wide range of stakeholders affected by and interested in court administration. Each brings a different set of perspectives and concerns to the debate. The public is likely to be most concerned with outcomes—both substantively and procedurally in terms of delays and the like. It is also concerned with costs—not in the sense of costs to the system, but of the costs to be borne by defendants and litigants. Legislators, in general, will respond to public concerns.

Executives and bureaucrats are likely to bring to the table a preeminent concern with costs and efficiency. This will include a strong emphasis on resource allocation and utilization, on effective management, and on the adoption of information technology. Judges may rightly fear that the principles of the rule of law and judicial independence will not



necessarily be foremost in the minds of bureaucrats charged with managing the court system.

Judges, of course, will be primarily concerned with those issues, and with ensuring judicial control over resources, staff, and facilities. The bureaucrats may rightly fear that judges are not predisposed to worry first about costs, efficiency, or effective personnel management. Indeed bureaucrats may be correct, at least in part, if they believe that the judiciary is self-serving, resistant to change, and suspicious of new technologies and new fangled management.

If each of these groups has a legitimate stake in, and responsibility for the health of the judicial system, and if the watchword is, as I have suggested, interdependence, then what might some of the possible models for interaction be? I have neither the knowledge nor the time to set out any ideal model here. Valuable suggestions have been made by a number of observers, most recently and helpfully by Martin Friedland in his study for the Canadian Judicial Council, *A Place Apart: Judicial Independence and Accountability in Canada*.<sup>11</sup>

It is however helpful to think of the possible relationships along a continuum. At one pole is autonomy and self-management: the courts should run themselves. “Splendid Isolation,” we might call it. At the other pole is public management. Judges judge: the setting in which they do this is established and managed by the government. In the middle are various forms of co-management, which can be tilted either towards or away from judicial power and autonomy.

Autonomous self-management appears generally to be the case in most jurisdictions in the United States, and Australia has been moving away from the traditional responsibility of the Attorney General to a “judicially autonomous” system, or “self-administration.”<sup>12</sup> It has been advocated most forcefully in Canada by Chief Justice Jules Deschênes in his report *Masters in Their Own House: A Study on the Independent Judicial Administration of the Courts*.<sup>13</sup>

In order for individual judges to be independent, he argued, the judiciary needs institutional independence. “Faced with the increasingly pervasive presence of the state, the judiciary must also enjoy collective independence, for a general administrative decision can affect the



judge's independent performance of his duties every bit as much as individual contact." For the greater good of our society the time has come when members of the judiciary must at last find themselves masters in their own house.<sup>14</sup>

The required degree of institutional independence should be enshrined in the constitution.

Progress towards this goal should begin with greater consultation between government and the judiciary, followed by co-decision-making, and eventually leading to the "bright sun of independence." Courts would be governed by a Council, made up of a majority of judges, which would neither be appointed by the cabinet, nor include Ministers or officials of the government. The senior court administrator would be appointed by and responsible to the Council.

There are powerful arguments for such a position. There is potential conflict of interest inherent in the fact that the chief litigator before the courts is also responsible for managing them; and there are tensions between when court management and support staff serve two masters. It may be inherently undesirable that an institution with one set of responsibilities is largely managed by another, with a different set of perspectives and interests.

Yet, as I have suggested, it is neither possible nor desirable to wall off the courts so thoroughly. Courts, as I have argued are inherently part of the public sector and one link in the larger chain of the justice system. It is the government, not the courts that is responsible for the whole judicial system, as well as for public management and finances generally. It is the government that is responsible before the legislature and the voters for the overall functioning of the system.

Moreover, there is much to be said for the principle of letting judges judge. There is no reason to expect judges to have particular aptitude, interest or competence in managing the large, complex and costly administrative systems that courts have now become. The more the courts are responsible for their own administration, the more energy, resources, and judicial time would have to be devoted to administration, and the less would be available for the key, central task that judges perform.



Indeed, the more courts become institutionally independent, the more obligation there will be on them to develop their own mechanisms for openness, responsiveness, transparency and accountability to the legislature and the public.<sup>15</sup> This would be a considerable task that judges might be unwilling or unable to perform.

The alternative pole of leaving virtually all aspects of management of the judiciary to the Ministries of the Attorney General is equally unacceptable. The cases, which led to this conference, are only the tip of the iceberg in terms of dissatisfaction from all sides with the status quo.

Solutions therefore must lie in the middle ground. Again, there are various possibilities. One would simply be to develop a more cooperative relationships in which dialogue might help ease tensions. Greater mutual regard and cooperation, in itself is no guarantee of more coherent, effective administration. As Miller and Baar suggest, it can lead to “a mutual reluctance to tread in the no-man’s-land between the ill-defined borders separating executive and judicial authority,” and thus retard “initiative, reform, and modernization of court administration.”<sup>16</sup> Martin Friedland adds that judges may be reluctant to innovate, saying it is the job of the government; while government is reluctant to step on the toes of the judiciary.<sup>17</sup> Moreover, informal cooperation of this sort, behind closed doors, may threaten the perception of judicial independence.

A second approach might be to engage in a clarification of the division of responsibility between courts and governments. This would entail the ability to delineate those aspects of judicial administration, which are essential to judges’ decisional independence; and those aspects about which a larger public interest should prevail. I do not believe it is possible to divide responsibilities so neatly.

Hence the desirability of a third approach—co-management. This would recognize the inherent interdependence of the two branches, and the impossibility of separating them. It would also recognize, as Martin Friedland notes, the need for global coordination of the judiciary as a whole.

Thus Friedland proposes establishment of a Board of Judicial management, somewhat akin to a University Board of Directors, represent-



ing the Chief Justices of the three levels of courts, other judges, representatives of the bar, and some lay persons. The chair would not be a judge, and lay members would constitute a small majority. The board would appoint the chief manager, or administrator.

Several other variants on this idea have been published. Deschenes' Judicial Council would have judges in the majority, and not be appointed by government. It would submit a budget directly to the legislature. Judge Thomas Zuber, of the Ontario Court of Appeal in his 1987 *Report of the Ontario Courts Inquiry* called for an Ontario Courts Management Committee, Chaired by the Chief Justice and in this case including three officials of the Attorney's General department.<sup>18</sup> The American Bar Association has recommended a permanent National Commission on the Federal Courts, representing all three branches, and developing proposals for Congress on "practice, procedure, administration, and the like; and evaluating legislative proposals affecting the courts."<sup>19</sup> South Africa has established a broadly representative Judicial Services Commission,<sup>20</sup> which is to advise the national government "on any matter relating to the judiciary or the administration of justice."<sup>21</sup>

It is this sort of option that I believe we need to explore. It recognizes, rather than denies interdependence. It recognizes the ambiguity of the precise dividing line between governmental responsibility and judicial independence, and builds in into the process. It concentrates administrative responsibility in one place. The membership structure can recognize the inherent variety of stakeholders in the judicial system. It minimizes the possibility of Ministry and Courts working at cross-purposes. Through its procedures and reporting relationships, transparency and accountability can be assured. It can be designed to reflect the broad range of factors essential to the system of justice as a whole.

