

# Keeping the Scale of Justice Balanced – Québec Justices of the Peace and Judicial Independence

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## Citation Information

Hunter, Josh and Kraicer, Sarah. "Keeping the Scale of Justice Balanced – Québec Justices of the Peace and Judicial Independence." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 81. (2019).

<https://digitalcommons.osgoode.yorku.ca/sclr/vol81/iss1/8>

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# Keeping the Scale of Justice Balanced – *Québec Justices of the Peace* and Judicial Independence

Josh Hunter and Sarah Kraicer\*

## I. INTRODUCTION

Protecting judicial independence is a constitutional imperative that requires striking a careful balance between safeguarding the role of judges and courts and permitting governments to carry out their constitutional responsibilities with respect to the administration of justice. On the one hand, public confidence in the administration of justice requires robust assurances that judges are sufficiently independent from the Executive and Legislature that they need not fear reprisals or expect rewards if they judge as the law requires without fear or favour. On the other hand, the elected branches of government are responsible to the people to ensure that judicial misconduct is dealt with appropriately, that justice is effectively administered, including through the “constitution, maintenance and organization” of courts, and that public finances are managed in a fair and responsible manner.

In a series of cases, the Supreme Court of Canada has discussed the origins, content, and limits of the constitutional guarantee of judicial independence and has consistently sought to ensure that both sides of the balance are given appropriate weight. The Court’s most recent judicial independence decision, *Conférence des juges de paix magistrats du Québec v. Québec (Attorney General)*,<sup>1</sup> considers the financial security aspect of requirements judicial independence in the context of a significant Québec government court reform initiative that created a new judicial office of Presiding Justice of the Peace (“PJP”). The Court’s

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<sup>1</sup> [2016] S.C.J. No. 39, 2016 SCC 39, [2016] 2 S.C.R. 116 (S.C.C.) [hereinafter “*Québec Justices of the Peace*”].

unanimous decision, authored by three justices, continues this balanced approach and further elucidates the proper roles of both the judiciary and the elected branches of government.

The Court recognized that judicial independence required prompt commission review of a newly created judicial office's remuneration but accepted that flexibility was required to avoid stymying court reform. It therefore accepted that retroactive commission review could take place within a reasonable period *after* the new office was created. It also accepted that existing judicial officers could be reappointed to the new office, but that their existing salaries had to be frozen until that commission review took place. Finally, it accepted that judicial officers could be members of broader public sector pension plans in which civil servants were also members.

This article will explore the manner in which the Supreme Court's judicial independence decisions, culminating in *Québec Justices of the Peace*, have tried to strike a balance between two constitutional principles: (1) protection of the independence of the judiciary from the Executive and the Legislature; and (2) democratic control of the public purse and the overall structure of the administration of justice. Part II will briefly examine the protections for judicial independence that existed before the enactment of the *Canadian Charter of Rights and Freedoms*. Part III will examine the major Supreme Court decisions on judicial independence, discussing how they sought to balance the proper roles of the judiciary, Executive, and Legislature. Finally, Part IV will analyze the *Québec Justices of the Peace* case, examining how the Court continued its history of careful balancing, in certain respects accepting that greater protections were required to ensure the independence of presiding justices of the peace and in other respects accepting that sufficient flexibility had to be accorded to permit the democratically-responsible branches of government to reform the court system in the public interest.

## II. JUDICIAL INDEPENDENCE BEFORE THE ENACTMENT OF THE CHARTER

Before 1982, only judges of the superior, county and district courts enjoyed constitutional protection of their independence. Superior court judges had tenure for life (changed to age 75 in 1960) during good behaviour, removable by the Governor General only on joint address of

the Senate and House of Commons and the remuneration of superior, county, and district court judges had to be fixed and provided by Parliament.<sup>2</sup> By statute, county, district, and provincial judges in both Ontario and Québec had security of tenure during good behaviour until retirement age, removable for cause by the Executive after a judicial inquiry.<sup>3</sup> Provincial judges' salary and benefits in both Ontario and Québec were set by regulation.<sup>4</sup>

### III. MAJOR SUPREME COURT OF CANADA JUDICIAL INDEPENDENCE DECISIONS

With the enactment of the *Canadian Charter of Rights and Freedoms* ("Charter") in 1982, the courts began to take a more active role in defining the contours of judicial independence. The guarantee in section 11(d) of the Charter<sup>5</sup> for persons charged with an offence to a hearing "by an independent and impartial tribunal" was the starting point for a series of challenges to legislation and other measures that were alleged to infringe constitutional guarantees of judicial independence. In a series of cases beginning with *R. v. Valente*<sup>6</sup> up to, most recently, *Québec Justices of the Peace*, the Supreme Court of Canada has considered the nature and requirements of judicial independence guaranteed by the Constitution and set out important limits to those guarantees.

#### 1. *R. v. Valente*

In December 1982, the Crown appealed a \$200 fine imposed for careless driving to the Provincial Court (Criminal Division). The respondent, Walter Valente, asserted that the court was not an independent and impartial tribunal as required by section 11(d), challenging the nature of the tenure of provincial court judges (particularly post-retirement reappointments which were at pleasure

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<sup>2</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 99-100; *Constitution Act, 1960* (U.K.), 9 Eliz. II, c. 2.

<sup>3</sup> *Judges Act*, R.S.C. 1985, c. J.1, ss. 7-8, 53 and 58-67; *Provincial Courts Act*, R.S.O. 1980, c. 398, ss. 4-8; *Courts of Justice Act*, R.S.Q. 1977, c. T-16, ss. 80, 85, 113, and 127.

<sup>4</sup> *Provincial Courts Act*, *id.*, ss. 34(1)(c)-(d); *Courts of Justice Act*, *id.*, ss. 83, 113, and 133. In Ontario, the Government had established a non-binding remuneration commission to advise it. Order in Council 643/80.

<sup>5</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>6</sup> [1985] S.C.J. No. 77, [1985] 2 S.C.R. 673 (S.C.C.) [hereinafter "*Valente*"].

rather than for a fixed term) and the manner in which their salaries and pensions were fixed and provided. The judge found he lacked sufficient impartiality to determine the Charter question, given the direct pecuniary interest all provincial judges had in its outcome.<sup>7</sup> The Crown appealed to the Court of Appeal. Chief Justice Howland, writing for a unanimous five-judge panel, held that provincial judges were sufficiently independent.<sup>8</sup> Mr. Valente sought and was granted leave to appeal to the Supreme Court.

In a unanimous decision, Le Dain J. set out the degree of independence section 11(d) constitutionally required all judges hearing offences to have.<sup>9</sup> The Court took a balanced approach to judicial independence. It recognized that in order to be sufficiently independent to try offences in a manner fair to the accused, provincial judges had to have both individual and institutional independence, provided through certain objective and essential constitutional guarantees of security of tenure, financial security, and administrative independence. But in setting out the scope of each of these protections, it also recognized that the Executive and Legislature, as the democratically elected branches of government responsible to the public for the prudent management of public funds and the administration of justice, also had their proper roles to play. Mindful of these roles, the Court carefully delineated those measures which were constitutionally required and feasible and those which would provide an even greater level of protection for judicial independence and that might therefore be “preferable” or “desirable” for a government to enact in ideal circumstances.

The Court recognized that the Constitution did not require the wide variety of tribunals who might hear offences to all possess “the most rigorous and elaborate conditions of judicial independence”.<sup>10</sup> It therefore rejected the argument that all judges must have the same guarantees of security of tenure and financial security as sections 99 and 100 of the *Constitution Act, 1867* provide to superior court judges. Instead, the Court held that provincially-appointed judges had to have security of tenure “until an age of retirement, for a fixed term, or for a specific adjudicative task”. Judges’ tenure had to be “secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner”; they could only be removed “for

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<sup>7</sup> *R. v. Valente*, [1982] O.J. No. 1101, 3 C.R.R. 1 (Ont. Prov. Ct.).

<sup>8</sup> *R. v. Valente (No. 2)*, [1983] O.J. No. 2971, 41 O.R. (2d) 187 (Ont. C.A.).

<sup>9</sup> *Supra*, note 6.

<sup>10</sup> *Id.*, at 692.

cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard.” It therefore was not constitutionally required that removal be recommended by address of the Legislature or that the report of the judicial inquiry be binding on the Executive in determining whether to remove a provincial judge for cause.<sup>11</sup>

The Court found that although provincial judges therefore enjoyed appropriate security of tenure until age 65, the ability of the Executive to reappoint judges during pleasure after retirement age did not provide sufficient security of tenure.<sup>12</sup> The Court noted that this concern had been addressed by the subsequent passage of the *Provincial Judges and Masters Statute Law Amendment Act, 1983* which gave the power to approve post-retirement continuation in office to the Chief Judge (to age 70) and the Judicial Council (to age 75) rather than to the Executive.<sup>13</sup> Although not ideal from a security of tenure point of view, that regime was acceptable because “it replaces the discretion of the Executive by the judgment and approval of senior judicial officers who may reasonably be perceived as likely to act exclusively out of consideration for the interests of the Court and the administration of justice generally.”<sup>14</sup>

Turning to financial security, the Court rejected arguments that provincial judges’ remuneration had to be fixed by permanent statutory appropriation from the Consolidated Revenue Fund. Instead, the Court held that the essential point was “that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge.” Fixing judicial salaries by regulation and paying them out of annual appropriations was sufficient protection.<sup>15</sup> Nor was it problematic that provincial judges received the same benefits and pension as civil servants. Although it might be preferable to provide special and separate benefits for judges, it was not constitutionally required.<sup>16</sup> As discussed further below, the separate pension issue was raised again before the Court in the *Québec Judges of*

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<sup>11</sup> *Id.*, at 697-98.

<sup>12</sup> *Id.*, at 698-703.

<sup>13</sup> S.O. 1983, c. 18 cited in *Valente*, *supra*, note 6, at 705.

<sup>14</sup> *Valente*, *id.*, at 703-704. The Court of Appeal subsequently followed *Valente* on this point and held that the renewal of Small Claims Court Deputy Judge appointments by the Regional Senior Judge did not violate judicial independence. *Ontario Deputy Judges’ Assn. v. Ontario (Attorney General)*, [2012] O.J. No. 2865, 2012 ONCA 437 (Ont. C.A.).

<sup>15</sup> *Valente*, *id.*, at 704-707.

<sup>16</sup> *Id.*, at 707-708.

*the Peace* case, and the Supreme Court reconfirmed its holding in *Valente* that judicial pensions need not be provided through a separate judicial pension plan rather than through a public service pension plan.

Finally, the Court rejected suggestions that the Constitution required judges to have control over all aspects of the administration of the courts. The Court accepted, as Howland C.J.O. had in the Court below, that the judiciary needed to have control over “matters of administration bearing directly on the exercise of the judicial function”, which the Court went on to state included “assignment of judges, sittings of the court, and court lists — as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions”.<sup>17</sup> But it rejected suggestions that judges had to be given more complete control over the budget and human resources of the courts. Similarly, the fact that certain benefits available to civil servants were also made available to provincial judges or that the Executive exercised administrative control over certain discretionary benefits and advantages did not undermine the independence of the provincial courts.<sup>18</sup>

## 2. *Beauregard v. Canada*

Two years later, the Supreme Court again considered the requirements of judicial independence after Parliament decided to make federally-appointed judges contribute to a portion of the cost of their pensions by deductions from their salaries.<sup>19</sup> Chief Justice Dickson, writing for the majority, recognized that judicial independence was protected not only by the express words of the Judicature provisions of the *Constitution Act, 1867* and section 11(d) of the Charter. It was also deeply rooted in the Preamble of the *Constitution Act, 1867*'s recognition that Canada was to have a Constitution “similar in Principle to that of the United Kingdom”. Judicial independence therefore protected judges from interference not only by the Executive, but also by the Legislature.<sup>20</sup> *Beauregard* thus marked the beginning of the Court's reliance on unwritten principles to support judicial independence even though, as the case concerned superior court judges protected by the judicature provisions of the

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<sup>17</sup> *Id.*, at 708-709.

<sup>18</sup> *Id.*, at 709-715.

<sup>19</sup> *Beauregard v. Canada*, [1986] S.C.J. No. 50, [1986] 2 S.C.R. 56 (S.C.C.) [hereinafter “*Beauregard*”].

<sup>20</sup> *Id.*, at 69-74.