Friedland quotes Hugh Arnold, a management specialist in support of his proposal:

If we want to encourage greater levels of responsibility throughout the organization, the real challenge ... is how we find ways of effectively sharing resources, of working collaboratively and of dealing with ambiguity. The manager who insists that he or she must have total control of all resources necessary to carry out his or her responsibilities is, in my



experience at least, an individual who is unlikely to be successful in the more fluid, more flexible, more rapidly changing organizations that exist today.<sup>22</sup>

Like it or not, the justice system is such an organization. As the American Bar Association says in its recent report on Judicial Independence, the challenge for government is oversight without micromanagement; and the judiciary should recognize that not every disagreement is a threat to judicial interdependence, nor every inquiry into how it spends money a hostile act.<sup>23</sup>

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- <sup>1</sup> Quoted in L. Ralph Mechem, "Introduction: Mercer Law Review Symposium on Federal Judicial Independence" (1995) 46 Mercer Law Review 637 at 637.
  - <sup>2</sup> *An Independent Judiciary: Report of the American Bar Association Commission on the Separation of Powers and Judicial Independence: Findings, Conclusions and Recommendations*, 1997, at 5.
  - <sup>3</sup> [1997] 3 S.C.R. 3 at 81.
  - <sup>4</sup> As the present Chief Justice of the United States puts it, Congress and the courts are "two branches" which are "constitutionally separate, but whose on-going functioning is steeped in interdependence." See Mechem, *supra* note 1 at 638.
  - <sup>5</sup> Quoted in Martin H. Redish, "Federal Judicial Independence: Constitutional and Political Perspectives" (1995) 46 Mercer Law Journal 697.
  - <sup>6</sup> *Ibid.*, *passim*.
  - <sup>7</sup> Judge Timothy White, Provincial Court in Saskatchewan, "Responsible Governance: The Implications of Judicial Independence for Policy and Practice in the Provincial Courts in Canada" <http://www.acjnet.org/capcj/white.html>, p. 4.
  - <sup>8</sup> See Neil Nevitte, *The Decline of Deference: Canadian Values in Cross-national Perspective* (Peterborough: Broadview Press, 1996).
  - <sup>9</sup> Chief Justice M. E. J. Black, Chief Justice, Federal Court of Australia, and "The State of the Courts in Australia", First Worldwide Common Law Judiciary Conference, Document 5. <http://www.primenet.com/~jldc/1stWorldwide/doc5.html>, p. 1.



- <sup>10</sup> The Hon. Sir Gerald Brennan, Chief Justice of Australia, “Opening Remarks: Judicial Independence”, The Australian Judicial Conference, Canberra, Australia, November 2, 1996: [http://www.anu.edu.au/law/dev/law\\_reform/jca/brennan.html](http://www.anu.edu.au/law/dev/law_reform/jca/brennan.html).
- <sup>11</sup> M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995).
- <sup>12</sup> See Black, *supra* note 9 at 3-4.
- <sup>13</sup> J. Deschênes, *Masters in their Own House: a Study of Judicial Administration of the Courts* (Ottawa: Canadian Judicial Council, 1981).
- <sup>14</sup> *Ibid.* at 11.
- <sup>15</sup> Gordon Bermant and Russell R. Wheeler call this “within Branch accountability.” See G. Bermant and R.R. Wheeler, “Federal Judges and the Judicial Branch: Their Independence and Accountability” (1995) 46 *Mercer Law Journal* 835 at 835.
- <sup>16</sup> See Perry S. Millar and Carl Baar, *Judicial Administration in Canada* (Kingston: McGill-Queen’s University Press, 1981).
- <sup>17</sup> Friedland, *supra* note 11 at 221.
- <sup>18</sup> *Report of the Ontario Courts Inquiry* (Toronto: Ministry of the Attorney General, 1987).
- <sup>19</sup> *An Independent Judiciary: Report of the Commission on Separation of Powers and Judicial Independence: Executive Summary*, 1997, at 1.
- <sup>20</sup> It is made up of the Chief Justice, the President of the Constitutional Court, one other judge, the cabinet member responsible for the administration of justice, four practicing lawyers, six members of the National Assembly (of whom three must be members of opposition parties), four permanent delegates of the National Council of the Provinces, and four others named by the president after consultation with opposition party leaders.
- <sup>21</sup> Constitution of the Republic of South Africa, 1996. s. 178.
- <sup>22</sup> Quoted in Friedland, *supra* note 11 at 29.
- <sup>23</sup> *An Independent Judiciary: Report of the American Bar Association Commission on the Separation of Powers and Judicial Independence*, 1997, at 2.





# Judicial Independence in the Context of Interdependence

## Trudy Govier

In any complex modern society there are multiple levels of interdependence between people both as individuals and with respect to social or professional roles they may occupy. Because competent and well-motivated performance within most of these roles is normal most of the time, we tend to trust implicitly that others will do their part. We assume without thinking very much about it that people will serve the roles that they occupy and will act competently and with integrity. As sociologists have said, trust in this sense is “the glue of society”.<sup>1</sup> However, the fact that trust plays this fundamental role in a modern society such as Canada’s tends to be insufficiently appreciated because we tend to be unaware of this trust until it is disturbed. As a consequence, we tend to under-estimate trustworthiness, reliability, and interdependence and over-estimate negative phenomena—the cases when trust breaks down.

In a democracy such as Canada, the independence of the judiciary is of fundamental importance and is a necessary condition of the rule of law. Yet, while the judiciary must be independent of the executive in the sense of having administrative autonomy, security of tenure, and financial security, it is nevertheless also true of members of the judiciary that they stand in relations of interdependence with other branches of government, and therefore must rely on them. The reliance is mutual and requires some degree of trust.

The need for trust, and its virtual ubiquity in a complex society, may be illustrated by the example of flying. Boarding an airplane, we must implicitly trust in the competent and appropriate behaviour of the pilot, co-pilot, flight personnel, ground crew, mechanics, traffic controllers, airport security personnel, pilots of other planes in the area, and even



our fellow passengers. Yet many of us board planes comfortably, having done so many times without significant mishap. When we do so, we presume that dozens, if not hundreds, of people have done their jobs competently and honestly; we have, without noticing it, implicitly trusted them to do so. It is this sort of trust that underlies the functioning of many modern institutions. Ironically, perhaps our trust is so undisturbed, it is implicit and we do not notice it. What we notice instead are such things as delays, quarrels, conflicts, lawsuits, lying, promise-breaking, corruption, exploitation, and manipulation. This differential attention, resulting from the fact that workable trust is typically unobserved while broken trust is highly conspicuous and disturbing, produces a negative bias in our outlook on the world. It gives us a picture of human nature and human society that under-estimates reliability, trustworthiness, and interdependence. We may become overly preoccupied with protecting ourselves against each other, failing to understand how much, and how effectively, we depend on each other.

Trust is a fundamental aspect of human relationships, whether these be personal, social, institutional, or political. We often hear mention of trust, and yet people seldom stop to define it. What is trust? To trust another person is to expect that he or she will live up to our expectations because he or she is competent and well-motivated. When we trust, we are vulnerable, dependent on the other, and risk being harmed should he or she not act appropriately. Trusting, we accept that risk because of our beliefs and expectations about the other. To trust someone to judge a case fairly is to expect that he or she is competent to assess the submitted facts and apply the relevant laws, and that he or she is impartial and motivated to make a reasonable and fair decision. Trust in collectives and institutions may be defined in a closely parallel way.

To speak of **public confidence** in the judiciary is, in effect, to imply that most members of the public trust the judiciary, assuming that its members will act with integrity and competence. A central aspect of that confidence is the belief that judges are impartial and not open to pressure from the legislative and executive branches of government. In the context of judicial remuneration, the recent Supreme Court requirement of commissions to make recommendations on salaries is



intended to ensure that the judiciary is not in a position where it must, or will be tempted to, negotiate with governments on salary matters, and to ensure that salaries for judges will be commensurate with their status in society and their need to be, and be perceived to be, immune from any attempt that might be made to influence their decisions. For the Canadian public to have confidence in the judiciary and in the rule of law requires that they regard the judiciary as competent, well-motivated, impartial, and independent in the sense that judges are not affected, in their decisions on cases, by the interventions of the executive or legislative branches of government.

In traditional village societies trust is based on personal acquaintance and knowledge. By contrast, life in complex modern societies requires trust in people who are near or complete strangers. A study of shopping illustrates the contrast. In a village society, people buy products from others whom they know personally, and they have confidence in the products and the prices because of this personal knowledge and experience. In modern societies, we must interact regularly with strangers, and we also conduct many transactions in which the reliability of people whom we never even see is presupposed—as is indicated by the example of flying in an airplane. When Canadian consumers buy products such as meat and vegetables from large stores such as Safeway or IGA, they are in effect placing their trust on persons whom they do not know personally and also on the workability and reliability of institutions—including, in this case, government inspection agencies.<sup>2</sup> In modern societies such as Canada, much of our trust is grounded on roles and institutions. Among these, the judiciary, executive and legislative institutions of government are of paramount importance.

We interact with institutions frequently in a modern society. No only do we encounter them explicitly (as when submitting a tax return to Revenue Canada) or implicitly (as when buying meat that has been packaged and transported under government regulation), most of us conduct our occupations within an institutional framework. Thus we are related to institutions not only as consumers or users but also as agents, as those whose activities within a given occupational role help to make the institution what it is.



A person's ability to act within a given role is dependent on the trustworthy and effective actions of others within other roles. For example, a public teacher cannot perform her job satisfactorily without parents bringing up children equipped to attend school, students willing to learn, a principal to administer the school, and school board and government to set broader policy and allocate funds. *No one does a good job, or achieves anything, all by himself or herself.* And this applies to members of the judiciary and to the civil service as much as it does to anyone else. As a constitutional matter, judicial independence refers to the need for judges to be free of legislative and executive interference. But the importance of judicial independence in this sense should not be taken to imply that judges are in all senses independent.<sup>3</sup>

Interdependence as well as independence characterize the judicial role. If legislators did not pass laws and allocate funds, professors did not train law students, police did not arrest suspected offenders, and civil servants did not administer the relevant government departments and maintain the buildings which house the courts, the judiciary could not function as it does. These roles of legislator, professor, student, police, and civil servant—and, accordingly, the people in them—are interdependent. They work as they do because they work together. The effective functioning of the system, and public confidence in it, presupposes that people serving these functions can characteristically count on each other to do their jobs competently and with integrity, and trust each other enough to work cooperatively and effectively together. If disputes about remuneration or other matters were to become aggravated to the point where this interdependent functioning were jeopardized, the matter would be very serious. The judiciary is not contained in a sealed-off cell; for it to be so would not be possible even if it were desirable.<sup>4</sup> We must reflect on the independence of the judiciary, because the issue of judicial remuneration, which is an aspect of that independence, has become controversial and is the focus of the Supreme Court decision which is under discussion here. And yet this **independence** must be understood as within the context of the **interdependence** between judicial institutions and many others.



This emphasis on workable interdependence and the frequency with which we do, and can, count on other people to exercise their functions responsibly and well should not be understood as denying the existence of distrust in many quarters. Nor is it to deny that such distrust may be warranted. Problems of trust are not easily solved, and it is especially tempting to try to avoid them. Sometimes we can avoid them by breaking off the relationship in question. However, such ruptures are seldom possible when people have to work together. Judges must exercise their function in jurisdictions where politicians are elected to a legislature on a popular mandate and where civil servants conduct their affairs under the direction of these “political masters.” Judges cannot affect which individuals occupy those roles; nor can they control the political agenda. Similarly, the legislative and executive arms of government cannot determine who is a judge and what the beliefs and actions of judges will be.<sup>5</sup> Sometimes, that lack of control can be difficult to accept.<sup>6</sup>

When people who have to work together distrust each other, unpleasant and awkward problems arise. These include discomfort, lack of ease, fearfulness, insecurity, misinterpretation, flawed communication, unnecessary complexity, error, and limited cooperation and scope of operations. A management study conducted in 1972 indicated that a group in which the leader was trusted was able to operate with openness and creativity to address problems, whereas in a comparable group in which the leader was mistrusted, members operated so as to minimize risk to themselves. They regarded the manager as trying to get control, they distrusted him, and as a result they operated so as to minimize risk to themselves. This behaviour made them uncreative, closed to new ideas, and inflexible in their thinking.<sup>7</sup>

Such devices as seeking control, increasing regulations, contractualizing details of service, and taking out insurance are strategies by which we seek to manage and control distrust. However these strategies cannot fully compensate for the difficulties of relationships marked by distrust. When those who distrust each other must continue to work together, they should if possible seek to overcome their distrust because it will make their working styles uncreative, unpleasant, risk-averse, and inefficient.



Different roles require different talents and interests and give a different perspective on the world. For example, if a family gets a backyard trampoline, the parents may think of it as a way to entertain their children at home; a philosopher might wonder what principles the children will appeal to in order to equitably share time; a doctor or orthodontist might see the trampoline as a possible source of injury; a physical education teacher as a means to fitness; a lawyer as a possible cause of lawsuits. Clearly the judiciary, the legislators, and the civil service have quite distinct roles. Different talents and interests are required for these roles, and different perspectives will tend to emerge from them.