*Constitution Act, 1867* and section 11(d) of the Charter, it was unnecessary on the facts to do so.<sup>21</sup>

At the same time as it made this move beyond the express text of the Constitution, the Court also showed restraint by rejecting the argument that Parliament could never decrease federally-appointed judges' remuneration. Instead, the Court's starting point was "recognition that *someone* must provide for judicial salaries and benefits and that, by virtue of s. 100 of the *Constitution Act 1867*, that someone is explicitly, Parliament."<sup>22</sup> Judges therefore not only had to pay taxes and other general deductions to which all citizens' salaries were subjected such as Canadian Pension Plan contributions, but could also be required to pay contributions towards the cost of their pensions.<sup>23</sup> Judicial independence issues would only arise if there was some hint that a federal law reducing judicial salaries was enacted for an improper or colourable purpose or imposed "discriminatory treatment of judges *vis-à-vis* other citizens".<sup>24</sup>

### 3. The *Provincial Judges' Reference*

In 1997, after economic circumstances had led a number of provinces to impose salary freezes or reductions on judicial salaries, the Supreme Court revisited its earlier decisions and revised and expanded the scope and content of the constitutional protection of judicial independence. Chief Justice Lamer, writing for the majority, grounded judicial independence not only in section 11(d) of the Charter (which only applies to those charged with offences and therefore is limited to criminal and *quasi*-criminal courts) but also in the unwritten principles embodied in the Preamble to the *Constitution Act, 1867*, thereby extending judicial

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<sup>21</sup> The controversy which this development gave rise to is discussed further below in relation to the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Ekmecic; R. v. Wickman Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 (S.C.C.) [hereinafter "*Provincial Judges' Reference*"]. Even before that case was decided, commentators were warning of the possibility that the Court's decisions in *Valente* and *Beauregard* could lead to a radical expansion of the requirements of judicial independence. See, e.g., I. Greene, "The Doctrine of Judicial Independence Developed by the Supreme Court of Canada" (1988) 26 Osgoode Hall L.J. 177, at 198-206.

<sup>22</sup> *Id.*, at 76 (emphasis added).

<sup>23</sup> *Id.*, at 76-77. The Privy Council had decades earlier dismissed a claim by Saskatchewan judges that judicial independence protected them from even having to pay income tax. *Saskatchewan (Judges) v. Saskatchewan (Attorney General)*, [1937] J.C.J. No. 4, [1937] 2 D.L.R. 209 (U.K.P.C.).

<sup>24</sup> *Beauregard*, *supra*, note 19, at 77-78.

independence to provincially-appointed judicial officials exercising civil jurisdiction.<sup>25</sup> The Court also introduced several additional requirements to ensure financial security, including requiring a commission process to be interposed between government and the judiciary to consider any changes to judicial remuneration. While the *Provincial Judges' Reference* significantly expanded the constitutional requirements of judicial independence,<sup>26</sup> the decision also reconfirmed the role of legislatures and the Executive and articulated limits on the new requirements it set out that provided a counterbalance to the expansion of judicial independence.

Judicial independence had both individual and institutional dimensions. *Valente* had dealt solely with the individual aspect of financial security.<sup>27</sup> The institutional dimension of financial security required the relationship between the judiciary and the other branches of government to be depoliticized so that courts could both be free and appear to be free from political interference through economic manipulation. At the same time, however, the Court recognized that remuneration from the public purse is an inherently political concern in the sense that it implicates general public policy and that judicial salaries must ultimately be fixed by one of the political organs of the Constitution, the executive or the legislature, who bear the constitutional responsibility for managing the public purse.<sup>28</sup>

To balance these concerns, the Court rejected suggestions that judicial salaries could never be frozen or reduced. It also rejected suggestions that judicial salaries could only be reduced as part of a general reduction of salaries applicable to all those paid by the public purse. Instead, it held

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<sup>25</sup> *Provincial Judges' Reference*, *supra*, note 21, at paras. 82-109.

<sup>26</sup> A move a number of commentators have criticized, both on the ground that unwritten principles should not be used to expand the already detailed guarantees of judicial independence contained in the text of the Constitution and on the ground that judicial remuneration commissions are unnecessary and do not in fact depoliticize the relationship between the Executive and the judiciary or reduce the risk of litigation. See, e.g., P.W. Hogg, "The Bad Idea of Unwritten Constitutional Principles: Protecting Judicial Salaries" in A. Dodek and L. Sossin, eds., *Judicial Independence in Context* (Toronto: Irwin Law, 2010), at 28-29 and 34-36 [hereinafter "Dodek and Sossin"]; L. Sossin, "Between the Judiciary and the Executive: The Elusive Search for a Credible and Effective Dispute-Resolution Mechanism" in Dodek and Sossin, *id.*, at 67-81; J. Goldsworthy, "The Preamble, Judicial Independence and Judicial Integrity" (2000) 11:2 *Constitutional Forum* 60, at 60-64; J. Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002), 27 *Queen's L.J.* 389-43, at 432-43; T. Kahana, "The Constitution as Collective Agreement: Remuneration of Provincial Court Judges in Canada" (2004), 29 *Queen's L.J.* 445-488, at 459-61 and 467-69; R.G. Richards, "*Provincial Court Judges Decision* – Case Comment" (1998), 61 *Sask. L.R.* 575 at 581-83 and 586-88; J.S. Ziegel, "The Supreme Court Radicalizes Judicial Compensation" (1998) 9:2 *Constitutional Forum* 31, at 39-41.

<sup>27</sup> *Provincial Judges' Reference*, *supra*, note 21, at paras. 110-130.

<sup>28</sup> *Id.*, at paras. 131-146.

that judicial salaries could be reduced, increased, or frozen, either as part of a general measure or as part of a measure applicable only to the judiciary as a class. However, the imperative of protecting the courts from political interference through economic manipulation required the imposition of an independent, objective, and effective body — a remuneration commission — between the judiciary and the other branches of government.<sup>29</sup> Judicial independence also required that there be no negotiations on judicial remuneration between the judiciary and the other branches of government and that judicial salaries not be allowed to fall below a basic minimum level.<sup>30</sup>

In requiring the establishment of remuneration commissions, the Court left considerable leeway to governments to design the particulars of the commission process. The Court was careful not “to dictate the exact shape and powers of the independent commission here. These questions of detailed institutional design are better left to the executive and the legislature, although it would be helpful if they consulted the provincial judiciary prior to creating those bodies.” Different provinces had to “be free to choose procedures and arrangements which are suitable to their needs and particular circumstances.”<sup>31</sup> The Constitution did not require any particular membership, so long as appointments were not entirely controlled by any one of the branches of government.<sup>32</sup> The Court suggested, but did not require, that commissions receive submissions from the judiciary and the government and make their decisions based on a legislated list of relevant factors.<sup>33</sup> It gave the provinces’ discretion to consider the appropriate length of each commission’s mandate, although commissions did have to convene periodically (approximately every three to five years) to ensure judicial remuneration was not eroded by inflation.<sup>34</sup>

Finally, and importantly, the Court rejected the argument that commission recommendations had to be binding because “decisions

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<sup>29</sup> *Id.*, at paras. 147-169.

<sup>30</sup> *Id.*, at paras. 186-196.

<sup>31</sup> *Id.*, at para. 167. See *Ontario Deputy Judges’ Assn. v. Ontario (Attorney General)*, [2006] O.J. No. 2057, 80 O.R. (3d) 481, at paras. 36-39 (Ont. C.A.) and *Masters’ Assn. of Ontario v. Ontario*, [2011] O.J. No. 1450, 2011 ONCA 243, at paras. 41-52 and 61-70 (Ont. C.A.), for examples of where the Court of Appeal followed the Supreme Court’s flexible and balanced approach in requiring the creation of remuneration commissions for deputy judges and case management masters but leaving the design of the commission to the government.

<sup>32</sup> *Provincial Judges’ Reference*, *supra*, note 21, at paras. 170-172.

<sup>33</sup> *Id.*, at para. 173.

<sup>34</sup> *Id.*, at para. 174.

about the allocation of public resources are generally within the realm of the legislature, and through it, the executive.” Provinces could choose to make commission recommendations binding or to implement a negative resolution procedure where they would become binding if not set aside. But they were also free to make the recommendations non-binding so long as the Executive or Legislature gave rational reasons, which could be reviewed by the courts on a deferential standard, if they chose to depart from those recommendations.<sup>35</sup>

The Court also took a balanced view to claims that certain provinces had unconstitutionally restricted the administrative independence of the courts. It found that the co-location of various government offices such as Crown Attorneys, Legal Aid, *etc.*, in courthouses did not undermine judicial independence.<sup>36</sup> The government could designate the initial place at which a provincial judge was required to reside but could only change it thereafter with the judge’s consent.<sup>37</sup> But the Executive could not unilaterally determine the days on which the courts would be open for business, as this was an interference with judicial control over sittings of the court, which the Court had previously held in *Valente* fell within the administrative independence of the judiciary.<sup>38</sup> Finally, despite calls by the judiciary for greater control over human resources and finances, the Court held that judicial independence did not require the courts to administer their own budget or hire their own staff.<sup>39</sup> By limiting the scope of the constitutionally required level of administrative independence, the Court left considerable scope for continued executive involvement in court administration.<sup>40</sup> Of course, the Executive and judiciary must work closely together in carrying out their mutual roles in court administration.<sup>41</sup>

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<sup>35</sup> *Id.*, at paras. 175-185. To date, however, only one province has converted a formerly binding remuneration commission into a non-binding one: *Financial Measures (2016) Act*, S.N.S. 2016, c. 2, Part II.

<sup>36</sup> *Provincial Judges’ Reference*, *id.*, at para. 252.

<sup>37</sup> *Id.*, at paras. 254-255 and 266.

<sup>38</sup> *Id.*, at paras. 267-276.

<sup>39</sup> *Id.*, at para. 253.

<sup>40</sup> See G.G. Mitchell, “‘Be Careful What You Wish For’: Administrative Independence and Alternative Models of Court Administration – the New Frontier” in Dodek and Sossin, *supra*, note 26, at 119-25 for a discussion of the potential implications of greater judicial control of court finances and administration.

<sup>41</sup> *Valente*, *supra*, note 6, at 709. For example, in Ontario, the chief justices of the various courts have entered into Memoranda of Understanding with the Attorney General setting out their mutual understanding of the roles and responsibilities of the Executive and judiciary in courts administration. *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 71-72 and 77; Justice B. Lennox, “Judicial Independence in Canada – The Evolution” in Dodek and Sossin, *id.*, at 632-37.

#### 4. *Mackin v. New Brunswick (Minister of Finance)*

In 2002, the Supreme Court held that New Brunswick's decision to abolish the opportunity for provincial judges to elect supernumerary status (the ability to continue to receive a full salary while working reduced duties) did not infringe their security of tenure because the office of supernumerary judge was not a separate office from that of provincial judge. Ending the opportunity to elect supernumerary status therefore did not deprive provincial judges of their judicial office. Nor was the ability to elect supernumerary status such an essential part of the office that eliminating it could affect its integrity.<sup>42</sup> The Court did find, however, that the Legislature's decision to eliminate a system of supernumerary judges that conferred an undeniable economic benefit on provincial judges without first obtaining the recommendations of a remuneration commission infringed their financial security and thus was invalid.<sup>43</sup>

#### 5. *Ell v. Alberta*

In 2003, the Supreme Court considered whether a court reform initiative in Alberta that increased the qualifications and independence of justices of the peace infringed judicial independence. Justices of the peace who did not meet new qualifications set by an independent judicial council were removed from office and offered administrative positions as non-presiding justices of the peace.<sup>44</sup> The Court found that justices of the peace were entitled to judicial independence, including security of tenure, but that the removal of the non-qualified justices of the peace from office did not violate their security of tenure.<sup>45</sup>

The Court strongly acknowledged the importance of permitting governments to implement court reforms to serve the public good by improving the administration of justice and the independence of the judiciary. The principles of judicial independence should not be

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<sup>42</sup> *Mackin v. New Brunswick (Minister of Finance)*, [2002] S.C.J. No. 13, [2002] 1 S.C.R. 405, at paras. 42-49 (S.C.C.).

<sup>43</sup> *Id.*, at paras. 50-70.

<sup>44</sup> *Justice Statutes Amendment Act, 1998*, S.A. 1998, c. 18, ss. 2.1(1), 2.2(2), and 2.4(8).

<sup>45</sup> *Ell v. Alberta*, [2003] S.C.J. No. 35, [2003] 1 S.C.R. 857, at paras. 22-26 (S.C.C.). The Ontario Divisional Court had earlier found that Ontario justices of the peace were entitled to judicial independence. *Ontario Federation of Justices of the Peace Assns. v. Ontario*, [1999] O.J. No. 78, 43 O.R. (3d) 541 (Ont. Div. Ct.).

interpreted so as to prevent such court reforms from taking place in a timely fashion. The Court stated, that

[t]enure cannot be viewed as an absolute. If an absolute, necessary reforms would be almost impossible. ... A legislated change resulting in a removal from office undertaken upon the advice of an independent Judicial Council is justified if it is necessary to accommodate significant reforms that are considered integral to public confidence in the administration of justice.<sup>46</sup>

Judicial independence was not an end in itself. Rather, it is a means to safeguard our constitutional order and to maintain public confidence in the administration of justice.<sup>47</sup> Removal from office that was reasonably intended to further the interests that underlie the principle of judicial independence was not arbitrary and advanced rather than undermined the judicial independence of Alberta's justices of the peace.<sup>48</sup> Unlike the Executive, which can never remove a judicial official without cause as determined by a judicial inquiry at which the judicial officer has the right to be heard, the Legislature can remove judicial officials without cause when doing so reflects a good faith and considered decision of the Legislature intended to advance the public interests that judicial independence is intended to protect.<sup>49</sup>

The Court in *Ell* also held that there was no requirement that incumbents be grandfathered when reforms were being made to their judicial offices. Once the Legislature has established that an office is in need of significant structural reform, it is not obligated to potentially delay that reform for many years by grandfathering incumbents. Public confidence in the administration of justice could be harmed by delaying beneficial court reforms, and by retaining incumbents in office who no longer meet minimum qualifications.<sup>50</sup>

## **6. *Provincial Judges Association of New Brunswick v. New Brunswick et al.***

In 2005, the Court heard appeals of judicial reviews of four provinces' responses to their respective judicial remuneration commissions and clarified

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<sup>46</sup> *Ell, id.*, at para. 36.