Conflicts may arise from the different perspectives and interests which accompany different roles. For example, it is the job of a dean to allocate numbers of academic positions between departments and the role of a department head to do her best for her own department; their roles in this regard tend to pit them against each other. Analogous scenarios may exist with the judiciary and other roles.

Though the practice is common, it does not in the final analysis make sense to resent people for gaining perspectives attendant on roles which define a major part of their lives. A mother, for instance, expends a considerable part of her energy caring for people. It is the role of a school principal to discipline unruly students. It makes little sense to criticize a mother because she has developed a tendency to be solicitous for the interests of others, or a school principal because he has come to think it is his role to discipline unruly behaviour in conflict situations. To come closer to the present case, it would be unwise and unnecessary to pit civil service, political, and judicial roles against each other. To be sure, the functions, talents, and even the values that accompany these roles differ, but that should not be a basis for resentment and distrust.

We may call role-induced conflict between those whose roles are, in the final analysis, interdependent, the *Tragedy of Roles*. A familiar scenario from the university can be illustrative. The Department Head resents the Dean, because the Dean will not give him the money he wants to hire faculty members to support a new program. The Dean resents the Department Head because of his repeated, and somewhat aggressive, attempts to get funding for a new program at a time when



the dean is under considerable pressure just to allocate to existing programs widely acknowledged to be necessary. The dynamic in such a case is natural enough but it may be called tragic because it pits people against each other merely because they are doing their job. Such conflicts are worsened if people conflate personalities with functions and come to see the individuals in question as having personal failings that bear on the case. We must hope to avoid such tragedies with the judiciary and civil service as major players.

We can undermine the dynamic of the *Tragedy of Roles* by:

- (a) distinguishing between a person and the role that person occupies;
- (b) realizing that people typically serve in several roles (a judge may also be a parent, a son, a church member, and so on);
- (c) understanding the limited perspective which may be a natural by-product of our own role or roles; and
- (d) understanding that certain motives and perspectives are intrinsic to certain roles and should not be a basis for disrespecting those within them.

In times of stress and change, conflict and suspicion are all the more likely and it will require special care and effort to avoid them. Given the high degree of complexity and the highly interdependent roles in modern societies, efforts should be made to preserve or improve relationships. Public confidence in government and the judiciary will be severely jeopardized if the relationships between people in differentiated roles deteriorate. One thing especially likely to undermine public confidence is a situation in which branches of government are seen by the public to be expending valuable time and energy contending against each other.

*There are no people-proof institutions.*<sup>8</sup> For our institutions to work fairly and effectively, and merit public confidence, people in different roles must be able to respect and trust each other, and cooperate readily. The need for mutual understanding, trust, and respect is inescapable. The implementation of commissions to make recommendation on judicial remuneration will not eliminate the need for mutual respect, understanding,



and trust; it will only relocate it. At some point, human beings have to deliberate about factors pertinent to status and salary and make a recommendation; at some point other human beings have to decide whether to accept that recommendation; and (considering a situation in which government seeks to overturn a recommendation by a commission) other human beings have to determine whether that decision itself is *reasonable*. There is no way of avoiding human decisions, to which humans must react. No divine agent or infallible machine is going to do these things for us, and when people do them themselves, they depend on each other for information, support, interpretation, and reasoned response.<sup>9</sup> Commissions, as required by the Supreme Court, may do much to avoid direct the sort of bitterness that culminates in lawsuits, but they do not eliminate the need for human judgement, trust, and trustworthiness.

Situations are not fixed; rather, they are fluid—changing, and changeable. A participant in the Round Table meetings told the story of an acrimonious relationship between the civil service and judiciary in which he had been able to intervene by chatting with the people involved for a few hours over beer and pizza. This talk had tremendously beneficial effects. We can understand such rapid change when we reflect on the effect that we have on each other through our emotions, attitudes, and actions. What people do depends in large part on how others treat them. People treated with trust and respect are more likely to act in a competent and trustworthy manner. If a man who has been suspicious and resentful of another comes to regard him as friendly and well-intentioned, he will find that other behaving quite differently from the way he did before, and the changes are likely to further strengthen his more positive attitude. And the changes are likely to work both ways.<sup>10</sup>

What we feel, believe, and do affects other people and what they feel, believe, and do. Thus our mutual attitudes do much to determine our situations, which emerge from the nature of personalities, roles and human relationships as well as from more objective factors. In a new situation, we have new possibilities for action and through them, new possibilities for responses to our action. Those responses in turn reflect back on our attitudes, actions, and beliefs and those of other people, which in turn work to structure future circumstances and states of





affairs. Reflexivity and interactivity appear at all stages. It is through such interactivity and reflexivity that we may find downward spirals in relationships—where distrust breeds hostility and further conflict and distrust in a seemingly endless and vicious process. But the same structural features of interactivity and reflexivity also have their positive side, in that dramatic and rapid improvements in relationships and situations are thereby made possible.

With regard to recent changes and challenges in the area of judicial remuneration and the relationship between the judiciary and other branches of government in Canada, relationships may be improved if the people involved are aware of such dynamics and seek to better those relationships. The following aspects of relationships especially merit attention:

- (a) the *interdependence* of roles and the people serving in those roles;
- (b) the need for *respect* for the *knowledge, skills, and dedication* of the people serving in the relevant roles;
- (c) an understanding of the *situational constraints* which may accompany various roles and a recognition that individuals are not responsible for those situational constraints;
- (d) an understanding that *attitudes* (trust, distrust, respect, and disrespect being paramount among them) may worsen or may improve situations and relationships;
- (e) flexibility and *openness*.

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<sup>1</sup> I have argued this case in detail in *Social Trust and Human Communities* (Montreal and Kingston: McGill Queen's University Press, 1997).

<sup>2</sup> See, for instance, Ann-Mari Sellaerg, "On Modern Confidence" (1982) 25 *Acta Sociologica* 39 and Niklas Luhmann, *Trust and Power* (trans. H. Davies, J.F. Raffman, and Kathryn Rooney) (London: John Wiley and Sons, 1979).

<sup>3</sup> This interdependence was noted by other participants at the Round Table—notably Roderick Macdonald, Stephen Owen and Richard Simeon.