<sup>47</sup> *Id.*, at para. 29.

<sup>48</sup> *Id.*, at para. 33.

<sup>49</sup> *Id.*, at paras. 35-36.

<sup>50</sup> *Id.*, at paras. 49-51.

the test that should be applied when assessing whether a government's reasons for departing from a remuneration commission's recommendations meet the constitutional standard of "rationality" articulated in the *Provincial Judges' Reference*.<sup>51</sup> The Court again held that judicial independence did not require commission recommendations to be binding:

A commission's report is consultative. The government may turn it into something more. Unless the legislature provides that the report is binding, the government retains the power to depart from the commission's recommendations as long as it justifies its decision with rational reasons.<sup>52</sup>

Those reasons in turn are subject to judicial review by the courts, but the standard of judicial review is a deferential one.

The Court then gave further guidance as to what reasons will meet the constitutional standard of rationality. The reasons must be "legitimate", that is, reveal a consideration of the judicial office and an intention to deal with it appropriately, not to manipulate it.<sup>53</sup> The government's reasons must also rely upon a reasonable factual foundation. The government must indicate the factual basis upon which it bases its decision and, on the face of the evidence before a reviewing court, it must have been rational for the government to rely on those facts. The facts led by the government need only persuade the court that there is a rational basis for the government's decision.<sup>54</sup>

Finally, the court must consider the response from a global perspective to determine whether the government has engaged in a meaningful way with the process of the commission and given a rational answer to its recommendations. Throughout, the court must bear in mind that the commission process is flexible and that, while the commission's recommendations can only be rejected for legitimate reasons, deference must be shown to the government's response.<sup>55</sup> Where a court finds that the government has failed to meet the rationality standard, the appropriate remedy will generally be to return the matter to the government for reconsideration. Reviewing courts should avoid issuing

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<sup>51</sup> *Provincial Judges' Reference*, *supra*, note 21, at paras. 183-184; *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judges' Assn. v. Ontario (Management Board)*; *Bodner v. Alberta*; *Conférence des juges du Québec v. Québec (Attorney General)*; *Minc v. Québec (Attorney General)*, [2005] S.C.J. No. 47, [2005] 2 S.C.R. 286 (S.C.C.) [hereinafter "*Bodner*"].

<sup>52</sup> *Bodner*, *id.*, at paras. 19-21.

<sup>53</sup> *Id.*, at paras. 23-25 and 32.

<sup>54</sup> *Id.*, at paras. 26 and 33-37.

<sup>55</sup> *Id.*, at paras. 38-43.

specific orders to make the recommendations binding unless the governing statutory scheme gives them that option.<sup>56</sup>

The commission process outlined in the *Provincial Judges' Reference* and *Bodner* involves the government, the judiciary, and an independent commission in a multi-stage, multi-forum process that balances the roles of all three participants. In a non-binding commission process, none of the three participants can unilaterally determine judicial remuneration. The role of the judiciary and the need to protect their independence is respected and recognized through the requirement of a commission and the right to seek judicial review of the government's response to its recommendations (and for other judges to conduct the judicial review). The role of the government and its ultimate responsibility for the public purse is recognized in its ability to depart from commission recommendations with rational reasons and the deferential standard applied on judicial review to those reasons. The balanced approach the Court adopted in *Bodner* was unfortunately only partially effective in stemming the tide of litigation over judicial remuneration. Litigation continued over provincial court judges' compensation as well as that of other judicial officers such as Small Claims Court deputy judges, case management masters, and Federal Court prothonotaries.<sup>57</sup> To date, however, none of those cases have reached the Supreme Court.

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<sup>56</sup> *Id.*, at para. 44.

<sup>57</sup> See L. Sterling and S. Hanley, "The Case for Dialogue in the Judicial Remuneration Process" in Dodek and Sossin, *supra*, note 26, at 49-52 and 61-62, who suggest that although the greater clarity the Court provided concerning the standard of review has helped to reduce litigation concerning judicial remuneration, allowing greater scope for dialogue between governments and judiciary in the process leading up to Commission recommendations could help reduce it further. For examples of litigation concerning judicial remuneration post-*Bodner*, see *Manitoba Provincial Judges' Assn. v. Manitoba*, [2013] M.J. No. 279, 2013 MBCA 74 (Man. C.A.); *Provincial Court Judges' Assn. of British Columbia v. British Columbia (Attorney General)*, [2017] B.C.J. No. 214, 2017 BCCA 63 (B.C.C.A.); *Provincial Court Judges' Assn. of British Columbia v. British Columbia (Attorney General)*, [2015] B.C.J. No. 574, 2015 BCCA 136 (B.C.C.A.), leave to appeal to SCC dismissed [2015] S.C.C.A. No. 199 (S.C.C.); *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice and Consumer Affairs)*, [2009] N.B.J. No. 278, 2009 NBCA 56 (N.B.C.A.); *Québec (Procureur général) c. Conférence des juges du Québec*, [2007] J.Q. no 10867, 2007 QCCA 1250 (Que. C.A.); *Québec (Procureur général) c. Conférence des juges municipaux du Québec*, [2007] J.Q. no 10868, 2007 QCCA 1251 (Que. C.A.); *Nova Scotia Presiding Justices of the Peace Assn. v. Nova Scotia (Attorney General)*, [2013] N.S.J. No. 61, 2013 NSSC 40 (N.S.S.C.); *Aalto v. Canada (Attorney General)*, [2010] F.C.J. No. 949, 2010 FCA 195 (F.C.A.), leave to appeal to SCC dismissed [2010] S.C.C.A. No. 352 (S.C.C.); *Assn. of Justices of the Peace of Ontario v. Ontario*, [2016] O.J. No. 5474, 2016 ONSC 6001 (Ont. Div. Ct.), leave to appeal to C.A. dismissed March 20, 2017 (Ont. C.A.); *Assn. of Justices of the Peace of Ontario v. Ontario*, [2014] O.J. No. 5010, 2014 ONSC 6130 (Ont. Div. Ct.), leave to appeal to C.A. dismissed May 11, 2015 (Ont. C.A.); *Assn. of Justices of the Peace of Ontario v. Ontario*, [2013] O.J. No. 1, 2013 ONSC 27 (Ont. S.C.J.), aff'd [2013] O.J. No. 3911, 2013 ONCA 532 (Ont. C.A.); *Assn. of Justices of the Peace of*