- <sup>4</sup> A point emphasized by Richard Simeon in his presentation.
- <sup>5</sup> That is to say, once someone is a judge he or she cannot be removed by these arms of government. So if there is an acrimonious relationships, regarding salary or some other matter, between judges and the other branches of government—if there is distrust as expressed, for instance, in lawsuits—that distrust cannot be rectified by simply rupturing the relationship. It will continue to exist, with more or less effective efforts be made to manage it, or (more optimistically) it will be eliminated when relationships are improved.
- <sup>6</sup> Nicholas d’Ombraïn noted in his presentation that governments are used to making decisions and having options. The Supreme Court decision requiring Compensation Commissions to make recommendations about judicial salaries puts something quite different before them. D’Ombraïn predicted that governments would have trouble accepting, in this context, that they are not in charge.
- <sup>7</sup> Dale E. Zand, “Trust and Managerial Problem Solving” (1972) 17 *Administrative Science Quarterly* 229.
- <sup>8</sup> As Richard Simeon commented, neither are there any institution-proof people. Institutions affect people; people affect institutions. Since office-holders change more frequently than the offices themselves, it seems appropriate to stress the design of institutions as a factor of more enduring importance than the specific people who hold office. However, in any particular case, the latter may be more important than the former.
- <sup>9</sup> As noted in the presentation of Roderick Macdonald. The ways in which we depend on each other for information and expertise are described in Chapter 3 of *Social Trust and Human Communities*, *supra* note 1.
- <sup>10</sup> Intervention of the Honourable Ted Hughes at the Round Table.



# Where do we go from here? Laying the Foundations of the Executive-Judicial Relationship

**Stephen Owen Q.C.**

## Introduction

The matter of judicial salaries and the appropriate process for setting them in order not to offend judicial independence is perhaps the most easily relieved tension in the executive-judicial relationship. The issues are quantifiable, comparable and explicable. The Supreme Court of Canada has set out criteria to guide this process and provincial and federal governments are acting to comply.<sup>1</sup>

In her excellent paper, Trudy Govier has situated the discussion of the executive-judicial relationship in the more general setting of human interaction, where trust and an understanding of interdependence, even among those with formally independent roles, is necessary for positive social relationships. She notes the negative bias caused by our disproportionate attention to wrongful acts which disturb our higher expectations of appropriate good behaviour. However, perhaps the resulting cynicism is self-limiting. If we come to expect the bad, we must eventually bottom out and begin the upward cycle of delight in the surprise of the much more common good. This recognition is the basis for the respect necessary to support positive relationships. I would like to relate these general observations back to the executive-judicial interaction.

The independence of the judiciary from the executive branch (and from the legislative, to the extent that it has not already been subordinated to the executive) is necessary to fulfil Charter obligations under section 11(d) in criminal cases, extended to “all suits at law” under international commitments.<sup>2</sup> However, this “judicial control over the



administrative decisions that bear directly and immediately on the exercise of the judicial function”<sup>3</sup> does not divide crisply from the provinces constitutional responsibility for the administration of justice and an Attorney General’s duty to “see that the administration of public affairs is in accordance with the law” and “superintend all matters connected with the administration of justice.”<sup>4</sup> Hence the interdependence and the need for trust and respect between branches.

### Issues

However, the fundamental nature of the rule of law in a democracy is not well understood by the public, including many in government. The social services and economic and political structures that we have come to consider essential in our society are yet derivative of the stability and accountability secured by laws and legal process democratically established and binding on all, including government. When budgets are cut, there is often little sympathy within government for calls to insulate the justice system, seen by many to have received special treatment in the past. This sentiment is amplified by a general public resentment of privilege. “Elite” seldom now connotes leadership, excellence and sacrifice; but rather unearned status and disproportionate influence. In this atmosphere, targeting judges can be good politics; it is unlikely to be good public policy.

As a further complication, the role of the Attorney General in our system of government as both law officer of the Crown and cabinet minister often causes confusion. The quasi-judicial and necessarily independent functions can overlap with the executive and advisory ones. When the Attorney General concedes a *Charter* challenge to legislation, is s/he exercising a valid quasi-judicial discretion, treading on the judicial responsibility to interpret the law, usurping the legislative function of law-making, or depriving the executive client of a defence?

The Attorney General’s responsibility to administer court services and to support the judicial function can overlap with the independent judicial role. This is particularly so given the current pressures to restrain and reform a court system that is seen by many as too expensive, slow



and complex. Judicial and executive attempts to lessen pressure on the criminal and civil courts through reduced litigation and early resolution require concerted action to collect and analyze data, pilot new approaches, determine judicial complement and support services, and identify best practices across the country. This interdependence increases both the potential friction and the need for collaboration.

The necessary countervails of judicial independence and accountability present special challenges. Clearly understood lines of accountability enhance public respect for any independent body. Appointment processes, judicial councils, codes of conduct, education, and court management processes are receiving considerable attention, in addition to adequate judicial compensation, complement and support services. The special vulnerability of judges to public criticism, either individually justified but unfairly generalized, or superficial and contemptuous, complicates the notion of judicial independence.

A judge in the role of case manager, mediator, public inquiry commissioner, bankruptcy supervisor, or media commentator can blur the public and executive impression of the judicial function, and lessen appreciation of independence. Executive abdication of its policy role in addressing vexing public issues, and the judicial guardianship of *Charter* supremacy can place the judiciary in the spotlight of political criticism. And the increasing frequency of a judge returning to active and often high profile legal practice can confuse the distinctions between the judiciary and the legal profession.

### Ways Forward

Public education and dialogue on the justice system is critical to its proper appreciation. Given its fundamental importance to our system of government, it is extraordinary that so little attention is given it in the school curriculum. Judges and Attorneys General should be constructive and mutually supportive leaders in the public discussion of legal issues and not merely defensive reactors to unfair criticism. This joint action will enhance the understanding and respect between them that is required to build the positive relationship.



The current political responsibilities of the Attorney General make communication and collaboration with the judiciary awkward. The quasi-judicial and independent responsibilities of the Attorney General should be emphasized, possibly by severing the role from the executive functions as member of cabinet and Minister of Justice. The Attorney General can still act as the legal advisor to government without having direct, executive responsibility for policy development and implementation.

In any event, the court administration and judicial support roles of the Attorney General should be made as distinctly independent from ministerial responsibilities as that of the prosecution of crime, with statutory protections against the appearance or potential for improper interference.<sup>5</sup>

The Deputy Attorney General, as the senior non-political government official responsible for the administration of justice, court services, and support for the independence of the judiciary should work closely and develop trustful and respectful relationships with Chief Justices and Chief Judge. This should be a confidential, constructive, and continuous exchange of ideas, needs and concerns, towards the effective joint administration of the overlapping and interdependent functions. Justice reform initiatives, backlog issues (especially in criminal and child protection cases), judicial appointments, legislative changes that could increase pressure on the courts, and judicial directions for legislative action are all important topics for such dialogue. Without such relationships, no system of checks and balances will ensure the smooth operation of the shared responsibilities.

Consideration should be given to an independent court services agency with a senior administrator, responsible to the judiciary and interacting on its behalf with the executive (*e.g.*, Ministry of the Attorney General and Treasury Board). However, such an arrangement, while successful elsewhere, is unlikely to resolve the frictions in the absence of the positive relationship with the Deputy Attorney General discussed above.