IV. *CONFERENCE DES JUGES DE PAIX MAGISTRATS DU QUÉBEC V. QUÉBEC (ATTORNEY GENERAL)* (“*QUÉBEC JUSTICES OF THE PEACE*”)

The one judicial independence decision that has reached the Supreme Court in recent years arose from Québec’s decision to reform its justice of the peace regime in 2004 in response to a Québec Court of Appeal decision finding the former regime did not satisfy the requirements of judicial independence. Québec created the new Office of Presiding Justice of the Peace (“PJP”) with a distinct jurisdiction and remuneration from the previous office of Justice of the Peace with Extended Powers (“JPEPs”). The six existing JPEPs were reappointed as PJPs and their remuneration was “redlined” so that they would continue to receive the same salary as before their appointment until the salary of newly appointed PJPs, initially set by the Government at a lower level, caught up. All PJPs were provided with a pension through a public service pension plan. None of these remuneration decisions were put to a remuneration commission before they were made. The new office’s remuneration was only subject to commission review on a prospective basis from 2007 onwards.

The Court found that while prior review by a commission was not constitutionally required, the lack of any retroactive commission review of salary levels from 2004 to 2007 within a reasonable time after appointment violated the financial security guarantee. The Court rejected all other challenges to the new regime and held that the salaries from 2007 on which had been subject to commission review were valid. The Court’s decision provided mixed success to the parties and in doing so recognized that legislatures have the constitutional ability to create, transform and abolish judicial offices, so long as that power is exercised consistently with the principles of judicial independence.<sup>58</sup>

### 1. Justices of the Peace in Québec Before 2004

The office of JPEP was created in 1870.<sup>59</sup> Justices of the Peace who were not granted extended powers came to be known as Justices of the

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*Ontario v. Ontario*, [2014] O.J. No. 3305, 2014 ONSC 4231 (Ont. S.C.J.); *Ontario Deputy Judges’ Assn. v. Ontario (Attorney General)*, [2006] O.J. No. 2057, 80 O.R. (3d) 481 (Ont. C.A.); *Ontario Deputy Judges Assn. v. Ontario (Attorney General)*, [2009] O.J. No. 2880, 98 O.R. (3d) 89 (Ont. Div. Ct.); *Masters’ Assn. of Ontario v. Ontario*, [2011] O.J. No. 1450, 2011 ONCA 243 (Ont. C.A.).

<sup>58</sup> *Québec Justices of the Peace*, *supra*, note 1, at para. 1.

<sup>59</sup> *An Act to provide for the appointment of Justices of the Peace with more extensive jurisdiction*, S.Q. 1870, c. 12; *Courts of Justice Act*, CQLR, c. T-16, ss. 186-88.

Peace with Limited Powers (“JPLPs”).<sup>60</sup> By 2004, there were approximately 600 JPLPs and only six JPEPs.<sup>61</sup> JPLPs served part-time and exercised predominantly administrative tasks but did conduct some judicial tasks while JPEPs served full-time and exercised a broader range of judicial functions. JPLPs were public servants appointed during pleasure. In 1992, JPEPs were given security of tenure unless removed for cause under the same procedure that applied to removing provincial judges.<sup>62</sup> The Order appointing each JPEP set their salary at 72 per cent of the salary of a provincial judge and they were permitted to join a public sector pension plan.<sup>63</sup>

## 2. *Pomerleau* and the Creation of Presiding Justices of the Peace

In 2002, the Québec Court of Appeal held that the existing system for JPLPs was unconstitutional on the basis that, as at pleasure appointees, they lacked the requisite degree of security of tenure.<sup>64</sup> Leave was sought to the Supreme Court which, in light of its then-recent decision in *Ell* that Justices of the Peace were entitled to judicial independence, remitted it to the Court of Appeal for reconsideration.<sup>65</sup> On remand, the Attorney General of Québec conceded that JPLPs lacked judicial independence and the Court declared that the provisions governing them were unconstitutional.<sup>66</sup>

The National Assembly responded six months later by replacing the existing offices of JPEP and JPLP with two new offices: PJPs and administrative justices of the peace.<sup>67</sup> Administrative justices of the

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<sup>60</sup> After a 1919 amendment allowed the jurisdiction of any Justice of the Peace to be limited to the purposes set forth in his commission. *An Act to amend the Revised Statutes, 1909, respecting the jurisdiction of certain justices of the peace*, S.Q. 1919, c. 45.

<sup>61</sup> *Pomerleau c. R.*, [2003] J.Q. No. 19020, [2004] R.J.Q. 83 at para. 23 (Que. C.A.) [hereinafter “*Pomerleau* (2003)”].

<sup>62</sup> *Courts of Justice Act*, *supra*, note 63, s. 162, as amended by *An Act respecting the implementation of certain provisions of the Code of Penal Procedure and amending various legislative provisions*, S.Q. 1992, c. 61, s. 617.

<sup>63</sup> Originally the Government and Public Employees Retirement Plan and then, after 2001, the Pension Plan of Management Personnel. *An Act respecting the Pension Plan of Management Personnel*, S.Q. 2001, c. 31, s. 393; *Courts of Justice Act*, *id.*, s. 162.1, as amended by *An Act to amend the Courts of Justice Act, the Act respecting municipal courts and other legislative provisions*, S.Q. 2002, c. 32, s. 7.

<sup>64</sup> *R. c. Pomerleau*, [2002] J.Q. no. 5061 (Que. C.A.).

<sup>65</sup> *R. c. Pomerleau*, [2002] C.S.C.R. no 522 (S.C.C.).

<sup>66</sup> *Pomerleau* (2003), *supra*, note 61, at paras. 25-35.