As a final matter, the independent commission contemplated by the Supreme Court in the *Provincial Court Judges* case might serve a broader purpose to facilitate collaboration and resolve disputes between the



executive and judiciary. I suspect that such commissions will demonstrate their worth on the relatively straightforward compensation issues and, thereby, suggest themselves as appropriate locations for safe resolution of more complex issues.

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<sup>1</sup> *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (hereinafter, *Provincial Court Judges* case).

<sup>2</sup> International Covenant on Civil and Political Rights, Article 14.

<sup>3</sup> *R. v. Valente*, [1985] 2 S.C.R. 673 at 712, per Le Dain J.

<sup>4</sup> *Attorney General Act*, R.S.B.C. 1996, c. 22, s.2 (b) & (c).

<sup>5</sup> For example, see the *Crown Counsel Act*, R.S.B.C. 1991, c. 10, s. 5 and 6, whereby the Attorney General or Deputy Attorney General may issue prosecution policy directives or specific case directions to the head of the prosecution service, so long as these are in writing and published in *The Gazette*.



## Summary of the Round Table

The documentation prepared by the Law Commission of Canada for circulation to participants in the Round Table indicated that no recording of the proceedings and no formal minutes would be kept. Nonetheless, at the close of the day several participants asked the Law Commission to prepare a brief note summarizing the discussion for distribution to those in attendance and others interested in issues addressed at the Round Table.

In that spirit a Summary of the Round Table was circulated shortly afterwards. This is a revised version of that Summary. It is intended neither as minutes of the Round Table, nor as a record of the views of any particular participant. It is, rather, a reflection of the impressions and observations of the three Commissioners of the Law Commission of Canada who were present, and should be taken to reflect no other point of view.

### Participants

Altogether about 70 people attended the Round Table. Participants were drawn from a number of constituencies. There were four members of the Canadian Judicial Council, most Chief Judges of Provincial Courts in Canada (from both provinces and territories), a number of representatives from the Canadian Conference of Judges, as well as several officials and provincial representatives of the Canadian Association of Provincial Court Judges. In addition, Deputy Attorneys-General or their delegates from ten of Canada's thirteen jurisdictions, various officials from central agencies, other invitees from organizations interested in judicial affairs, and a number of individuals with a special concern for or expertise in the matter of judicial compensation attended the Round Table.

Three Commissioners of the Law Commission of Canada—Roderick Macdonald, Nathalie Des Rosiers and Stephen Owen, Q.C.—and one member of the Advisory Council of the Law Commission—Gerry Ferguson—acted as Chairs for the four sessions. Mr. Macdonald and





Professor Owen, along with five invited experts—Professors Elizabeth Edinger, Danielle Pinard and Richard Simeon, Mr. Nicholas d’Ombrain and Ms. Trudy Govier—presented papers at the Round Table.

### General Tenor of Discussions

Approximately 30 different invited participants spoke during the day. They included Chief Justices and Chief Judges, other members of the judiciary, Deputy Attorneys-General, officials from central agencies, and representatives of other organizations. Notwithstanding the advertised organization of the day into four sessions, from the beginning the discussion was not so constrained. It immediately ranged over the entire field of topics identified in the draft programme.

The interventions and observations were of three main types. They dealt with: (1) the past; (2) the present; and (3) the future.

A number of participants sought to indicate, from their perspective, how it was that the litigation in question came about and why the Round Table was beneficial in facilitating discussion of the new constitutional requirements flowing from the Supreme Court decision. These discussions were focused on presenting the frustrations felt by those directly implicated in the salary determination process—both from the judiciary and from the executive.

Other participants saw the Round Table differently. They asked questions about the current status of developments in various jurisdictions and what steps were in course for responding to the judgement of the Supreme Court. These interventions were aimed primarily at the sharing of information about different possibilities for designing Compensation Commissions.

Still others sought to engage in a discussion about the kind of relationship between judiciary and executive that would flow from the judgement. They spoke to the requirements of judicial independence, and the contexts in which a productive and helpful relationship could be built so as to ensure public confidence in the independence of the judicial process.



As could be expected in a dialogue about issues having a financial dimension, a number of comments from members of the judiciary dealt in detail with the impact of the decision on the remuneration of judges. The issues of retroactivity, pension contributions and fringe benefits attracted no small notice.

Other judges were, however, more interested in procedural questions. They highlighted their concern either with existing processes, or with the responses to previous processes, for determining that remuneration.

The day's discussion clearly indicated much dissatisfaction among many members of the judiciary with the current state of affairs in their relationship with the executive. The majority of those present at the Round Table also thought, however, that the Supreme Court decision gave the parties an opportunity to revisit this relationship and to set it on a better footing.

### Compensation Commissions

There was a general sentiment that the question of judicial remuneration had become so charged that the establishment of Compensation Commissions such as those contemplated in the Supreme Court judgement might be the only way to address the issue productively. Nonetheless, opinions varied considerably about the wisdom of the decision in the *Provincial Court Judges* case.

Some were troubled that the Court had invented novel requirements that it then made constitutionally imperative. Others felt the requirement that the executive give a rational response if it declined to follow Compensation Commission recommendations would help improve the overall relationship between executive and judiciary because it would make the process more transparent. Some questioned the implications of this requirement for the Parliamentary process. Still others expressed surprise at how controversial the Supreme Court judgement was among scholarly commentators and the media.

Most participants felt, however, that moving the contentious issue of compensation to a distinct process would be a real contribution to improving the relationship between executive and judiciary simply by



allowing them to focus their attention on other, equally important, questions of judicature.

Many different views were expressed about the range of questions that could or should be referred to the Compensation Commission envisioned by the Supreme Court decision. More than a few felt that there was a minimum core of issues that the Compensation Commissions were obliged to handle, but that these Commissions could also be given a broader mandate to deal with other matters.

Some other participants looked at the question from the opposite vantage point. They were uncertain about what questions had to be settled by the Compensation Commission, and could not be discussed in other settings. Indeed, several participants observed that, if the Supreme Court decision were to be read broadly, even the Round Table itself might be thought to be an unconstitutional encounter between judiciary and executive.

Ideas about the mandate of Compensation Commissions as imagined by the Supreme Court judgement were of three general types:

- (1) Most participants felt that the judgement should be restricted to issues clearly related to compensation and fringe benefits.
- (2) Others felt that the model might be appropriate for dealing with a broader menu of matters touching the executive-judiciary relationship—including issues such as, for example, support staff, clerks, computers and parking spaces.
- (3) Still others noted, however, that these latter matters have historically been the purview of the Chief Judges and that were the Commission to have authority in such matters, it would undermine the relationship between Chief Judges and the executive and compromise the capacity of the Chief Judges to administer their courts.

A number of observations were also made about the character of the Compensation Commissions. Once again, opinions varied considerably, even as among members of the judiciary, among government officials, and among the experts invited to the Round Table themselves.



Comments about the nature and character of the Compensation Commissions were expressed in such questions as:

- (1) Should these Compensation Commissions function like a labour arbitration panel, or should there be a more broadly cast public input into their membership?
- (2) Should governments, in structuring such bodies, provide that their recommendations be merely recommendations or should they give it the capacity to make binding recommendations as in a labour situation (the latter possibility not, of course, being a part of the framework set out in the judgement)?
- (3) Should the function of the Compensation Commissions be simply to set the salary and benefits of the judiciary or should it have the authority to examine issues such as whether judges should be paid a flat salary, or a salary adjusted according to years of service, or even adjusted annually on the basis of some principle relating to merit?
- (4) Should these Compensation Commissions be required to act as fiduciaries in balancing some of the different compensation interests (salary vs. pension, for example) that may have a differential impact on different cohorts within the judiciary, and on the capacity of the government to attract applications for judicial appointment from certain cohorts of the legal profession?

### The Ongoing Relationship Between Executive and Judiciary

The general view of participants was that the present relationship between judiciary and executive was strained. Several attributed this to a failure of communication not as between Deputy Attorneys-General and judiciary as to a failure of communication between central agencies such as Treasury Boards and the judiciary. Some pointed out that the relationship between courts and Deputy Attorneys-General was, in their jurisdictions, healthy and productive. Not all participants assented to this affirmation, however.



As for the relationship with central agencies, it was observed that officials from these agencies did not appear to understand the significance of the judicial role in a Parliamentary system, and the protected constitutional position that it is afforded. It was felt that Parliamentarians generally missed this point as well. Perhaps even more importantly, participants felt that the public was not well informed about the difference between independence and impartiality in individual cases, and the need for independence and impartiality of the judiciary as an institutional matter.

One or two participants pointed out that the Attorney-General and others interested in judicial affairs had an obligation to defend the judiciary against attacks from those who would attribute to judges a self-interested perspective on these questions. There was some sense from participants that better public education designed to improve public understanding of the role of the judiciary and the importance of judicial independence was required.

Some participants did observe, however, that communication is a two-way street. They asked whether the judiciary, for its part, fully understood the constraints under which central agencies were operating in times of growing budgetary deficits. To illustrate the point, comparisons were made to the remuneration received by Deputy-Ministers and Governor-in-council appointees over the same period.

### Concluding Observations

While participants by and large accepted the need for some kind of Compensation Commission, not all believed that the model envisioned by the Supreme Court was the best possible. Many judges were of the view that, even in provinces and territories with Compensation Commissions, the attitude of governments towards their recommendations in recent years had been cavalier.

Moreover, no-one thought that a Compensation Commission process of any type would be a panacea for dealing with all aspects of the relationship between judiciary and executive. In particular, it was observed that a number of matters relating specifically to questions



falling within the competence of Chief Judges needed to be addressed in other fora. Nonetheless, several judges were of the view that the model might be appropriate for dealing with a broader menu of financial questions relating to the executive-judiciary relationship—including issues such as, for example, support staff, clerks, computers and parking spaces.

Participants also generally felt that it was important to build up a relationship of trust between judiciary and executive, and that continued litigation was counterproductive. Continued litigation risked making the question of judicial remuneration a rallying point for budget-cutters. It also risked further disturbing the terrain upon which good relationships between courts and executive was thought to depend.

Towards the end of the Round Table there was a suggestion that further meetings among representatives of the judiciary, the Canadian Judicial Council, Deputy Attorneys-General and central agencies might be a useful exercise. Some mentioned that a national Discussion Table involving judges of all courts should be contemplated. Others felt that a Discussion Table involving only provincial and territorial judges would be preferable. This idea was not, however, pursued by other participants. The consensus view was that the next steps should not be undertaken in some general forum, but rather that the initiative should lie with the affected parties in each of the provinces and territories concerned.

Most participants concluded that, whatever they thought about the merits of the Supreme Court decision, it had at least provided judiciary and executive with an opportunity to off-load the question of remuneration to another body and to move forward with other pressing issues relating to Judicature in Canada. Many of these issues, representatives of the Law Commission of Canada noted at the close of proceedings, were already among the topics that the Commission hoped to consider under its research theme—governance relationships.



## Appendix I: Biographies of Authors and Session Chairs

**Nathalie Des Rosiers** | Professor Des Rosiers is Vice-President of the Law Commission of Canada. Since 1987, she has also been Professor of Law at the University of Western Ontario. Her research and teaching interests are in constitutional law, environmental law, tort law, and the area of law and social issues.

Ms. Des Rosiers is an active member of the Association des juristes d'expression française de l'Ontario and past President of the Canadian Law Teachers Association. She is also a member of the Ontario Environmental Appeal Board. From 1993 to 1996, she was a member of the Ontario Law Reform Commission.

Ms. Des Rosiers obtained an LL.B. from the Université de Montréal in 1981 and an LL.M. from Harvard University in 1984. She became a member of the Barreau du Québec in 1982 and the Law Society of Upper Canada in 1987.

**Nicholas d'Ombrain** | An expert on the parliamentary and cabinet system and adviser to governments on organization and management, Mr. d'Ombrain has 28 years of experience in advising governments. He served in the Public Service of Canada for 25 years, four at the level of deputy minister and nine as an assistant deputy minister. His long service at the centre of the Canadian government has equipped him to advise on practical means of building and reforming democratic, accountable public institutions that provide efficient and orderly government while maintaining high standards of public management.

**Elizabeth Edinger** | Professor Edinger is Associate Dean at the Faculty of Law, University of British Columbia. She obtained a B.A. and LL.B. from the University of British Columbia in 1964 and 1967 respectively, and a B.C.L. from Oxford University in 1977. She was a member of the British Columbia Provincial Court Judges Compensation Committee in 1993. She teaches in the areas of Constitutional Law, Conflicts of Law, and Creditor's Remedies.

**Gerry Ferguson** | Professor Ferguson is a member of the Advisory Council of the Law Commission of Canada. He is a Professor of Law at the University of Victoria. He sits on the Board of Directors of the International Centre for



Criminal Law Reform and Criminal Justice Policy (UN Crime Prevention Program), and is a member of the International Society for Reform of the Criminal Law. He has been a consultant on criminal law and sentencing issues to the Law Reform Commission of Canada and the federal Department of Justice.

**Trudy Govier** | Ms. Govier received a Ph.D. in Philosophy from the University of Waterloo (1971) and was for a number of years Associate Professor in the Department of Philosophy at Trent University in Peterborough, Ontario. She has also taught at the University of Amsterdam, Simon Fraser University, and the University of Lethbridge.