<sup>67</sup> *Courts of Justice Act*, *supra*, note 63, ss. 158 and 161, as amended by *An Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace*, S.Q. 2004, c. 12.

peace served during pleasure and were given a limited range of functions that did not require judicial independence.<sup>68</sup>

PJPs were given a broader range of judicial functions, including conducting trials for provincial offences and non-criminal federal offences, issuing arrest and search warrants although, unlike the former JPEPs, they cannot conduct bail hearings or try summary conviction criminal offences.<sup>69</sup> They have security of tenure during good behaviour until age 70 unless removed for cause after a judicial inquiry.<sup>70</sup> Their salary and benefits were to be set by the same remuneration commission process as provincial judges but not until 2007. Until then, the Government could set their salary and benefits unilaterally. As well, PJPs (like JPEPs) were to be members of the Pension Plan of Management Personnel rather than the Pension Plan for Cour du Québec and Municipal Court judges.<sup>71</sup>

The existing JPEPs were deemed to be appointed as PJPs without having to go through the usual selection process.<sup>72</sup> JPEPs continued to receive their previous salary, benefits, and pension until the salary of the office of PJP equalled or exceeded it.<sup>73</sup> That salary was \$137,280 as of June 30, 2004. The Government set the initial salary of new PJPs at \$90,000.<sup>74</sup>

After the first new PJPs were appointed in 2005, the *Conférence des juges de paix magistrats* (the “*Conférence*”) was created to represent the interests of PJPs.<sup>75</sup> In 2008, the remuneration commission for the period 2004 to 2007 (the “*Johnson Committee*”) submitted its report. It concluded that it lacked the authority to retroactively review PJP remuneration for the years 2004 to 2007, recommended that the annual salary of PJPs be increased to \$110,000 for the years 2007 to 2010, and recommended that the salaries of the former JPEPs remain frozen. The Government accepted these recommendations.<sup>76</sup>

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<sup>68</sup> *Id.*, s. 160 and Sch. IV.

<sup>69</sup> *Id.*, s. 173 and Sch. V.

<sup>70</sup> *Id.*, ss. 161 and 165-68.

<sup>71</sup> *Id.*, ss. 175-79 and Part VI.4; *An Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace*, *supra*, note 67, ss. 30-32.

<sup>72</sup> *An Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace*, *id.*, ss. 26-29 and 35.

<sup>73</sup> *Id.*, s. 27. JPEPs who were members of the Government and Public Employees Retirement Plan could elect to join the Pension Plan of Management Personnel.

<sup>74</sup> *Québec Justices of the Peace*, *supra*, note 1, at paras. 11-12; *Conférence des juges du Québec c. Québec (Procureur général)*, [2007] J.Q. no 5681, 2007 QCCS 2672, [2007] R.J.Q. 1556 (Que. C.S.); Décret/Order 689-2004.

<sup>75</sup> *Québec Justices of the Peace*, *id.*, at para. 13.

<sup>76</sup> *Id.*, at para. 14; Décret/Order 932-2008.

### 3. The Courts and Remuneration Commissions Consider the Remuneration of Presiding Justices of the Peace

The Conférence commenced litigation in 2008 arguing that the remuneration process failed to respect the judicial independence of PJPs.<sup>77</sup> While that case was working its way through the courts, two more remuneration commissions reported. In 2010, the D'Amours Committee recommended that the salary of PJPs be increased to \$119,000 and that the salaries of the former JPEPs remain unchanged. The Government accepted those recommendations. In 2013, the Clair Committee reviewed the salary of PJPs again. By 2013, the salary of PJPs had increased beyond that of the former JPEPs and there were no longer two tiers of remuneration based on appointment date.<sup>78</sup> Both the Québec Superior Court and Court of Appeal rejected the Conférence's claims that the provisions regarding the remuneration of PJPs infringed judicial independence.<sup>79</sup> The Conférence sought and was granted leave to appeal to the Supreme Court of Canada.

### 4. The Supreme Court Decision

In a unanimous decision written by Karakatsanis, Wagner and Côté JJ., the Court granted the appeal in part. It acknowledged the power and responsibility of legislatures with respect to the administration of justice, including the power to “create, transform and abolish judicial offices.” The Court accepted that such reforms can enhance public confidence in the administration of justice, improve the independence and qualifications of judicial officers, adapt to new realities, and increase access to justice. This power is, however, limited by the constitutional requirements of judicial independence.<sup>80</sup>

The issue before the Court was to identify the requirements of financial security that applied in the context of a court reform that abolished an old office and created a new office. The Court held that commission review of the initial salary of a new judicial office was required. Otherwise, there would be a risk that the creation of a new

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<sup>77</sup> *Québec Justices of the Peace, id.*, at para. 15.

<sup>78</sup> *Id.*, at paras. 16-17.

<sup>79</sup> *Conférence des juges de paix magistrats du Québec c. Québec (Procureur général)*, [2012] J.Q. no 2260, 2012 QCCS 1021, [2012] R.J.Q. 729 (Que. C.S.), affd [2014] Q.J. No. 9733, 2014 QCCA 1654 (Que. C.A.).

<sup>80</sup> *Québec Justices of the Peace, supra*, note 1, at para. 39.

judicial office could be perceived as a means to interfere with the judiciary through economic manipulation as there was still a possibility of economic manipulation. Further, commission review was required to assure the public that the initial salary met the constitutional minimum.<sup>81</sup>

The Court did not agree, however, that commission review of initial salary in this context had to be “prior review”; instead, the review could take place within a reasonable time (months, not years) after the creation of the new judicial office. This requirement is different than that which applies to changes or freezes to the remuneration of sitting judges which can only be undertaken after prior review by a commission. The Court found that a less onerous requirement of subsequent retroactive commission review would satisfy judicial independence in this context, given the Legislature’s constitutional power to reform courts and the fact that the risk of economic manipulation is not as strong in the context of the creation of a new judicial office as compared to a change or freeze applied to a sitting judge. The Court stated that this requirement would both be a “sufficient safeguard for the financial security guarantee” and “enable legislatures to fulfill their constitutional role effectively” by providing “governments with flexibility, while not imposing unwarranted barriers to the effective implementation of court reform initiatives.” It also noted that subsequent retroactive review is more practical and efficient, as it allows time for judicial associations of new office holders to form in order to participate fully in the commission process, and avoids delays inherent in the establishment of a commission process.<sup>82</sup>

The Court concluded that the same subsequent retroactive commission review process satisfies the judicial independence of both new appointees and sitting judicial officers reappointed to the new office. While reappointed sitting judges are more susceptible to the risk of economic manipulation because of their existing relationship with the Government, the practical considerations regarding delay, representation, and avoiding barriers to reform apply equally to both groups. Considering the remuneration of both groups together also is more effective. To address the higher risk of economic manipulation, however, the Court held that the Government must maintain and cannot change the remuneration of sitting judges reappointed to a new office until after commission review.<sup>83</sup>

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<sup>81</sup> *Id.*, at paras. 43-47.

<sup>82</sup> *Id.*, at paras. 50-51.

<sup>83</sup> *Id.*, at paras. 57-63.