Ms. Govier is the author of six books including a widely used text on argumentation entitled *A Practical Study of Argument* (Wadsworth; fourth edition 1997) and, most recently, *Social Trust and Human Communities* (McGill-Queen's University Press 1997). Her current interests include peace politics and conflict resolution. Ms. Govier is normally based in Calgary, where she is affiliated with the Institute for the Humanities at the University of Calgary.

**Roderick A. Macdonald** | Mr. Macdonald is President of the Law Commission of Canada. Since 1994, he has also been F.R. Scott Professor of Constitutional and Public Law at McGill University, where he was Dean of Law from 1984 to 1989. His research and teaching interests are in constitutional law, administrative law, civil law, philosophy of law, sociology of law and commercial law.

Mr. Macdonald was Director of the Law Society Program of the Canadian Institute for Advanced Research between 1989 and 1994. He was Chair of the Task Force on Access to Justice of the Ministère de la justice du Québec from 1989 and 1991. He became a member of the Law Society of Upper Canada in 1977 and the Barreau du Québec in 1983. He was elected to the royal Society of Canada in 1996.

**Stephen Owen, Q.C.** | Mr. Owen is the David and Dorothy Lam Professor of Law and Public Policy and Director of the Institute for Dispute Resolution at the University of Victoria. Mr. Owen was Deputy Attorney General of British Columbia from 1995 to 1997. He served as Commissioner for the Commission on Resources and the Environment from 1992 to 1995, as Ombudsman from 1986 to 1992, and as Executive Director of the Legal Services Society from 1982 to 1986.

Mr. Owen was President of the International Ombudsman Institute from 1988 to 1992. He has also served as legal representative for Amnesty International in numerous cases and investigations, including security force





killings in the former Yugoslavia, apartheid in South Africa, and the IRA inquest in Gibraltar.

Mr. Owen obtained an LL.B. from the University of British Columbia in 1972, an LL.M. from the University of London, England in 1974 and an M.B.A. from the University of Geneva, International Management Institute in 1986.

**Danielle Pinard** | Professor Pinard has been a professor at the Faculty of Law at the University of Montreal since June 1987. Her teaching and research interests are in constitutional law and statutory interpretation. She obtained an honours bachelor's degree in social service (B.Sc.), from the University of Montreal in 1977 and a master's degree in social service (M.Sc.), University of Montreal in 1978. She subsequently took an LL.B. from the University of Montreal in 1983 and an LL.M. from the University of London, London School of Economics and Political Science in 1986.

Her most recent publications include: "Le contexte factuel d'élaboration et d'application comme facteur d'interprétation de la norme juridique", in Pierre-André Côté (dir.), *Le temps et le Droit*, Actes du Congrès international de méthodologie juridique [Proceedings of the International Congress on Legal Methodology], Éditions Yvon Blais, 1996, 171-183; "La notion traditionnelle de connaissance d'office en droit de preuve", (1997) 31 *Revue juridique Thémis*, 87-148; "La connaissance d'office des faits sociaux en contexte constitutionnel", (1997) 31 *Revue juridique Thémis*, 315-397; "La preuve des faits sociaux et les Brandeis Briefs: quelques réserves", (1996) 26 *Revue de droit de l'Université de Sherbrooke*, 497-513.

**Richard Simeon** | Professor Simeon was William Lyon Mackenzie King Professor of Canadian Studies at Harvard University in 1998, on leave from the University of Toronto, where he is Professor of Political Science and Law. From 1988 to 1994 he was Vice Chair of the Ontario Law Reform Commission. Before joining the University of Toronto, he taught for many years at Queen's University, where he was Director of the Institute of Intergovernmental Relations (1976-82) and of the School of Public Administration (1985-1990).

He also served as Research Coordinator (Federalism) for the Royal Commission on the Economic Union and Canada's development Prospects, 1983-1985, and has been an adviser on constitutional matters to the government of Ontario. Professor Simeon's published work has focused primarily on federalism, the constitution and public policy in Canada; recently he has broadened his interests to encompass comparative issues in federalism and constitutionalism, and questions of governance.



## Appendix II: Round Table Schedule

08h00	<b>Welcome:</b>	Roderick Macdonald <i>President, Law Commission of Canada</i> George Thomson <i>Deputy Minister of Justice and Deputy Attorney-General of Canada</i>
08h30	<b>Session One:</b>	<b>What could the judgement mean? The history and context of the executive-judicial relationship</b>
	Chair:	Professor Nathalie Des Rosiers <i>Vice-president, Law Commission of Canada</i>
	Presenter:	Roderick A. Macdonald <i>President, Law Commission of Canada</i>
	Themes:	<ul style="list-style-type: none"><li>• the relationship of executive to judiciary</li><li>• the relevance of structures and processes to establishing an appropriate relationship</li><li>• politicizing relationships or constitutionalizing relationships: does this exhaust the choices?</li><li>• what generates public confidence in the administration of justice?</li></ul>
10h00	<b>Health Break</b>	
10h30	<b>Session Two:</b>	<b>What did the judgement actually say? What now seems to be constitutionally required?</b>
	Chair:	Professor Stephen Owen <i>Commissioner, Law Commission of Canada</i>
	Presenters:	Associate Dean Elizabeth Edinger <i>Faculty of Law, University of British Columbia</i> Professor Danielle Pinard <i>Faculty of Law, University of Montreal</i>
	Themes:	<ul style="list-style-type: none"><li>• what does the “special commission process” mean?</li><li>• how far does the “constitutionalizing” of the process reach?</li><li>• what is the weight to be accorded to commission recommendations and is the government’s response to recommendations reviewable by the courts?</li></ul>



- what is the meaning to be attached to the idea that judges and executive or legislature cannot “bargain” about judicial salaries?

12h00 **Lunch**

13h30 **Session Three: What are the options? Implications of the judgement for questions of institutional design**

Chair: Professor Gerry Ferguson  
*Advisory Council, Law Commission of Canada*

Presenters: Professor Richard Simeon  
*Political Science, University of Toronto*

Nicholas d’Ombrain  
*Consultant, St. Joseph, New Brunswick*

- Themes:
- what are the process constraints?
  - what is the relationship between the values sought to be promoted and the available instruments?
  - what do these constraints say about jurisdiction and scope of mandate?
  - how do these bear on issues of appointment to a body, and review of its decisions?

15h00 **Health Break**

15h30 **Session Four: Where do we go from here? Laying the foundations of the executive-judicial relationship**

Chair: Roderick Macdonald  
*President, Law Commission of Canada*

Presenters: Trudy Govier  
*Independent Scholar, Calgary, Alberta*

Professor Stephen Owen  
*Commissioner, Law Commission of Canada*

- Themes:
- what are the social conditions for effective coordinated action? how can they be nurtured in the executive-judicial relationship?
  - coercion and consensus in decision-making: rules, roles and relationships; alternatives to adversarialness
  - private confidence and public trust: dynamics of responsible relationships; money, status and social responsibility

17h00 **Wrap-Up**



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