Applying these principles to the facts, the Court found that the 2004 reforms had in fact created a new judicial office and were not simply an adjustment to an existing office. PJPs have a narrower jurisdiction than the former JPEPs, benefit from greater judicial independence guarantees, and both the structure and the Parliamentary history of the 2004 Amending Act suggest the National Assembly intended to create a new judicial office.<sup>84</sup> Therefore, prior commission review of the initial salary of neither reappointed JPEPs nor newly appointed PJPs was required.<sup>85</sup>

The Court found, however, that the delay of any commission review to 2007 and the fact that that review was not retroactive meant that the 2004 Amending Act did violate judicial independence, as the initial salary was not subject to any commission review during the period from the first appointments in 2005 to 2007. The Court held that three years was not a reasonable time.<sup>86</sup>

The Court rejected other arguments made by the Conférence alleging violations of judicial independence. It held that there was no constitutional bar to setting the remuneration of new appointees at one level and maintaining the remuneration of transferred appointees at existing higher levels; indeed, the government may be entirely justified in doing so as such a salary gap does not infringe judicial independence. Equally, the Court held that there was no violation of judicial independence after 2007. Given the Government did comply with its obligation to periodically submit the remuneration of PJPs to commission review after 2007, the fact that the pre-2007 remuneration level was only one of the factors those commissions considered, and the fact that judicial independence “is not intended to serve as a means of labour arbitration to ensure better remuneration for judges”, the Court found that public confidence in the post-2007 remuneration would not have been undermined by the lack of commission review from 2004 to 2007.<sup>87</sup>

Finally, the Court rejected the Conférence’s argument that there was anything problematic with judicial officers being members of a broader public sector pension plan of which civil servants were also members. Membership in a public sector pension plan does not preclude adapting that plan to the specific characteristics of judicial office. Judicial independence does not require that a pension plan be exclusive to or controlled by judges or that there be a special part of the plan tailored to

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<sup>84</sup> *Id.*, at paras. 64-78.

<sup>85</sup> *Id.*, at para. 82.

<sup>86</sup> *Id.*, at paras. 79-81.

<sup>87</sup> *Id.*, at paras. 83-85.

judges. It does, however, require that any changes to the plan as it applies to judicial officers be submitted to a commission for prior review before being made. The Court also rejected the argument that, because it was not designed to reflect the shorter average length of a judicial career compared to a civil service career, the existing pension plan failed to meet the basic minimum constitutional threshold. Three remuneration commissions had evaluated the pension plan and found it to be adequate. The constitutional test was not whether PJPs had as beneficial a pension plan as provincial judges, but whether it met the constitutional minimum standard.<sup>88</sup>

The remedy the Court ordered was also balanced. It rejected both the Conférence's suggested remedy — striking down all the Orders setting the remuneration of PJPs since 2004 and requiring a commission to review the entire period — and the Government's — a declaration of invalidity and a declaration that in the future, a commission must review the initial remuneration of any new office. Instead, it crafted a more nuanced response. The Court struck down the provisions of the 2004 Amending Act that provided for a freeze of the former JPPEs' salary and allowed the Government to unilaterally determine the remuneration of the new office without any retroactive commission review. It then ordered that a remuneration commission retroactively review the remuneration of PJPs for the period 2004 to 2007 only. The remuneration orders made as a result of the three post-2007 remuneration commissions were allowed to stay in place.<sup>89</sup>

## 5. Pension Postscript – The Blais Committee

On September 23, 2016, the most-recent Québec remuneration commission, the Blais Committee, issued its report. As the Supreme Court had not yet released its decision requiring retroactive review for the years 2004 to 2007, the Blais Committee limited itself to considering the period from July 1, 2016 to June 30, 2019 as it had been mandated to do. It found that significant challenges in recruiting PJPs could be traced to the office's less beneficial pension. It therefore recommended that PJPs be allowed to join the Pension Plan for Cour du Québec and Municipal Court judges. Given the impact of that more generous pension plan on overall remuneration, the Committee did not recommend further salary increases above the Consumer Price Index (CPI) so long as its

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<sup>88</sup> *Id.*, at paras. 86-95.

<sup>89</sup> *Id.*, at paras. 96-107.

pension recommendations were implemented; if they were not, it recommended that the salary of PJPs be increased by 30 per cent over three years. It also recommended that PJPs receive the same group insurance benefits as provincial judges.<sup>90</sup>

The National Assembly accepted the recommendation that PJPs be allowed to join the Pension Plan for Cour du Québec and Municipal Court judges with certain modifications. PJPs would have until September 1, 2018 to elect whether to transfer pension plans. The actuarial value of a given PJP's participation in the Pension Plan of Management Personnel was to be determined in light of the plan as it stood on December 31, 2016. Those PJPs who elected not to transfer pension plans would continue to receive a pension in accordance with the terms of the Pension Plan of Management Personnel as it stood on December 31, 2016 and would not be subject to any future changes to the plan. The National Assembly also accepted the recommendations to increase the salary of PJP by CPI and to grant them the same group insurance benefits as provincial judges.<sup>91</sup> It remains to be seen what, if any, further remuneration increases will be proposed by the commission that retroactively considers the remuneration of PJPs for the years 2004 to 2007.

## V. CONCLUSION

*Québec Justices of the Peace* is the latest judgment in a series of cases where the Supreme Court has reaffirmed the constitutional requirement of setting judicial remuneration through a Commission process. The case does not revisit the Court's original decision to constitutionalize the commission process or the doctrinal tools such as unwritten constitutional principles on which it relied in doing so, as some commentators have suggested it should. The Court does clarify, however, that those principles must be interpreted in a practical and flexible manner that respects the constitutional role of the democratically-responsible Executive and Legislature in determining the structure of the administration of justice and overseeing the prudent use of the public purse.

The Court affirmed the National Assembly's decision to create a new judicial office in response to the concerns the Québec Court of Appeal

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<sup>90</sup> Comité de la rémunération des juges, *Rapport du comité de la rémunération des juges 2016-2019* (September 23, 2016), at 124-31.

<sup>91</sup> Minister of Justice, *Réponse du gouvernement au rapport du comité de la rémunération des juges pour la période 2016-2019* (February 2017), at 12-16; National Assembly, *Journal des débats*, 41st Leg., 1st Sess., Vol. 44, No. 225 (February 9, 2017), at 13638-43.

had expressed about a lack of judicial independence under the former legislative regime. It gave the Legislature the flexibility to reappoint existing judicial officers to the new office and to permit the Executive to set the salary of new appointees for an initial period. It also recognized that a broader public sector pension plan could meet the unique needs of judicial officers. At the same time, it ensured judicial independence was protected by requiring retroactive commission review of the remuneration of the new office within a short time after its creation. By protecting judicial independence without discarding the flexibility required to enact needed court reforms and responsibly manage the public purse and the administration of justice, the Court has given helpful practical guidance to future court reform efforts and has signalled that while governments must pay heed to the requirements of judicial independence and cannot avoid mandatory commission review of remuneration, those requirements must also permit the Executive and Legislature to enact court reforms in a timely and responsible manner.

